Contract with David McLauchlan

Terminology, Sentences, Abbreviations.

Breach of Contract – BK.

Equity/ Equitable – EQ

Common Law – CL.

Distraint; seizure of someone else's property in order to obtain payment of money owed,

Consideration; is the acceptance of an obligation to be bound at law.

Nominal Consideration: something sufficient but utterly inadequate – a peppercorn.

Synallagmatic Contract; in common law jurisdictions is roughly the same as a bilateral K.

Bilateral Contract – K in which *both Parties are promisee and promissor*.

Promisee will be trying to enforce the contract.

Gratuitous Promise (noun; gratuity); a purely gratuitous promise where there is no consideration provided in *return* – these do not give rise to a contract – UNLESS; estoppel example.

Negotiable instrument; Cheque or Bills of Payment – essentially a document to enforce payment.

Agent; An agent is a person who has authority to act on the behalf of another (the Principal). If an agent acts within the scope of their authority, they will conclude a K between the 3rd Party and the Principal: 2 kinds of authority

where there is **actual authority** of an agent to enter into a transaction

ostensible authority or **apparent authority** – where an agent is held out as having authority to do things, but does not actually have it.

- Requires a representation by the Principal that the agent has the authority

Classic example of Real Estate Agent – although not *actual* authority; they do have *ostensible* authority to do things.

Don't usually have authority to conclude K on principal (vendor's) behalf; role is to introduce buyers

Sometimes they do have full authority to be a full agent

Ostensible authority to make representations about the property; sometimes they exceed that authority and make statements and decisions about the property that the vendor is not aware they are making

Vendor may be bound and forced to pay damages for mistakes made by agents

Liability

Joint: Each of the partners were liable for the *full sum* vs. **Several**: Only liable for proportion due

Trust; developed by courts of equity; essentially an equitable obligation to hold property on the behalf of another; Even possible to have a trust in a promise – contractual right

Repudiation/ Anticipatory Repudiation; act or communication that a party will breach a K / refusal to perform.

Diminution of value; Either (1): difference between value and price paid, or (2) an alternative measure of damages. IF court says that damages is a "diminution of value" its between promised and actual value – or alternatively, the cost of reinstatement.

- "diminution in value"; there will usually be a close relation between a diminution in value and the cost of repairs – BUT not always; the cost of putting the promise right might be far greater than the promised and actual value. In some, so great that the court will not grant it.
    - in *Ruxley* D built a swimming pool 6-9 inches too shallow at the deep end – described as a "beautiful pool" BUT no *actual* distinction between the value gained…
- Essentially won't get *repair costs* when so much greater than diminution.

Reliance Damages;

Introduction

What is truly needed for a binding K is; *consensus* (1) sufficient agreement, (2) sufficient detail, (3) intention to be bound – note; can be a **Manifestation of willingness** as seen from the other party.

- Manifestation of Willingness; The impression created – is enough that X appeared to intend to be bound – if a ***reasonable person*** **(should Y have ought to have known X had no intention to be bound)** in Y's shoes would have inferred so.

Smith v Hughes **(1871) QB**: Objectivity stated by **Blackburn J** (p71)

- "*If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him [SUBJECTIVE ELEMENT WITHIN OBJECTIVE TEST], the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms*."

Similarly, the answer to whether an offer has occurred is dependent upon **Promisor's** intent to be bound – or if **Promisee** knew or ought to have known there was no intention to be bound.

Consideration/ Inadequacy of consideration

Not concerned with **adequacy (what consideration is worth)** only **sufficiency (is consideration of worth)**

- parties are free to make their own contracts/ bargains: Courts reflect capitalist ideals and free market (Adam Smith) Developments in the late 19th C.

Does this mean that inadequacy of consideration is irrelevant?

- Could be so low as to warrant a "contractual mistake" via **Contractual Mistakes Act 1977;** wide grounds for relief if Parties enter in to K on belief that ends up being erroneous – can be disbarred or relief provided under this act.
    - Essentially prevents a windfall scenario to the buyer's benefit.
    - Suppose there is X for sale, and Defrauded (i.e. says X is valueless, when it is not)
    - Unconscionable Bargains.
- Common Law might just say "bad luck"

Gratuitous Promises

Example of Gratuitous promise creating Legally binding Effects – Equitable Estoppel

Rule*: The Promissee may rely on a gratuitous promise to their detriment. If this happens then the promissor may not renege unless they compensate the promisee for their loss!*

Ex 1: A promises B $1million payable next week; B spends $50k on a construction project he would otherwise have not without A's promise – A then reneges.

- A might well be liable for the $50k – estopped from going back on the promise without first compensating B for his detriment.

Other than via Deed or estoppel, there is no legal method to enforce a gratuitous promise. Consideration is relevant to the enforceability of the promise / K.

Deed – when "B" has nothing to provide consideration

A "contract under seal" (nowadays called a deed). Relevant statute is Property Law Act 2007 s9.

- Written, signed, witnessed by a traceable person (occupation and place of abode).

Unilateral Contracts and Conditional Gifts

***Beaton v McDivvit* (1987) from McHugh JA:** "When a person promises or offers to transfer property to another person, care must be taken to distinguish between three situations.

> **The** first; ***gratuitous promise*:** concerns a promise to transfer property subject to occurrence of an event or condition. The promise will not be enforceable even if the event or condition occurs. An example is a bare promise to pay X $100 if a certain team wins a football match.
>
> The **second**; (**This is an instance of Equitable Estoppel**); situation concerns a promise to transfer property after which the promisor allows the promisee to act to his detriment in reliance on the promise. In this situation, depending on the circumstances, Equity may prevent the promisor insisting on his strict rights and may enforce the promise
>
> The **third** situation is where the promise contains an express or implied request by the promisor to do an act or fulfil a condition. In that situation the doing of the act or the fulfilling of the condition by the promisee in reliance on the promise will usually constitute consideration and create a binding contract…"

Provision of Gift and Unilateral Contracts

Ex 1: A will provide B a book if B collects it from A's office – a conditional gift promise.

Ex 2: A will provide B book if B comes and tidies A's office; consideration is provided through detriment. More of a unilateral contract where no notice needs to be given if performance is what is required to gain the reward:
Here the tidying is acceptance, consideration and performance – unilateral because B made no promise.

Had B said "yes I will do this" would simply be a bilateral K.

Distinction between the two; in **Ex 2** there is a bargain being struck and a concrete benefit to A.

Part-payment of debt/ Accord and Satisfaction

Introduction

Foakes v Beer *Prima Facie* the acceptance of part of a debt in lieu of the whole does not prevent the **debtor** collecting the rest later – even if he promises he will not, **there is no consideration provided.**

Fundamentally, ***Foakes v Beer*** rule and that from ***Stilk v Myrick*** and other **sailors cases** are the same: there is a pre-existing obligation that is already owed – so **no change in consideration** despite the renegotiation

- **Ex 1:** Where **seller** seeks to enforce an increase in payment, **buyer** can argue that no consideration was provided as **seller** was already bound to deliver the goods for the lesser – earlier – cost.
- **Ex 2:** where **seller accepts** a payment, then sues later for the balance it can be argued that **buyer** was already bound to pay; **buyer** was trying to enforce a decrease in payment – **seller** can argue that no consideration moved from **buyer** who was already bound to pay the higher price.

Stilk v Myrick (1809) **and** ***Hartley v Ponsonby*** **(1857) – Sailor's Cases.**

Facts: Seamen sued for wages allegedly earnt. In the course of their second voyage – there were two deserters. Captain, upon inability to find replacements promised extra wages to continue. However, the seamen's **responsibility was predominantly the same and thus they had not provided consideration**.

Rule: Fulfilling an existing contractual duty to the other party is not valid consideration.

Hartley v Ponsonby (1857) there was such a shortage of labour that the continuation of the voyage was exceptionally dangerous – this was held to be good consideration.

Extension: exceeding the initial contractual duty should create a new contract.

Williams v Roffey Bros & Nicholls (Contractors) Ltd **(1991) QB** and "**Factual Consideration**"

Departs from *Stilk v Myrick*; However, in *Re Selectmove* the English courts again departed from *Williams*.

Facts: R is head contractor – job to renovate flats; **W** is sub-contractor for carpentry – paid £20 000 – this price is **too low**; **W is unable to complete job**. Under **traditional contract law** he would have no excuse. Parties agree to extra £10 000 for **W**. **Agreement is held to be binding**.

Issue: Is there a **K** via which **W** can enforce the extra money *despite* providing nothing new. Found that there was **factual consideration** – benefit to **R** in that the work was done in time; he would have needed to find a new carpenter and subsequently breached a penalty clause with his client.

Policy implications clash: (**1**) People should be bound to K in commercial contexts but (**2**) people should not be able to enforce more money… here **W** genuinely needed more money….

Rule from ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991) QB**	
Glidewell LJ Formulation	Dmac Formluation
(i) if A has entered into a K with B to do work for, or to supply goods or services to B, in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the K, B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.	(i) **If A contracts to do work for B** in return for payment by B; and (ii) **A later doubts whether B will**, or will be able to, **pay**; and (iii) A promises B that, **in return for B's promise to pay such sum, she will accept a lesser payment from B**; and (iv) as a result of giving her promise, **A obtains in practice a benefit or avoids a detriment**; and (v) **A's promise is not given as a result of economic duress or fraud on the part of B**; then (vi) the **benefit to A is capable of being consideration for A's promise**; promise will be legally binding. **This is because (v) should come post (vi) unless there has been legitimate pressure.**

Summary

1. A enters K with B (work, services etc.)
2. A doubts B will pay – either deliberately or incapable
3. A promises B will accept lesser sum. B promises will pay lesser sum.
4. A gets benefit or avoids detriment.
5. Promise is not via Economic fraud or duress by B.
6. Benefit at (4) will be consideration for A's promise at (3); legally binding K.

Pinnel's Case* (1602)** – NB; Criticised in ***Foakes.

Facts: Pinnel sued Cole in debt for £8 10s, due on bond for 11 November 1600. **C's defence was that at P's request, C had paid him £5 2s 6d on 1 October and that P had accepted this as part payment of the original debt**. Judgement given for P. BUT had it not been for a technical flaw, they would have found for C on the ground that part payment had been made on an earlier day than 11 November.

Law:

- Payment of a lesser sum on the day in satisfaction of a greater cause cannot be any satisfaction for the whole, because it appears to the J that by no possibility can a lesser sum be a satisfaction to the P for a greater sum.
- **A gift of something *else as well as a smaller sum* (horse, hawk, clothing etc) would satisfy – it might be more beneficial to the plaintiff than money in the respect of some circumstance otherwise the P would not have accepted it initially**.
    - Payment of lesser sum earlier than the original agreement
    - Rendering additional services, providing service has some value to the promisor and was accepted

Procedure and Criticisms: *Pinnel's* case was sued in debt not assumpsit, no consideration was necessary.

- Explanation of this lies in the fact that no consideration was provided – required for assumpsit. Could not provide consideration by doing something that D was already bound to do.
- Criticism of this is that although consideration is necessary to form a K, why should it be required to enforce a promise as a means of *defence*.

***Foakes v Beer* (1884) HL.**

Facts :
B obtained a **judgment against F** for £**2090**. **F** asked for time to pay, **B&F** agreed that if **F** paid £500 at once and the rest in instalments, **B** would not take any proceedings.

No agreement was made as to interest.

F eventually paid the whole debt, **B** demanded interest. **F** refused to pay it. **B** applied to be allowed to issue execution or otherwise proceed on the judgment in respect of the interest.
F pleaded the agreement they had made, **B** replied it was not supported by consideration. **£2090 could not be consideration / satisfaction for £2090 + interest**. Court found *nudum pactum* and consequently P (**Beer**) was owed some £360

Blackburn J [p18]; condemns **Lord Coke** in ***Pinnel*** – discusses the practicality / unpracticality of whether or not tradespeople and clients can strike a *bargain* – i.e. immediate reward.

- *This line of thinking underlies the **Williams v Roffey** case in the situation where a tradesperson demands more money.*
- Had he had more support he might have dissented.

Issue: Can lead to harsh outcomes; "It might be… **an improvement in our law**, if a release or a quittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally binding."

- **Because the Rule can operate harshly and prevent a bargain being upheld, the court can find ways around it by recognising limitations and exceptions.**
    - *DMAC criticism: This allows them to pay lip service to precedent, whilst also finding an 'equitable' outcome where the rule would operate too harshly.*

Early rules are clumsy; strike down both fair and unfair bargains; Nowadays, we have various doctrines to determine whether it will be fair or not – this avoids confusion in cases where either

i. The Creditor behaves as a villain, victimising the debtor OR contrarily where the debtor attempts to avoid full repayment through bad behaviour
ii. A genuine bargain is struck.

In modernity, we can deal with these situations through ***economic duress* – application of illegitimate pressure where the other party has no alternative option**, but where submission will allow the K to be voidable under the doctrine of economic duress.

Reasonably modern: ***Cook Island Shipping Co Ltd v Colson Builders Ltd* (1975)** – the rule in ***Stilk v Myrick*** prevented economic duress argument. Means variation of existing K requires consideration on both sides.

Limitations and Exceptions to *Foakes v Beer*

Because the Rule can operate harshly and prevent a bargain struck, being upheld, the court can find ways around it by recognising limitations and exceptions. Limitations: situations where the rule will not apply. **Exceptions;** where it would seem to apply but the court finds an exception.

Limitations: *Liquidated and Undisputed Debt*

Limitation 1: Must be liquidated debt; "must be prima facie a fixed sum (liquidated) / (legally measurable) due"

- the rule doesn't apply to 'unliquidated claims' – such as claims for damages, even though its calculable, or where the obligation that is pre-existing is to pay a reasonable remuneration.
- What is initially an unliquidated debt can actually be liquidated later on; i.e. not disputed in any way and becomes expressly or impliedly agreed – look at *Homeguard*

Limitation 2: Debt must Be undisputed – Contract of Compromise

- *The rule will not apply if the debt is disputed – it may be a liquidated debt, such as a fixed sum, but the rule will not apply.* Reflects that Courts have an interest in upholding settlements that are freely entered into
- Debt must be **genuinely** disputed; from ***Dalgetty*** a "genuine" and honest belief there is a dispute about the debt where the **debtor** must honestly believe that they are not obliged to pay the full sum; it *must be a disputed debt, not a dispute about the debt*.
    - The parties may have a dispute about how much the creditor will take to discharge the debt – this does not make it a disputed debt.
    - i.e. owed $1000, offered $500, counter $800 – the dispute here is a dispute about how much will settle it rather than the debt itself.
    - In *Foakes v Beer* the creditor can accept the lesser sum then turn around and demand the balance.
- If there is a settlement – both parties agree to settle the dispute with a *compromise* in between this is acceptable.
    - Creditors acceptance of lesser sum, there will be consideration; even if they did not accept as much as they were entitled to, the court will not allow the settlement to be reopened.

Exceptions: *New Element, Multiple Creditors, Judicature Act, 3rd Party Payment, Estoppel*

Exception 1: Introduction of a New Element – i.e. Debtor does something more than obliged

- Payment Earlier
    - i.e. partial payment before the due date *at the request of the creditor* will be a discharge will constitute good consideration.
    - There's a bargain, a benefit to the creditor, and a detriment to the debtor
    - ***There must be a request with the agreement of the Creditor.***
- Payment in Different Form
    - i.e. payment of $10 will not discharge $100, provision of a pen or a watch will be consideration.

- This springs from the refusal of the courts to measure the adequacy, and is reflected in *Pinnels Case (*1602).
- Court will say that they do not know what the article was worth to the Creditor at the time, so will act on the assessment of the creditor at the time.
- Is this a transparent fiction? Certainly a trap for the unwary

- Payment by Cheque (or other negotiable instrument) (**initially but not now**)
  - *Inevitable this was not going to survive so merely consider – i.e. there has been a payment via cheque; this is no longer considered to be a new contractual element.*
  - For a time the Courts held that payment via Cheque instead of cash provided the necessary new element, constituting consideration; essentially ignored common sense.
    - i.e debt $100, cash $10 would be worse – cheque $10 was fine.
  - This exception was applied in a number of 19thC rulings
    - Whilst Judges often pay service to precedent, will create spurious distinctions or legal labels to avoid an inconvenient legal rule.
    - i.e. "I'm following *Foakes v Beer*… but there is an exception in the case of cheques"
  - Dealt to in ***D&C Builders v Rees* (1966) CA; Lord Denning** p33
    - **Facts** D owed P money for work done – delayed payment then offered a smaller sum; stating in effect that if he did not accept this sum they would get nothing. AS P was in desperate financial straits, accepted smaller sum in full settlement of debt – then sued for balance
    - P was **entitled to recover the difference between what was owed and what was paid. The payment was not a material distinction**.
    - "No sensible distinction can be taken between payment of a lesser sum by cash and payment of it by cheque… If a creditor is not bound when he receives payment by cash, he should not be bound when he receives payment by cheque."
  - ***Homeguard Products v Kiwi Packaging***
    - 2 major outcomes – BFT 19.2.3.
      - (1) Cheque is no longer adaption – L. Denning above
      - (2) Banking of the cheque is an issue.
    - Major issue is the banking of the cheque intended as "full and final settlement", creditor banks, is this Acceptance?
    - Provided the debt is disputed so that there is consideration passing from both parties, the banking was conclusive

Exception 2: Composition with (several) creditors:

we will not be dealing in examples with multiple creditors

- Given legal force by **Insolvency Act 2006**
- Ex. Debtor J who finds that she has 5 debts, totalling $2000; she does not have much income and if she sells everything she owns will have $1000 (assets); her creditors are pressing for payment.
  - Option 1: file for bankruptcy; but stigma etc
  - Option 2: Enter into a composition with her creditors. Her Solicitor will contact each creditor and say; 'my client has only $1000 – will you agree to 50c on the dollar, and next year when J has more money a further 25c on the dollar. BUT on full satisfaction of the debt'

    - Advantages to the creditor; not suing in court, not fighting over bankruptcy estate.
    - Courts have upheld these Contracts.
- Application of *Foakes v Beer* would find that each individual creditor would be able to accept 50c on the dollar, would *each* be able to sue on the balance.
- The reason for upholding these agreements lies not in principle, but in expediency; It is in the interests of all in the commercial world that composition agreements be upheld.

Exception 3: Judicature Act 1908 s92 - solely NZ statute.

- "*An* **(1)** ***acknowledgement in writing*** **(2)** ***by a creditor, or by any person authorised by him in writing*** *in that behalf,* **(3)** ***of the receipt of*** **(4)** ***a part of his debt in satisfaction of the whole debt*** *shall operate as a discharge of the debt,* **(5)** ***any rule of law notwithstanding***."
    - 1. Acknowledgement in writing – i.e **will not cover oral agreement**
    - 2. Acknowledgement must be a creditor OR an authorised person: **must be authorised in writing – not enough that there is actual authority**.
    - 3. Must acknowledge the *receipt* of - the **creditor must actually have received the part payment**.
    - 4. a part of debt in satisfaction of the whole debt - **must acknowledge that a part payment is being made in satisfaction of a larger debt**.
    - 5. Will operate as discharge of debt, *any rule of law notwithstanding*.
- Rationale? ***Homeguard Products v Kiwi Packaging*** **(1981) HC**
    - The absurdity found in *Couldery v Bartrum* (1880); "a creditor might accept anything in satisfaction of his debt except a less amount of money."
    - Lord Blackburn in *Foakes v Beer* (1884) was critical of this rule; discussion of the practicalities of sensible commercial practise whereby it would often suit a creditor to offer a discount upon an undisputed debt so as to procure prompt payment."
- Effect? **Balance between**
    - (1) robust criticism of *Pinnel's Case* (1602) (Lord Denning in *Foakes*, Sir George Jessel MR in *Couldery v Bartrum* (1880)
    - (2) the danger of permitting a payment on account to be "*the subject of controverted and uncertain testimony as to whether it was a sequel to an oral agreement wholly discharging the debtor*."
- **Holistic purpose; acknowledge written receipt to avoid controversy about whether the money was realistically paid.**
- Historically s92 protects the creditor against fraud through adopting the basic mechanism of the Statute of Frauds itself via requiring debtor to product *evidence* of the extinction of the debt.
- Therefore, must product evidence – formal **deed** (**Property Law Act 2007**) or written in the form of **s92 Judicature Act 1908**, otherwise *Foakes v Beer* (1884) rule applies and the part payment/ agreement will be *nudum pactum*.
    - **Written acknowledgement by the creditor in exact terms of the statute.**

Exception 4: Payment by Third Party

- **Example:** Debtor (A) owes $1000 to Creditor (B); Third Party (C) makes agreement with B; will pay 50c on the dollar (half debt); B agrees on part payment as satisfaction for the whole.
- **Option 1**: Courts often hold that this is an exception to *Foakes v Beer* (1884); in *D&C Builders Ltd v Rees*; "Where a cheque for a smaller sum than the amount due is drawn by a person

other than the debtor and delivered in satisfaction of his debt, it is clear that the debt is discharged if the cheque be accepted on that basis and duly paid."

- *Hirachund Punamchand v Temple* (1911) CA; British Officer in India, funded profligate and philandering lifestyle, acquired loans from H and P to fund said lifestyle. H and P wrote to T's father – Sir Richard Temple – who offered part payment on the debt.

- **Option 2**: Nowadays, the **same result can be found in the Contracts (Privity) Act 1982 s4** – an exception to the rule at common law that only the parties to the contract obtain enforceable rights. **Doctrine of Privity** – only parties gain enforceable rights. (s4) Basically, would enable the debtor in this case to enforce the K on the 3rd party as that K has been made for the 3rd Parties benefit.

Exception 5: Promissory / Equitable Estoppel

- Lord Denning in ***D&C Builders Ltd v Rees* (1966)** [34/B – 25]
  - "Equity has stretched out a merciful hand to help the debtor"; applies Lord Cairns in *Hughes v Metropolitan Railway Co*; the creditor will not be able to enforce where "it would have been inequitable."
    - Denning's manipulation of Precedent?
      - [page 34/C]:
      - Landlord giving notice to tenant to repair them – and 6 months to carry out the repair, or the leases would be forfeited. Shortly thereafter, the tenant offered to be bought out and parties entered into negotiations. Whilst these negotiations were going on, it was reasonable for the tenant to believe that there was no need to carry out the repairs. Negotiations broke down; shortly after, the landlord came back with a writ of ejecture – claimed that tenant had not finished repairs.
      - Court held that you cannot lead someone to believe you will forbear to exercise your legal rights and then turn around and insist on your strict legal rights.
      - Effect was that the tenant was given extra time to complete repairs
      - The obligation was put in suspense! VERY different to extinguishing the legal right altogether which this intervention actualises.
- This **principle has been applied where a creditor agrees to accept a lesser sum in discharge for a greater (*High Trees*) and consequently we can apply promissory/ equitable estoppel when a debtor is misled by a creditor who later reneges**.
- "The solution was so obviously just that no one could well gainsay it"
  - most controversial aspect of Contract law – divided the HOL for 20 years (*High Trees*)
  - many people viewed Lord Denning's argument as heresay.
- **If Lord Denning is right, it would virtually destroy the rule in *Foakes v Beer* – unless the Debtee's actions were unconscionable the Debtor would be unable to regain the rest of a debt**!
  - So, extra requirement: **Later cases have indicated that there must be detrimental reliance on the promise**! The Debtor must act to his detriment on reliance.
  - What will constitute such detrimental reliance?
    - Difficult.
    - Spending the money paying off other debts will not be detrimental reliance
    - Detriment requirement is referenced by LJ Dankwerts; "Nor does it appear that their position was altered to their detriment by reason of the receipt given by

the P's…I cannot see any ground in this case for treating the payment as a satisfaction on equitable principle."

- Qualification on Lord Denning's Comments:
  - "**The creditor is only barred from his legal rights when it would be *inequitable* for him to insist upon them. Where there has been a *true* accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts upon* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor to afterwards insist on the balance**."
- **In New Zealand it is unclear whether equitable estoppel will apply** – BFT 150-151 that promissory estoppel does not apply. Reason; ***Homeguard Products v Kiwi Packaging*** at [page 52/43]
  - **Objection 1**: that an equitable estoppel principle, not yet sanctioned by the HOL can displace one that is settled and affirmed
  - **Objection 2**: there is a temporal difference; in *High Trees*, the money was not yet due – in *Foakes v Beer* situation, the agreement necessarily applies to an existing liability.
  - Prefers **Winn LJ** in ***D & C Builders***
  - By the promisee as a result of relying on the promise, it is difficult to see how that can occur where a debtor has paid only part of the debt"
    - BUT – this is Mahon J saying that the promisee has to have actually relied on the promise AND gone on to incur further liabilities – i.e. extra expenses to the business.

BUT DMac thinks that when it happens, promissory estoppel will come to apply.

***D & C Builders v Rees* (1966) CA.**

Facts:

- P's – builders, claimed money on account **£480**; D's **wife came to them and offered £300 to clear the debt; P agreed – they were in desperate financial situations; D's wife knew this and knowingly threatened to pay nothing** (i.e. £300 or nothing!)
    - D's wife demanded a receipt; "received a sum of £300 from Mr Rees in satisfaction of account."
    - Note that there was ***no fixed price agreed upon*** – D's obligation was thus to pay a 'reasonable remuneration'
    - Note, *Foakes v Beer* only applies to **liquidated debt**? Why here? [page 32/E]
        - D at no stage during the 6months following the completion of the work, challenged the 'debt' so, prima facie an argument that there was dispute on the sum does not apply.
        - **Through conduct, D had agreed to the debt at £300**.
- English CA applied the rule in ***Foakes v Beer* (1884)** and allowed P's to press for the rest of the account.
- The decision of this case on the grounds of no accord, is widely regarded as being the beginning of economic duress – there is **still accord, but not *consent* and thus it is accord that is forced upon the Plaintiff**.
    - Hard to define the distinction between mere commercial pressure, and illegitimate pressure on another; the l**aw permits us to drive a hard bargain and to apply commercial pressure.**
    - **Illegitimate Pressure is*; Essentially, conduct that is clearly exploitative and that a right thinking member of society, would not find acceptable***.
    - The contract gained through illegitimate pressure will not be enforceable, rather it is voidable - EVEN if it is supported by consideration – where the plaintiff had no practical alternative.

Questions:

Q; D&C Builders v Rees; were there no illegitimate pressure, would the judges have found for the plaintiffs? Suppose debtor was genuine and who was actually in financial trouble themselves.

- *Foakes v Beer* applied
- Denning would have applied promissory estoppel – the appeal would have failed – it would have been inequitable for him to go back on it; inequitable for them to do so.
- Winn LJ; nothing in judgement regarding estoppel – focuses on *FvB*.

Q; same facts (same variation) arising in New Zealand today… as *F v B* applies, prima facie no consideration – what argument would we make for mr Rees?

- Judicature Act 1908 s92 might apply; Receipt said "Received the sum of 300. From Mr. Rees in completion of the account. Paid M.Casey". BUT does not indicate that it is a part payment is being received in part payment; re. *Homeguard* we know it needs to be strictly complied with

Q: All the same facts as in the actual case (NZ) BUT receipt makes it clear that there is a part payment of the actual debt (receipt is good law) – arguing for Mr Rees

- Plaintiff's will argue that D cannot rely on receipt gained through economic duress
- D will rely "any rule of law notwithstanding" in s92 Judicature Act 1908
    - P counter argument; that Parliament created a rule of law here to *create an exception* of FvB – regarding the need for consideration; Parliament could not have intended it to

apply in all cases, nor could they have intended for it to be invoked IF there were forms of bad behaviour.

- *Barnes v Jacobsen* (1924) NZLR 653; at 657 – the rule of law there referred to in s92 is as to the form of the release; it does not do away with protection of people under a disability.
  - Where the receipt has been obtained through poor means, then s92 would apply.

Q: had D provided a peppercorn alongside the £300, effect?

- There would still be no true accord – on the facts the P's had been held to ransom; findings of fact; "she was putting undue pressure on the creditor. She was making a threat to break the contract (by paying nothing) and she was doing it so as to compel the creditor to do what he was unwilling to do."
- "…there was no true accord."
- [page 36/F]

H B D Dalgety v Morton (1987) HC

Facts:

- **D – a real estate agent – sold a farm belonging to M. As a result, M became liable to pay the "real estate institute scale fee" (over $9000) and an invoice was forwarded; 2 weeks later, the invoice was returned with a cheque for $2450; M wrote, "*my estimate of costs on a work done basis*"**
- The cheque was receipted and banked
- **D wrote a letter, saying that *payment was not accepted in full for commission* – issued proceedings claiming the balance**:
    - NB abnormal – normally there would be a deposit paid to the real estate institution who deducts the commission.

District Court M argued 'accord and satisfaction' and won! D appealed and won handsomely.
In the High Court before Hillyer J:

- **Ground (1) Here there was no genuine dispute as to the amount owing**.
    - No explanation for Morton's acting poorly; were merely reluctant payers – there was no assertion that a lesser sum was due
    - **NB: you can have a liquidated debt that can be undisputed or disputed.**
    - **Since *Foakes v Beer* applied if there was no genuinely disputed debt, there could be no consideration – therefore, there could be no real agreement about a compromise and no satisfaction.**

- **Ground (2) Accord is a question of agreement; before a person is deemed to have agreed that a lesser amount is to be taken in satisfaction of a larger sum, the agreement must be clearly spelt out**
    - Here, **the words the debtor used did not efficiently convey that the amount paid was to be full and final – the words were open to interpretation**
    - "the statement '***my estimate of costs***'… does not make it clear that the amount paid is paid only on the basis that it is to be accepted in full and final satisfaction. It **could equally be well interpreted as 'I think this is all it is worth.'"**
    - Rule in *FvB* applies unless there was an exception!
        - In relation to the defence of accord and satisfaction, since the rule in *F v B* applies; since there was no genuinely disputed debt, which means there was no consideration, which means there was no satisfaction.
    - **Exception – that banking the cheque constituted acceptance**
        - Mahon J's poor ruling in *Homeguard*.
    - BUT…

- **Ground (3)** (Had he needed to…) **Disagreed with *Homeguard***
    - Distinguished ***Homeguard Products (NZ) Ltd v Kiwi Packaging Ltd***; **Mahon J** had held that; where money is paid in settlement, there are 2 options – either to reject the proffered amount or to accept in accordance.
        - Simultaneously, where the creditor retains and banks the cheque, then his acceptance of the cheque is conclusive evidence of his assent to the conditions upon which the cheque was sent; essentially its factual conduct of the creditors.

        - Followed D W McLaughlan – *Day v Mclea*: there will be "*accord and satisfaction only if there is a meeting of two minds, or if one of the persons involved acts in such a way as to induce the other to think the money is taken in satisfaction of the claim. But If the creditor does not agree, and if at the time that he accepts the amount he makes it clear to the debtor that he is not accepting it in full satisfaction, it seems to me that it cannot be said that there has been accord and satisfaction*."
    - "Were it necessary, I should have held in this case that *provided the letter which was referred to was written at the time the cheque was received and banked, and that it made clear that the receipt and banking was not an acceptance of the statement that it must be taken in full and final satisfaction, that letter would have prevented the appellant being bound to accept the smaller amount in lieu of a larger*."
        - **What he is saying, is that even if there was satisfaction, there was no accord**
- D won
    - **No offer, No consideration, No acceptance**
    - This shows that there was no disputed debt, and consequently no satisfaction which required compensation – FvB applies. Even if there was a disputed debt, FvB still applied.
    - Three independent grounds; any one of which would have allowed *Dalgety* to succeed

Questions:

Question 1: Vary the facts; there was a disputed cheque, and *Homeguard* applies – banking the letter is acceptance

- In the hypothetical there is satisfaction, BUT no accord – the statement accompanying the cheque was not specific enough to support a clear offer "in full and final settlement"
- "the banking of the cheque… would not be an acceptance of that statement"

Question 2: in *Dalgety*, mr Morton went to D's office and offered $5000 in full and final satisfaction and D's manager expressly agreed to take the payment on this. Will they succeed in re-gaining the balance?

- YES – even though there is a clear Offer, and Express Acceptance there is still no Consideration – the rule in *F v B* applies.
- This would have been the outcome in the case if the offer and acceptance was explicit – still no consideration.

Question 3: after a heated argument, M increased Offer to $6000 which D accepted. Still makes no difference – rule in *F v B* still applies, as we have a dispute *about* the debt rather than a disputed debt

- The dispute is essentially about how much *less* will be taken as the final payment "the extent of the indulgence" that the creditor will give.
- This does not transform it into a disputed debt.

Question 4: facts are still the same – clear Offer and Acceptance – but with the further element; unbeknown to M, events occurred at the time of the sale which gave him a basis to argue that D had breached its contractual duty and hence were not entitled to recover the commission. However, D did actually fulfil its duty so the argument would not succeed. Difference?

- Well, if we read Hillyer J's judgment literally
- P60; "Debtors frequently are unwilling to pay amounts, but there must be some proper basis for such an attitude before there will be a genuine dispute."

- CANNOT BE RIGHT: in order for there to be a genuine dispute, the debtor would need to put forward the basis for such an argument; "No other basis on which the sum claimed by appellant is said not to be owing was put forward, and I am of the view that there is not a genuine dispute as to the amount owing, and that therefore the payment of a lesser sum will not operate to excuse payment of the whole."
    - Per se there is requirement that there is an honest belief, even if that belief is infeasible
- If the ground is not asserted, but it subsequently appears – say, at the time the creditor claims the balance of the debt, then that may be a complete defence.
    - i.e. Agreeing the part payment, but suing the balance: the debtor finds that the property was sold to a friend of the real estate agent, for $100 000 less than the fair market value
    - in such a case, not only would (were it proved) the debtor have a defence for claim on the balance, but would also have a claim in breach of contract for performance of duty
    - I.e. were not aware of claim, became aware of it – wouldn't be anything to stop you doing anything.

Question 5: Prior to sending in the cheque with the note on it, the M's honestly claimed that D breached his duty by telling the eventual purchaser that the M's would accept a price lower than the asking price

- That would mean that there was consideration – but of course, there was still no clear offer; simply saying 'this is all I think the job was worth' was insufficient.
- Even if they had said that the cheque was in full and final satisfaction, the J found that there was no acceptance.

Cheque Banking Issue – *Homeguard approach vs. Dalgety*

Hillyer J in ***Dalgety v Morton***; "*provided the letter was referred to was written at the time the cheque was received and banked, and that it made clear that the receipt and banking was not an acceptance of the statement that it must be taken in full and final satisfaction, that letter would have prevented the appellant being bound to accept the smaller amount in lieu of the larger*."

- Question is essentially one of offer and acceptance; Debtor tendering the cheque on condition that is it accepted is an offer – whether the creditor has agreed to accept that offer, OR has by conduct led the debtor to believe that they have accepted.
- **IF the creditor, before or contemporaneously with, banking the cheque, tells the debtor that it is not accepted in full settlement, there will be no accord and satisfaction and the creditor can sue for the balance**.

In *Magnum Photo Supplies Ltd v Viko NZ Ltd*; clear that whether this has happened is **factual**! **Gault J**: "***Just as on any question of whether a contract is concluded, it is necessary to consider all the circumstances… the issue therefore is whether, by its solicitors, Magnum acted in such a manner as to cause Viko to reasonably believe that its offer was accepted before it was made plain… that there was no intention to accept***."

- *Magnum Photo* applies the *Dalgety Morton* approach which is consistent with *Day and McLea*

Ultimately; *Homeguard* is

- **Distinguished in other cases discusses in *HBF Dalgety v Morton***
  - ***Brown v Reardon* (1985) HC** – **Casey J**
    - P alleged that B owed compensation for dogs shot on property. B denied liability, argued that P owed them compensation for stock killed by the dogs.
    - Distinguished from *Homeguard* on the basis that there was correspondence after cheque "in full and final settlement"; prevented the original basis operating when the cheques were subsequently banked.
  - ***Bayswater Marine Ltd v Bay of Island Charter Co Ltd* (1983) HC** - **Wallace J**
    - Essentially; D sent a letter saying payment was 'conditional upon immediate delivery of a boat' and threatening legal action for damages – was not a contention that the cheque be full satisfaction.
    - Was more a statement of "**Here is the money which we say is owing, now hand over the boat or we will sue you for damages**." Rather than that P could not accept the money and still sue for alleged balance.
    - "…**authority for the proposition that there will be no accord and satisfaction where a cheque sent in full settlement is banked by the creditor if, 'in discussions' with the debtor prior to banking the cheque, the creditor makes it clear that the condition of full settlement is not accepted *and* the debtor does not demur or protest**."
- **based on poor reasoning (contradictory/ nonsensical)**
  - DWM, NZLR 259**; on the facts of *Homeguard* there was probably adequate basis for a conclusion that settlement had been reached – the creditor had retained and banked the cheque without complaining and had been silent for a period of 6 weeks**.
    - This would be more consistent with *Day v Mclea*
    - BUT this was not why it was followed by Mahon: followed the American rule
  - In *Homeguard* at 331-332: Mahon J takes the Bowen LJ comment from *Day v Mclea* (1889) QBD; discussion that "question whether there is an accord and satisfaction must

be one of fact…[where there is a part-payment]… there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. in either case it is a question of fact." (look at p54 CM)

- **Mahon J agrees with the proposition that where money is sent in full satisfaction and is kept by the creditor, it is a question of fact on what terms it is kept, YET apparently it is said there is a rule of law providing that if it is kept this is conclusive**
- **Cannot be both – contradictory; AND inconsistent with *Day v Mclea* – Bowen LJ's** real point was that **creditors action in keeping and banking the cheque was not conclusive.**

- Conclusion on the *Homeguard* rule that banking a full payment effects an accord and satisfaction? ***Magnum Photo Supplies Ltd v Viko New Zealand Ltd* at 339 (69 CM)**
  - **The conclusion that Mahon J reached was totally contrary to *Day v McLea* and** "*purports to convert a question of fact in each case to a question of law… [and] cannot be accepted as a correct statement of law*."
  - Instead; "***it is necessary to consider all the circumstances. There are to be borne in mind the nature of the parties and their dealings – the factual matrix. Agreement should be found in the absence of express confirmation only when the circumstances show that as the proper inference***."

Question: ***what if the Creditor, not intending to Accept the Creditor's Offer, Delays in notifying the Debtor that the payment is on account.***

- Principle applied; the *Day v McLea* approach; requires clear offer and clear acceptance – so if the creditor manifests an appearance of accepting the part-payment in stead of the full.
- OR if the Creditor acts in a way as to induce the Debtor to believe that the payment was accepted in full
  - Clearly had in mind the Objective principle.
- Cannot be the case that a delay is to give rise to an acceptance – it will be an element.
  - The longer the delay, the more likely it is that the Debtor might think that the Creditor has accepted the part-payment in full.
- Creditor might not know that the cheque is banked
  - i.e. office assistant banks it, or Solicitor (*Magnum*)
- Could infer from what Hillyer J said in *Dalgety* that there would need to be a rejection of an offer rapidly.

***Magnum Photo Supplies Ltd v Viko New Zealand Ltd* (1998) CA** (delivered by Gault J):

Facts

- **Creditor (Magnum)** successfully obtained judgment against the **debtor (Viko)** for over **$275 000**. The **Debtor** intended to appeal the decision but **sent a letter to the creditor's solicitors in which it offered to pay less than $125 000 in addition to returning equipment in full and final settlement of the claim**
    - Disputed Debt
- **Letter**; "*offer Magnum $125 000 plus the return of the remaining imager machines, in full and final settlement of all matters as between the parties… A cheque for $125 000 is enclosed with this letter. Presentation of this cheque will constitute acceptance of this offer*."
    - Clear offer with a mode of imposed/ purported acceptance.
- Response; **cheque was inadvertently banked by Magnum's solicitors**
    - "*Our client has not yet even seen the terms of your letter…. The banking of the cheque was therefore an administrative error which cannot be deemed to be acceptance of your client's offer*."

Positions of the Parties

- Viko; takes the position that, by its solicitors it had made a plain Offer of settlement – specified manner of acceptance and that the banking of the cheque by Magnum's solicitors, who confirmed that by sending the account receipt constituted acceptance
    - This was accord and satisfaction
- Magnum; never intended to accept the offer and should not be held to have become bound by mistake – the description of the payment on the account receipt must have alerted Viko to the likelihood of the mistake.
    - Offered to return the cheque – NB distinct to *Dalgety*

Issue:

- Whether by it's solicitors, Magnum acted in such a manner as to cause Viko reasonably to believe that its offer was accepted before it was made plain on 4 December that there was no intention to accept.
    - "*whether the creditor acted in a way as to induce a debtor into believing there was acceptance*."

Held; regarding cheque

- *Smith v Hughes* principle – usually applied to offer – here applied to acceptance.
- Principle: **if you make me an offer, which I do not intend to accept, but I act in a manner that induces belief in acceptance then there will be deemed acceptance**.
    - Prima facie, a contract.
- But "*the solicitors for Viko had no notification of the banking or presentment of the cheque until that was received contemporaneously with advice in the same letter that there was no intention on the part of Magnum to accept the offer*."
    - V knew that there was no intention on the part of M to accept.
    - "In the case of Magnum and its solicitors there was no intention to conclude a binding settlement and in the case of Viko and its solicitors there was no evidence that before notification to the contrary they actually believed the condition for acceptance had been fulfilled.

- Cheque was only acknowledgment of the receipt and an intention to bank the cheque. The debtors had no notice of the banking of the cheque until they contemporaneously received notification that the offer was not accepted.
- We are not prepared to infer that the offer was accepted.
    - "Even if the receipt, properly made out, could found an immediate assumption that the cheque had been banked, the form of receipt in this case did nothing to bolster an inference that the settlement was accepted as it was entirely consistent with treating the cheque as a payment of part of what was owed. There was no accord and satisfaction."

Approach to Accord and Satisfaction

- Adopts the factual, objective test of whether there is accord and satisfaction – "**The defendant having raised accord and satisfaction as an affirmative defence to the plaintiff's claim bears the onus of proving its allegation.**" (*Halsbury's Laws of England* 4thEd)
    - This is essentially the *Smith v Hughes* principle
    - Then *Day v McLEa*
- **Adopts *HBF Dalgety Ltd v Morton* (1987)**; trial judge said "I do not think that the accepted principle that there must be a meeting of two minds requires the assessor of fact to enquire into the state of mind or degree of understanding on the part of each party."
- Must be factual assessments of the particular circumstances of each case
    - Adopts *Day v McLea* (1889) QBD Bowen LJ, then condemns *Homeguard Products*, adopts *Dalgety* and DW McLauchlan's approach.
    - "the view of Mahon J, which has been departed from in subsequent judgments… cannot be accepted as a correct statement of the law"
- Instead, it is **necessary to consider all the circumstances**: "There are to be borne in mind the nature of the parties and their dealings – the factual matrix. Agreement should be found in the absence of express confirmation only when the circumstances show that as the proper inference."
    - "***It does not mean that parties are to be burdened with contracts inferred from communications they understand are not intended to give rise to legal relations***."
- "it is not always to be assumed that contractual relations arise where the offeror does not recognise conduct as an acceptance even though a reasonable objective observer might conclude that a contract has been made."
    - It is not enough objectively.
    - *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* (1983)
        - In the case there was a substantial lapse; argument that they had 'tacitly abandoned' the contract.
        - To entitle the sellers to rely on abandonment, they must show that the buyers so conducted themselves as to entitle the sellers to assume, and that the sellers did assume, that the contract was agreed to be abandoned."
            - Essentially; with a delay case – it would be part of the factual nexus; would not necessarily ruin it.

Main Points established by *Magnum*

- **Upholds *Dalgety*** regarding cheques **– banking is not necessarily conclusive of acceptance of an offer**;
    - Factual nexus; "**There are to be borne in mind the nature of the parties and their dealings – the factual matrix. Agreement should be found in the absence of express confirmation only when the circumstances show that as the proper inference**."

- **Subjective Element to this objective test**
  - ***Did the Offeror believe and reasonably believe that the offeree had accepted the part payment issue***.
  - "it is not always to be assumed that contractual relations arise where the offeror does not recognise conduct as an acceptance even though a reasonable objective observer might conclude that a contract has been made."
- ***A natural corollary of this is that a delay cannot be conclusive*** – this is different to Hillyer's implications from *Dalgety* that a response should be rapid in order to prevent conclusion on this.

Magnum also makes an issue of a term in the offer regarding the direct line; 'banking the cheque is acceptance of the offer'

- CA downplays the term by stating the letter also required confirmation (DMAC is unconvinced about this approach)
- There could be **no accord and satisfaction because by the time Viko's solicitors were aware of the cheque, Magnum's had made it clear they were not accepting**.
- "We accept that a cheque may be tendered on a condition that it be presented only by way of acceptance of an offer made."
  - An offeror may stipulate this, and the circumstances are such that communication of acceptance is achieved.
- Background: Offeror (master of the offer) can prescribe a formal time of Acceptance in the sense that an acceptance that does not comply with the requirements, will not bind the offeror. The acceptance condition (prescribed form) may even be bizarre – or virtually impossible!
- However, it is quite another thing to argue that action on the part of the offeree that correlates to the offer is binding on the offeror. An offeror cannot stipulate an action will be acceptance, upon that action attempt to make it binding: an offeree must manifest an Assent to the offer, and an intention to be bound
  - Subject to the objective element – an undisclosed intent will not prevent operatively binding contract coming to play if they are led reasonably to believe there has been acceptance.
  - Puts the offeror at the offeree's mercy.
  - Dependant again on the factual nexus; degree to which the action indicates assent etc.
  - CANNOT BE CONCLUSIVE.

Returning to *Magnum* – banking the cheque in full satisfaction – (1) did the offeree intend to accept or (2) was the offeror led to believe there was acceptance.

- "It does not mean that parties are to be burdened with contracts inferred from communications they understand are not intended to give rise to legal relations."
- **In circumstances in which one party purports to prescribe conduct on the part of the other as constituting acceptance, the mere coincidental conduct of the kind prescribed cannot attract legal consequences**.
- "performance of the conditions of the offer is not in all cases conclusive for they may have been performed by one who never hears of the offer or who never intended to accept it. Hence the statements or conduct of the party himself uncommunicated to the other party are admissible to show the circumstances under which an act, seemingly within the terms of the offer, was done and the inducement which led to the act."

        - Case of *R v Clarke* (1927) where a considered criminal passed on information about the true killer, but the motivation was to prevent his own trial
        - The supply of information was not in any way a response to his own offer.\
- The stipulation that banking the cheque will be acceptance
    - (1) offeree has intention to accept?
    - (2) lead offeror to believe there was intention to accept?

***Re Selectmove Ltd* (1995) CA** (Balcombe, Stuart Smith JJ and) Peter Gibson LJ providing J

Facts

- **Taxpayer co. (Selectmove) owed Revenue Department a substantial amount**
  - RD attempted to have co. **Wound Up (**i.e. struck from existence)
- Meeting with tax collector; co. director proposed that they should pay the taxes as the fell due, and repay the arrears at a rate of £1000 per month
- **Collector; would seek approval of superiors and revert to the company if the proposal was unacceptable. Silence**.
- **3 months later, Revenue demanded payment of arrears in full** – subsequent statutory demand
  - Company relied on the meeting with the officer to show the 'genuinely disputed' debt – essentially, a triable issue.
  - Company relied on the meeting and the delay.
  - If Company could prove its version of events, then there was no basis for having the company wound up.

Initial Court

- Co. Argument (1) Company relied on Revenue's acceptance of the proposal to support contention that the petition should be dismissed on the grounds that the debt was disputed by the co. in food faith and on substantial grounds.
  - Responses (judge)
    - (1) no agreement was concluded
    - (2) even if there was an agreement there was no consideration
- Co. Argument (2) Revenue were estopped from enforcing
  - Response; no agreement or promise by Revenue to give rise to estoppel

Appeal Grounds:

- **Collector had ostensible authority to accept the proposal AND had conveyed acceptance by silence**
- **Promise to pay an existing liability had amounted to good consideration on the ground that the revenue would derive practical benefits**
  - *Williams v Roffey* line of argument.

Issue; whether the debt of the company is disputed in good faith on substantial grounds

- (1) **Acceptance:** whether there was **acceptance** by the crown of the proposal by rev.
- (2) **Consideration:** if there was an agreement, was it supported by **consideration** moving to the crown
- (3) **Estoppel** if there is no agreement, is Rev. **estopped** from asserting that its debt is due?

Held:

- (1) No acceptance was communicated by Silence
  - Collector had no actual authority – had sufficiently communicated this; Revenue had not implied to the co. that he did
- (2) Even if there was an agreement, there was no consideration - *Foakes v Beer* (1885)
  - promise to pay a sum a debtor is bound, was not consideration (*F v B*)
  - *Williams v Roffey* (1990) principle distinguished; consideration as a practical benefit is confined to cases where the obligation involves supply of goods or services

- Impossible to extend that principle to an obligation to make payments
- (3) Promissory estoppel did not arise;
  - Collector had no actual authority – had sufficiently communicated this; Revenue had not implied to the co. that he did – SO no authority to make the 'promise' being estopped
  - Co. had failed to honour its promise to pay tax as it fell due So it was not *inequitable* or unfair for Rev. to have demanded payment.
    - Nor was it inequitable to have served a statutory demand and present a winding-up petition to enforce the debt.

Acceptance

- Holistic Issue: "can an agent who makes clear to an offeror that he lacks the principal's authority to accept the offer can, but indicating that he would refer the offer to his principal and that he would come back to the offeror only if that offer was not acceptable, bind the principal to accept the offer by the agent's subsequent silence."
- **Issue 1 – Silence as acceptance**
  - Silence will not usually amount to acceptance except in the most "exceptional circumstances"; authorities for that are cases where offeror sought to impose on the offeree a term as to acceptance by silence.
  - BUT "*The significance of silence, as a matter of law, may also be different when there is an express undertaking or an implied obligation to speak, in the special circumstances of the particular case*." – Evans J in *The Agrabele* (1985)
    - "*Where offeree himself indicates that an offer is to be taken as accepted if he does not indicate to the contrary by an ascertainable time, he is undertaking to speak if he does not want an agreement to be concluded. I see no reason in principle why that should not be an exceptional circumstance such that the offer can be accepted by silence. But it is unnecessary to express a concluded view on this point*."
- **Issue 2 – Authority of Agent: Tax collector had no authority – more substantial objection**.
  - Distinction between **ostensible** and **actual authority**
    - That the **Officer had neither ostensible nor actual authority**.
      - ***If they had found that he had either, then the court was prepared to accept that he could have accepted via silence***.
  - "In the present case, I am not aware of any fact which would enable Mr Ffooks reasonably to believe that the superiors to whom Mr Polland referred were themselves making a representation that Mr Polland had their authority to accept the offer or to convey their acceptance by his silence."
- No acceptance

Consideration

- Claimed by Co.
  - (1) promise to pay off existing liability by instalments
  - (2) promise to pay future tax as they fell due
    - NB: thinks that if (1) is not, then (2) should not be.
- *F v B* applied, but discussion of practical benefit; **Lord Blackburn's** "*all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole*."
  - **But HOL decided that 'practical benefit' is not good consideration**

- *Vanbergen v St Edmunds Properties Ltd* (1933); Lord Hanworth MR; "It is a well established principle that a promise to pay a sum which the debtor is already bound by law to the promisee does not afford any consideration to support the contract."
- ***D & C Builders Ltd v Rees* (1965) Danckwerts LJ**; "***payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is an accord and satisfaction***."

- **Additional Benefit argument? *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1990)**
  - Fact; **Rev was more likely to recover more from not enforcing debt against the co. which was in financial difficulties than from putting co. into liquidation**.
    - Similar to *Wiliams v Roffey*. Bankruptcy; Although Mr. Williams was not threatening to petition for his own bankruptcy, there was still practical benefit for the Roffey's in mitigating that possibility.
      - Are the other practical benefits more important?
  - "Proposition that a promise to perform an existing obligation can amount to good consideration provided that there are practical benefits to promisee."
    - Similar to *Williams v Roffey* – CA found that a practical benefit can constitute consideration…
  - "***If the principle of Williams' case is to be extended to an obligation to make payment, it would in effect leave the principle in Foakes v Beer without any application***."
    - "When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing."
    - Inconsistent with *F v B* – was not even referred to in *Williams*.
    - "The difficulty that I feel ... is that if the principle of Williams' case is to be extended to an obligation to make payment, it would in effect leave the principle in Foakes v Beer without any application... **If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission**."
      - Essentially, bound to follow precedent.
  - **CA did not allow *Williams* principle to extend to part-payment of Debt**.

Estoppel

- NB: as a matter of public law the crown could be prevented from acting unfairly
- (1) **tax Collector had no authority to make agreement claimed by the co**.
  - same point that prevented there being an agreement.
- (2) because **the co. failed to honour its promise to pay as tax fell due, it was not inequitable or unfair for the Crown to demand payment of all the arrears, nor in the light of the further payments, was it unfair/ inequitable to serve as a statutory demand and present a winding-up petition to enforce the debt**.
  - The **term breached was a central term to the bargain**.
  - NB: under the Contractual Remedies Act 1977, a party can cancel a contract if the other party has breached an essential term.

Question: what would have happened in *Re Selectmove* if they had found consideration following *Williams?*

- Would not have changed anything – the Agent of Rev. did not have authority to conclude an agreement.
- If an agent does not have authority, then a contract cannot be concluded.

Collier v P & MJ Wright (Holdings) Ltd (2007) CA

Facts

- C was 1 of 3 partners (property developer), owed W money.
  - Court order to get £46 800
- 3 partners were jointly liable for monthly instalments of £600
- 1999; payments go down to £200p.month for C – the joint account disappears
- 2000; C swears that W agreed to several liability for £15 600
  - in 2006 he finished paying for this 1/3 total debt.
- 2004/2005 – other partners go bankrupt
- 2006; W serves statutory demand on C for balance of debt
- C applies under rule 6.4 Insolvency Rules 1986; needs to be disputable on 'substantial grounds' – r.6.5(4)(b) – needs to show 'genuine triable issue' Alleges:
  - (1) **variation is Binding; by agreeing to accept sole responsibility for a 1/3rd share he gave consideration in law for the promise of W to accept him as debtor for only 1/3rd share of the judgment debt.**
  - (2) **that W was estopped from enforcing; could not proceed for more than 1/3rd share of the debt.**
- Ultimately *alleged* agreement to accept lesser sum in place of larger; question: if that agreement is proved at trial, will it be binding on the creditor.

Liability

- Joint: Each of the partner's were liable for the *full sum*.
- Several: Only liable for proportion due – in this case, 1/3.

Outcome

- *FvB* prima facie applies.
- **Arden LJ**; *FvB* applies BUT for Denning LJ in *High Trees* – which was confirmed in *D & C Builders v Rees*; promissory estoppel applies – it would be inequitable for W to renege on the promise
  - There was a "real prospect" that this defence would work at trial.
- **Longmore LJ**; **Confirms the need for meaningful detriment** from *D&C Builders v Rees* but stresses the **importance for true accord**; "*agreements which are said to forgo a creditor's rights on a permanent basis should not be too benevolently constructed*"
- **Mummery LJ**; Estoppel argument applies.

Issues

- 1. **Standard of Proof** for r.6.5(4)(b) to apply and set aside W's statutory demand
- 2. **Consideration** provided by C? (Part payment / *FvB* issues)
- 3. If not (3) then could **promissory estoppel** apply to a commercial setting?

<u>Standard of Proof</u>

- **Whether the test of 'genuine triable issue' set the bar lower than the test of 'real prospect of success'. Arden LJ concluded that they were the same**
  - Disproved of *Kellar v BBR Graphic Engineers (Yorks) limited* (2002) (Chancery Division).
- Essentially an **uncontroversial and convenient way of resolving the issue; the standard for setting aside a statutory demand is the same as that for refusing a summary judgment**

Consideration (four 'stages')

- **Mr Collier argued that by moving from a joint to a several debtor he had suffered detriment. For example, he had lost the chance of being discharged from liability, if he had predeceased his partners, or if the creditor had released the other partners, without reserving rights against Mr Collier**.

  Responses:
- (i) that the most the agreement could amount to was a promise by W not to sue C if he paid 1/3 of the judgment debt – new collateral agreement, not affecting joint liability.
  - Agreement was collateral to an existing obligation on a joint debt – not itself affected.
  - There could be no consideration for it because it was only a promise to pay part of an existing debt.
- (ii) **a promise by C not to petition for his own bankruptcy would be good consideration for such an agreement**
  - **no evidence of any such promise by C**
  - However, there was no evidence that these matters formed part of the agreement. There could have been consideration if Mr Collier had said that he would not petition for his own bankruptcy if the creditor limited his liability to one third of the debt.
    - Again, there was no evidence of any such statement. Accordingly, the mere fact of an agreement to convert a partner's liability from joint to several did not create a firm exception to the rule.
- (iii) **if there were an offer from C to release any right of his, this might amount to a good consideration**
  - **Arden LJ** considered the position if Mr Collier changes from being jointly liable for the whole debt to being severally liable for one third only.
    - In this case, he would **gain** from no longer being liable to claims for further contribution from his former partners.
    - He would, **however**, lose the possibility of being discharged if they were discharged by Wrights without reservation of Wrights' rights against him, and the benefit to his estate that would accrue from the discharge he would gain on predeceasing his fellow joint debtors
  - Arden LJ found no evidence that any such agreement had been reached between C and W.
    - But, wouldn't there be a **change of legal relationships? C's agreement to such a change would move from C, and agreement to a change rather than change itself would constitute consideration**…
  - *Williams v Roffey* – CA found that a practical benefit can constitute consideration…
    - Essentially *Pinnel's Case* rules – despite controversy.
      - Not enough to give a creditor some of the money he is entitled to; a good result in terms of creditor protection; consequence is also that, where a compromise has been made the expectations of the parties are frustrated.
        - Thus the rule makes it difficult to enter into **compromises** (NB: she is using it loosely – not a 'legal' compromise; compromise in the sense of agreement to accept a lesser sum to settle a debt) of claims, which it can often be commercially beneficial for both parties to do.
      - There are now a number of exceptions.

        - Payment in a different form.
        - Promissory Estoppel,
    - At [88/D] CA has held that the rule [**Note that *Williams* did not mention *F v B* at all. The Rule is that in *Pinnels Case*, *Stilk v Myrick* – the pre-existing duty rule**] does not apply where the debt arises from the provision of services [**not a debt, rather it is a pre-existing obligation**] (*Williams*);
        - As it is it makes no sense
            - (1) *Williams* did not mention *FvB*
            - (2) did not deal with debt, dealt with a pre-existing obligation for the supply of goods and services.
        - DMAC: the CA has held that the pre-existing duty rule does not apply where the *obligation* arises under the supply of goods and services.
    - "we are not concerned with this exception because this court in *Re Selectmove Ltd* (1995) considered the *Williams* case**]**, but confirmed that a promise to pay part of the money to which the creditor is already entitled to is not good consideration. The court applied *Foakes v Beer* and held that a debtor's promise to pay the sum due from him by instalments without interest did not prevent the creditor from suing for the interest."
        - Those are the wrong facts. Applied the facts of *FvB*; not of *Re Selectmove*.
        - NB you could plausibly rely on this in court!
- **CA set against holding that principle can apply to debt** – *Re Selectmove* (1995)
    - "The difficulty that I feel ... is that if the principle of Williams' case is to be extended to an obligation to make payment, it would in effect leave the principle in Foakes v Beer without any application... If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission."
- **Bankruptcy??; Although Mr. Williams was not threatening to petition for his own bankruptcy, there was still practical benefit for the Roffey's in mitigating that possibility**.

- (iv) **that there would only have been consideration in C *refraining* from pursuing his former partners if he had agreed he would not do so**.
    - No issue since there was no suggestion that C made any such agreement with W.

Promissory Estoppel

- Concludes that there was **no consideration or agreement to any change of status from a joint debtor to a several one, Arden LJ considers whether C had an arguable case to prevent W pusruing the remainder of the debt**.
- Doctrine development: ***D & C Builders*** made it clear that **although generally P.E. is suspensory in effect (i.e. *High Trees*) it could in appropriate cases extinguish the promisor's original rights; this implies that P.E might result in complete extinguishment of legal rights BUT also that the only action necessary on the part of the promisee to make it inequitable for the promisor to renege, is that the promisee acts on it – even if acting so is positively beneficial – i.e. making smaller payments**

- Arden LJ accepts that this is good at English law.
- Interestingly says that Denning and Dankwerts LJ agreed in *D & C Builders*, in reality Dankw. Added that there needed to be reliance.

- **Arden LJ concluded that C had raised a triable issue**
  - The mere fact that the time had elapsed would not be enough of itself to give rise to promissory estoppel. [. . .] *Mr Collier's case, however, is that he made the payments on the faith of the agreement he had made with Mr Wright. He contends that there is a triable issue as to whether there has been an accord and satisfaction since he has now paid his share of the judgments and... Wrights voluntarily agreed to accept that sum. It follows from the judgment of Lord Denning MR in D & C Builders... that that is enough to make it inequitable for Wrights in those circumstances to pursue him for the balance*.. ."
  - **4 Proposed Steps**:
    - (1) A representation by one party that he will not insist on his strict legal rights; and
    - (2) An intention by that party that the other party will act on that representation;
    - (3) Actual reliance by that other party; and an overriding condition;
    - (4) The circumstances make it inequitable for the representor to resile from the representation.
- Arden LJ thinks that the approach effects the recommendation of the Law Review Committee chaired by Lord Wright MR in 1937
  - Recommendations?
    - Quotes with approval, Blackburn's view in *FvB* – "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that that all men of business whether merchants or tradesman, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of a whole."
    - Viewed as valid
      - Should pass leglislation to abolish *FvB*
  - Also aims to continue the obiter of Denning J in *High Trees*.
    - That Denning relied on *Hughes v Metropolitan Railway Co* (1877)
    - Very, very different rule to that in *FvB* – at the most, the principle from *Hughes* would demand that there is notice necessary to claim the rest of the sum.
    - ***Hughes did not deal with extinguishing legal rights – merely extending them.***
  - Consistent with the *D & C Builders* principle; essentially has destroyed *FvB*
  - IS this true? (@ 'Conclusions')
- NB: with Promissory Estoppel, you are winning *despite* the absence of accord and satisfaction and consideration…
  - Promissory Estoppel is a means of circumventing *FvB*.
  - There is even a suggestion that for all intents and purposes, *FvB* is abolished.

Conclusions

- Extension of *Williams v Roffey* BUT without trumping *FvB* or *Pinnels*

- She is realistically saying that although there is an exception, it has for all 'intents and purposes' overtaken *FvB*.

- Essentially bypasses *Re Selectmove*; in **pure debt cases with no element of supply of goods or services if a debtor has begun to act on the promise (regardless of whether or not it is to their detriment) promissory estoppel will prevent the promisor reneging**
  - Unless, there has been inequitable behaviour on the part of the debtor.
  - There might be situations where promissory estoppel might not apply where the debtor does not behave appropriately.
- Could have a situation where there has been no late payment and no duress and it would still be equitable to renege – Situations where *FvB* applies.
  - Duress: What about *D & C Builders*? Remember that the debtor deliberately took advantage of the creditor… Would treat it as duress more likely than applying equity.
  - Misrepresentation: Where there has been a *misrepresentation* it might not be inequitable for a creditor to renege on their promise.
  - These are practical elements where *FvB* will still apply and promissory estoppel will not.
  - Payment: where the contract has not been executed; purely executory.
    - On applies where the promise does.
    - Had it been abolished; law review committee; the *agreement* to accept the lesser sum will be binding.
- Desirable result?
  - Recognises commercial reality and gives effect to creditor's decisions that commercially it makes sense to receive guaranteed amount rather than face uncertainty.
    - i.e. bankruptcy of the debtor
  - it has always been possible to make a promise to accept a lesser sum by way of deed – very easy as well.
  - Deed, or consideration provided objective evidence of an agreement existing.
    - In the light of *Collier*, this is kinda threatened – reliant on a Judge accepting one version of facts…
    - This is interesting considering the emphasis on the 1908 Judicature Act s92 – which balances commercial reality vs. need for evidence – essential mechanism from the Statute of Frauds 1677.
    - Longmore.
- Part of a trend toward less technicality.
- **Very possible that a court in New Zealand would follow – effective nail in the coffin of *Homeguard*'s argument against promissory estoppel.**
  - In New Zealand it is unclear whether promissory estoppel will apply – BFT 150-151 that promissory estoppel does not apply. Reason; *Homeguard Products v Kiwi Packaging* at [page 52/43]
    - Objection 1: that an equitable estoppel principle, not yet sanctioned by the HOL can displace one that is settled and affirmed
    - Objection 2: there is a temporal difference; in *High Trees*, the money was not yet due – in *Foakes v Beer* situation, the agreement necessarily applies to an existing liability.
    - Prefers Winn LJ in *D & C Builders*
    - by the promisee as a result of relying on the promise, it is difficult to see how that can occur where a debtor has paid only part of the debt"

- BUT – this is Mahon J saying that the promisee has to have actually relied on the promise AND gone on to incur further liabilities – i.e. extra expenses to the business.
    - BUT DMac thinks that when it happens, promissory estoppel will come to apply.
- Mahon said that promissory estoppel does not apply at all where there is an existing liability.
    - In other words, detrimental reliance point is valid.

Privity of Contract

General: Common law Position is that **only the promisee can benefit** (includes rights and responsibilities) **from the K – not a third party *even if the promisor said that a benefit would be transferred to them***. There are many exceptions to this however – a miscellany of rules.

Example – Roman Coins

- DMAC Signed K to agree to sell treasured Roman Coin Collection to Professor Prebble for 200 000; K provides that PP would pay 150 000 immediately, and further 50 000 to my wife (T) at the end of the month.
    - Provision for wife as a 3rd Party Beneficiary.
    - **Promiser – PP, Promisee – DMAC, T – DMAC's Wife**
- Handed over coin collection, received 150 000 – PP has not provided 50 000 to T at end of month.

Application of Law.

(1) What rights does DMAC – promisee have?

- Can apply to court for equitable remedy of 'specific performance' or that PP pays the debt
- If Specific Performance is declined? (Discretionary Remedy)
    - Under CL, DMAC could only recover *NOMINAL DAMAGES* – an award of a sum to recognize that a breach has occurred, not compensatory damages
    - To recover compensatory damages need to show damages
    - This can be an advantage in Contract Law – in any event a court will confer nominal damages.
- ***In any event, DMAC could not recover the 50 000 – the money was not going to go to him, the damages would belong to him not to his wife howeve***r.
    - The notion that DMAC has not suffered a loss is a very One Dimensional view – too narrow; in recent times attitudes have been changing to examine what constitutes a loss
        - I.e. DMAC has suffered a loss – sought to provide a benefit to T, to deprive him of the ability to provide that is a loss.
        - The loss of ability to perform is still a loss.

(2) what rights does T have – beneficiary of a promise – Third Party Beneficiary TPB

- Any ***damages recoverable would belong to DMAC as promisee. Under Common law if DMAC did not seek to enforce the promise, T could not do anything – not privy/ party to the K***
    - "expectations would be disappointed."
- Case thus falls into a 'Legal Black Hole' – there is a wrong, a breach BUT neither DMAC nor T can sue; promisor may get away with a flagrant breach of contract

(3) Devices to allow recovery of damages – in order to circumvent Privity:

- **Assignment**: DMAC could stipulate that both installments are to go to T, then *assign* the 2nd installment to T. The promise from PP to pay 50 000 to DMAC is *property* – that DMAC can do what he wills with it
    - NB that originally Common Law did not recognize assignment BUT equity did. Now we have a Statute under which assignment can be made

- T could sue as an *assignee* of the property.

- **Via Trust:** OR DMAC could receive the promise from PP in a trust for T – "I hereby promise to pay DMAC 50 000, DMAC acting as trustee for T" – DMAC is a trustee, T Can sue for the promise

- ***If DMAC did nothing to recover, T could do nothing***
    - T and DMAC might be getting divorced
        - DMAC might have received a payment from PP, in order to release PP from the debt.
        - I.e. DMAC and PP can agree to vary the K
            - Parties can vary what they will – could cut T out
    - DMAC might have run away to a desert island.
    - DMAC might have died – administrator of estate might be unwilling to take action against PP.
  - T would have no enforceable rights in Common Law
    - This is often considered to give rise to inequity – too harsh

- **Statutory exception – Property Law Act 1952; s7 *now repealed…**, any person may take an immediate benefit to a DEED though not named thereto (NB now repealed)
  - Assumes that original K was in the form of a deed
  - **Property Law Act 1952 has now been essentially overtaken by the Contracts (Privity) Act 1982**
    - Under s4 of this act, T would almost certainly be able to enforce the Contract under this section *regardless* of whether it is contained in a deed; "a contract or deed"
    - However, PP and DMAC may still be able to vary or discharge the debt in s5-7 of the CPA 1982.

- **Make DMac's Wife a <u>party to the agreement *via DEED*</u>:** in this case would have full legal rights – **TPB** cannot vary or benefit from a K; parties to a K can *even if it is designed for her benefit*.
  - PP makes promise to both – all 3 parties to the agreement
  - Q; does it matter that the wife didn't personally provide consideration
    - Ordinarily yes,
    - ***Not if the agreement is contained in a deed. Even though the promise to pay her 50 000 was gratuitous, consideration doesn't have to move from her.***

<u>Question: What if the promise is not contained in a deed? Contentious.</u>

***Coulls v Bagot's Executor* (1967) HCA.**

Per Windeyer J **(1 of 5 judges – 3 others agreed)**

Facts

- Case concerned a widow who's late husband had K to grant licence to Co. for the extraction of metal from land that the husband owned.
- Royalties were to be paid to the husband and wife jointly while they both lived, thereafter to the survivor of them
- Wife's only part of proceedings was to add signature

- 2 Judges found her party to K; as a joint promisee could enforce the K not withstanding that husband alone provided consideration
- 3 judges held that she was not a party by adding signature
  - 2 of them held that if she had been, the fact that only her husband provided consideration should not been an impediment to her

Influence

- HC of Australia authority; view that a joint promisee need not personally provide consideration if consideration was provided by the *other promisee* (i.e. DMAC)
- **A promise made to joint promisees** "*must of course, be supported by consideration. But that does not mean by consideration furnished by them separately. It means a consideration given given on behalf of them all, and therefore moving from all of them. In such a case the promise of the promisor is not gratuitous; and, as between him and the joint promises, it matters not how they were able to provide the price of his promise to them*."
- **Therefore, a party to a K even without providing consideration, will be able to sue**

Principles?

- It is difficult to see how a person can be party to a K in agreement with support of consideration if that person has not provided any consideration
  - He may be party to an agreement, nut you can't be party to a K unless you have personally provided consideration, unless you can sue on it. To be a party who can sue, you need to be a party who can be sued.
- **Principle appears to confuse consideration as a requirement for the formation of a contract, with consideration in the sense of actual performance of the K.**
  - Distinction between these;
  - Bearing in mind this distinction, it usually doesn't matter that only one joint promisee furnished the consideration, even though only one rendered or could render the performance bargained for
- Wife could be a party in that she expressly or impliedly assumes an obligation to ensure that the right to extract metal is complied with
  - Benefit to the quarrying company – if the widow had joined in her husbands promise, would not have been her provision of the quarry, but her accountability in law should her husband have defaulted
    - Consideration can be accountability to the vendor, not performance
- ***Difference between the assumption of an obligation, and the actual performance*.**
  - **Both are actually consideration.**
- ***There can be consideration in the form of accepting accountability – even where they had no consideration*.**

<u>Summing up</u>

- We don't know the law on this
- The principle in *Coulls v Bagot* could be followed! Though DMAC thinks it is misguided
- The HC of Australia was motivated to get around the doctrine of PoK
- Many other exceptions have evolved
  - **Assignment** – easy way to get around the First Example
  - **S7 Property Law Act 1952 – now repealed.**
    - Where a deed was involved that purported to confer a benefit
  - **Joint promisee** – make the 3rd Party actually a part of the K
    - Then to avoid issue of provision of consideration, make it a deed

        - In Australia, the Joint Promisee principle developed this further – *Coulls v Bagot*.
    - Special, largely statutory rules governing
        - Insurance K
        - Covenants Governing Land
        - Consumer Contracts
            - All Covered in Textbook – covered later at Law School.
    - EX Consumer Guarantees Act 1983
        - Applies where there is a provision of goods and services to a consumer. Contains a number of exceptions to the Doctrine of Privity
            - BFT 580
        - i.e. Goods will be of Acceptable Quality
            - Applies to Retailer – Privity and manufacturer – not privy to the K
        - i.e. Manufacturer is often privy to K of guarantees provided by retailers.
        - Manufacturers must often oblige with repair facilities and supply of spare parts.
        - S24 of the Act
            - Where a consumer buys goods from a dealer and then gives them to another person, that person has the same rights and remedies as the buyer – the consumer.
            - Removes reliance on actual purchaser pursuing the issue.

There are two qualifications to Privity even post 1982 reforms:

<u>Exceptions 1 – Law of Agency</u>

- **<u>A ← K → B (Agent for C – Principal)</u>**; Where one person – principal – **authorizes agent to act on their behalf and agent agrees to so it. Agent is authorized to conclude K on behalf of the principal, principal acquires rights and incurs liabilities made under K by the agent with other parties**.
- In itself, *agency is not a true exception to the doctrine of Privity* – agent is only the intermediary of the principal. It is the ***principal who is the real contracting party***.
    - i.e. above the K is between A and C; agent is neither a party nor liable on the K.
    - if the Principal fails to perform agent is not liable for principals non performance
        - unimportant exceptions:
        - where the agent exceeds authority – action for breach of warranty of authority

- **Agency is not really a true exception to Privity**
    - Courts are sometimes to prepared to manipulate the agency rules to circumvent Privity
    - i.e. if you say one of the parties was acting as an ***agent in part***
        - person promised a benefit under K, can show that one of the persons entered into a K as his or her agent
        - this means circumventing the rule has been relied on in regard to limitation of liability clauses in K for carriage of goods
            - commonly contain a clause excluding or limiting liability for the damage or loss of the,
        - they will have a clause extending the exclusion or limitation to cover employees, agents, subcontractors of the carrier

- i.e. Stevedores employed to unload goods
- ***NZ Shipping Co v AM Satterthwaite & Co (The Eurymedon)* (1975) PC** (BFT 15.5)
- **Where A (cosignee/ owner) ← K → B (carrier), in this case C is the Stevedore**
  - Contract between A and B includes alteration to limit liability; courts were prepared to hold that C – stevedore – was entitled to take advantage of a limited liability clause in the K of carriage on the basis of agency
    - Similar to subrogation of claim – takes over the claim for the negligent party.
  - Concerned to circumvent the Privity doctrine so the stevedore could rely on the exclusion to save them from the liability of damage to goods
    - Concerned to give effect to the bargain that was upheld.
- **There is less need these days to manipulate agency principles in order to circumvent the doctrine of Privity in view of our legislative reform in the Privity act**

- **Doctrine of Undisclosed Principal: one clear exception to Privity!**
  - *Where an agent makes a K with a 3rd person on behalf of an undisclosed principal, the principal can sue and be sued upon the K.* **Subject to limitations – we will not cover them. Essentially; Undisclosed principle can be sued on the K.**
  - Where A ← K of Sale → B , in this case C is the Undisclosed principal of B
  - After the K is formed, before sale is over, B tells A he is agent for C – allows C to enforce K with A
    - **Benefits FOR C**: even though A had no intention to K with C and had never known that B was acting as agent for anyone at all – A didn't know C existed!
    - **Benefits FOR A**: however, the doctrine has benefits for A – another potential defendant if buyer defaults; the buyer being C. If the buyer defaults and refuses to pay the price of the horse, the seller has a cause of action against both B and C together!
  - Simply an Exception developed by the Courts in the interests of commercial expedience. Common in the 18th and 19th C commercial transactions for people (*known as Factors*) who deal with goods for people on their behalf, often without disclosing agency.

Exception 2- Law of Trusts

- General
  - **Trust; developed by courts of equity; essentially an equitable obligation to hold property on the behalf of another, without that "other" actually becoming party to the contract.**
    - Even possible to have a trust in a promise – contractual right.
  - Doctrine of Privity could be avoided through the use of the trust
- Suppose; **A ← K → B, where B is Trustee for C**
  - May be existing or declared new Trust by B
  - When this happens, **C as beneficiary of the trust can enforce a promise**
  - DOES NOT MEAN THAT C BECOMES PARTY TO A CONTRACT
    - Trust creates an obligation on the part of the promisee, B and the obligation is to enforce the promise on behalf of the beneficiary, C
    - And if B won't act, C can indirectly enforce the promise by compelling B to enforce it

- In practice this means that the beneficiary can sue the promisor provided that the trustee is a defendant.

- Trust concept had the potential to provide a wide ranging exception to the common law Privity doctrine
  - **History:**
  - Original form of Contract - A promises B to confer benefit on C
    - In some early cases, the courts recognized B as a trustee of C for the benefit of the Contract
      - They were prepared to imply a trust
    - Later courts saw this as artificial and insisted a clear expression of intention to create a trust
      - Despite early cases, courts became unwilling to imply such an intention
      - They were particularly concerned that the irrevocable nature of a trust would *restrict the parties autonomy and prevent them from changing their minds* by varying or discharging the contract
      - IF there were a true trust here, when it was formed, there would be a level of consent; the trustee is the bare legal owner; the beneficiary is the 'equitable' owner
        - i.e. in this example, A and B have no rights – C has power
          - thought that unless trusts were created intentionally, B and A should retain their contractual authority.
      - Trust fell out of favor as a means of circumventing the Privity doctrine
  - **Nowadays, the reforms made by the Privity Act have removed the need to artificially construct a trust in order to do justice and circumvent the Privity doctrine. That doesn't mean that you cannot use the trust – from a beneficiaries POC a benefit of the trust is that ordinarily, parties will not be able to vary the arrangement without the consent of the beneficiary.**

- Example; Signed K to agree to sell treasured Roman Coin Collection to Professor Prebble for 200 000; K provides that PP would pay 150 000 immediately, and further 50 000 to my wife (T) at the end of the month.
  - Provision for wife as a 3rd Party Beneficiary.
  - Promiser – PP, Promisee – DMAC, T – DMAC's Wife
  - Handed over coin collection, received 150 000 – PP has not provided 50 000 to T at end of month.

- Privity meant that the Wife couldn't enforce the promise made for her benefit
- To avoid the situation;
  - (1) the lawyer employed to draw up K restructured it to include a trust of PP's promise
    - 'promise of 50 000 was made to DMAC as trustee for the wife'
    - DMAC could declare the existence of the trust in the K
    - Advantage for wife, even if Divorced, PP and DMAC couldn't change trust
  - (2) have an assignment of the promise to pay the Wife 50 000 installment
    - K could stipulate that 2nd installment was to be paid to DMAC who assigned rights to wife.

Summary of Privity.

- A large number of exceptions or qualifications to the doctrine of Privity have been created by Statute or Case law. Consequence of this is that it was possible to avoid the doctrine in almost all areas in which a strict application of it would create injustice or would conflict with business practice
- Why then, would we need legislation? Problem that the doctrine Remained
    - Always a number of cases where hardship would arise because people did not know and were ignorant of the need to adopt highly technical approaches such as assignments, or trusts in order to avoid the doctrine
    - Doctrine appeared to survive as only a trap for the unwary of the need to structure transaction to avoid the Doctrine of Privity
- Nobody wanted to abolish it all together; we do not want uninvolved parties seeking to enforce a K they were not party to
- However, what about 3rd party disclosure rule?

Law Reform Committee's

- Late 70s, 80s
    - Contract (Minors) Act
    - Contractual Mistakes Act 1977
    - Contractual Remedies Act 1979
    - Contracts (Privity) Act 1982
        - Best, most accessible, most competently written – provided a blueprint for the English Reform; Contracts 'Rights of Third Parties' Act 1999

- Privity Act was used by the English as a starting point for their proposals for the reform of the English Law of Privity. Decided to recommend a Big exception that would remove the injustice and inconvenience caused in remaining situations by the applications of the Doctrine.

Contracts (Privity) Act 1982

Contracts (Privity) Act 1982 Intro and Purpose

Designed to achieve a *Balance* between two basic objectives

- **(1) designated 3rd party beneficiaries of a K should be able to enforce the promise** against the promisor, **giving effect to the 3rd party** without creating artificial assigning or trust arrangements
- **(2)** to **preserve** (as far as possible) the **autonomy of the two contracting parties**, the promisor and promisee should be able to discharge, revoke, vary the contract.

These two objectives don't seem to be compatible

- At the heart it is; **a working out of a compromise of these two objectives**
- The two parts of the act give rights to the designated 3rd party beneficiary and s5- s7 of the act deals with the restrictions on variations or discharge of the contract.

Sum up in General terms whether the parties to a K with a benefit to a 3rd party can vary the K.

- ***Go to s5 – if any of (1)(a – c) are satisfied, cannot vary without permission of 3rd party.***
  - ***If not satisfied, then can vary under s4 and Right to vary K***
- ***Then go to s6*** – assume not (a) because TPB will not vary, so (b) all 4 limbs need to be varied.
  - If they are, can vary regardless!
- ***If not, go to s7***
  - If it is specifically precluded (1)(a) cannot vary
  - If it is not – (1)(b), then can apply to court to vary.
  - Q: no guidelines or case law regarding where Court will exercise discretion.
    - Say A, B and C; K stipulates that first 1million go to the 3rd party.
    - Third party and A divorce; and there is not as much metal in the quarry as expected.
    - Court might say, we will allow the variation of the contract provided that any injurious reliance by the 3rd party is compensated for.
    - i.e. there has been a material alteration but not so much that we will not compensate.

You can imagine cases where all sections 5,6,7 are being argued at once; there is nothing in s5 to stop us, but even if there was we could exercise rights under s6 – and you knew about this AND even if we are wrong on both counts, we can apply to the Court to allow variance *provided we compensate* TPB for reliance.

Contracts and Commercial Law Act 2016

Note that the **Contracts (Privity) Act 1982** will soon no longer exist – will be replaced by the Contracts and Commercial Law Act 2016 - "to assist people and businesses to find the rules that are relevant to them and reduce Regulatory Costs" In DMAC's view; this statute will cause utter confusion and needless work for the individuals who apply it the most.

- Consolidation Bill – increase accessibility etc. Will realistically make it more complicated to locate the relevant case law. The Privity Act will soon become Subpart 1 of Part 2 of this Act. S4 will become, s12 and 13 of the Contract and Commercial Law Act.

Contracts (Privity) Act 1982 s4 Requirements;

(1) need a promise contained in deed or contract

- *defined widely*; deed or in writing, or orally or partly in writing and partly orally, or implied by law.

(2) must confer or purport to confer a benefit on a person

- benefit is widely defined; immunity, advantage, limitation or qualification of an obligation

(3) Designated

- named and identified by description, or reference to a class of persons; "the children of X" or "the employees of X"

(4) who is not party to the deed or contract (NB, implicit anyway – if you are party can probably enforce it through the regular avenues).

- the **third party beneficiary** of the Contract
- whether or not the person is in existence at the time when the deed/ K is made

(5) the promisor shall be under an obligation, enforceable (by the designated party) at the suit of that person to perform that promise.

(6) Provided that this section shall not apply to a promise which, on the proper construction on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person

- i.e. where people have **included a proviso** that communicates that it is not intended to create an obligation the Contracts (Privity) Act 1982 is not to apply.
- Would also apply where there are no express references to this; term of Art "on its proper construction" – thus **K might *imply* or parties might reasonably be taken to have intended something**
    - **S4 will not apply where parties can be reasonably understood not to have reasonably intended to create an obligation.**
- The Onus is on the parties – the promisor to show that it was intended that the promise not give rise to enforceable rights.
    - Actively need to show that they didn't need to show benefits.

- Example 2 – i.e. Contract with Council that Homeowner's rubbish is collect
    - Say DMAC lives at the top of a hill, rubbish man leaves rubbish on the lawn
    - Can he sue the Collection Company for breach of K – who has K with the Council; far more likely WCC did not intent to confer rights on individual ratepayers

Contracts (Privity) Act 1982 s8 supplementary to s4 (should have been part of s4 or next to it)

When s4 is satisfied, the **3rd party can enforce the promise despite the lack of consideration and despite being a 3rd party**; Essentially, acts as an **inroad into the need for consideration**.

- Contrary to the Maxim that equity won't assist a volunteer. A volunteer is someone who has not provided consideration

Relief by way of damages will not be denied; a provision for avoiding/ releasing from a statute.

- Used here as the sense of remedy – damages, specific performance, injunctions are means of enforcing contractual obligations.
- Used briefly as a synonym for remedy.

Contracts Privity Act 1982 s9 – Availability of Defenses, and s3 Qualification to Set off.

S9: Promisor will have the same defenses (counterclaim, set-off, or otherwise) anything that is available on the promisee rather than the beneficiary.

- Coin Example: DMAC Signed K to agree to sell treasured Roman Coin Collection to Professor Prebble for 200 000; K provides that PP would pay 150 000 immediately, and further 50 000 to my wife (T) at the end of the month. Handed over coin collection, received 150 000 – PP has not provided 50 000 to T at end of month.
    - Provision for wife as a TPB. **Promiser – PP, Promisee – DMAC, T – DMAC's Wife**
- Except, DMAC told a lie – the Roman Coins are not worth 200 000, only worth 100 000; i.e. so DMAC's wife sues for 50 000, PP "sets-off" the 50 000 – against the loss he suffered by DMAC fraudulently inducing the transaction BUT PP cannot sue DMAC's wife for the other 50 000.

S9(3) is a qualification to the right to claim a set-off; available only if the "subject matter of that set-off or counterclaim arises out of or in connection with the deed or contract in which the promise is contained."

- Suppose DMAC did not lie to PP; 6months earlier, he had leant DMAC money – 20 000 on top of the 150 000 he had, DMAC's wife tries to claim 50 000 and PP argues she is only entitled to 30 000,
- Defence needs to relate to the actual case/ Contracts

Essentially just net off

Contracts Privity Act 1982 s14 – Savings. Makes it clear that this Act does not erase other options.

Variation Example.

A promises B to pay C $100 in Return for B's promise to do a certain act. Shortly after B has carried out her promise, A and B agree that the $100 shall be paid to B Not C. C sues A to recover the $100.

- NOW; ***unless that variation is valid, A might have to pay again (twice)*** – pay C; though, that said A could potentially sue B.

At common law; the doctrine of Privity of Contract will apply – C is not a party to the K and cannot enforce it. Assuming that Contracts (Privity) Act 1982 is the only mechanism for enforcement

- S4 – criteria that C needs to satisfy in order to enforce A's promise. On the surface here, they are all satisfied.
    - Nothing to suggest that the parties did not intend for it to be enforceable by C.

Background to Issue; there has been variation where A paid B rather than C;

- Variation needs to be explicit, and agreed upon by the contractual parties – here it is.
- Mere reluctance to pay, or forgetfulness etc. will not act as a variation.
- Nonetheless C is trying to enforce the question –

Issue – is the variation valid; can C recover? C is no longer a 3rd party beneficiary – i.e. if the variation is invalid, the result of C's action is that C will be able to recover the $100 – that A will need to pay twice.

Contracts (Privity) Act 1982 s5 – Limitation on Variation or Discharge of Promise

Section 5 subsection A.

- Subject to X immediately think that there can be qualifications in X.

S5(1)(a); where position of the beneficiary has been *materially altered by the reliance of that beneficiary or any other person on the promise* (whether or not that beneficiary or that other person has knowledge of the precise terms of the promise); the promise and the obligation imposed by that section may not be varied or discharged without that beneficiary's consent.

- **Material alteration is a term of art**
  - Material alteration of position would **involve a judgment regarding whether the 3rd party beneficiary would be prejudiced if the variation were to be allowed**.
  - It would not be enough that C's expectation is frustrated (NB might be under the English version of the Act).
- Material alteration is primarily used in restitution claims
  - **Example:** Finish work; receive an extra sum of pay – assume It is holiday pay; as a result of receiving that money you take steps and spend it going to Fiji, wouldn't have done it otherwise. When it is spent employer demands a refund – mistakenly paid you. As a principle, can recover – an action in unjust enrichment; to leave it, would leave the employee unjustly richer. There is a statutory law, that if the mistaken payee has materially altered their position that they can defend.
  - In this case, material alteration of position would probably work,
- Material alteration; Example: *A Promises B to pay C $100 in Return for B's promise to do a certain act. Shortly after B has carried out her promise, A and B agree that the $100 shall be paid to B Not C. C sues A to recover the $100.* NOW; ***unless that variation is valid, A might have to pay again (twice)*** – pay C; though, that said A could potentially sue B.
- (A, B, C); C spends $100 on something else in reliance that A provides $100 to C rather than A. Wins $10 000.
  - A and B might argue C is materially better off.
  - IF C were to argue that there was a detriment, that spent money that C would not have, might well not work.
  - Suppose that there has been a material alteration of position of C; A and B would need to approach C and request to change it. C is unlikely to do so

Provision '***or any other person'*** **where someone else materially changes the beneficiaries position where one relies on the promise. i.e. a 3rd Person relies on the promise and materially alters B's position**

- **Example A**. C is going to receive a very substantial benefit; C's father changes his will because C doesn't need as much financial provision as C's brothers and sisters
- **Example B**. OR a Rich Uncle makes gifts to all nephews/ nieces – but in awareness of the benefit C is about to receive provides nothing.
- In either EX A or B there is some degree of alteration of C's material position. The 3rd party who decides not to make the payment to C would need to be aware of the position.
  - 3rd Parties knowledge would need to be reasonably precise rather than intricacies.

Question: ***How can it be that in a case where a TPB has not materially altered position, the parties to the K can vary or discharge the K.***

- Section 4 is the exception to the Doctrine of Privity – there is no reference to the Parties can vary the Contract where there has been no material alteration
    - **If s4 does not apply, TPB does not get past square one – no rights at all!**
- Assuming that both parties have executory functions, there is mutual rescission – they can vary and destroy the K. It is their "goddamn given right" to make and unmake the K as they please.
    - Against this background s5 is enacted: one of the purposes of the act being to give the parties as far as reasonable their contractual authority.
- Had sections 5-7 been omitted it wouldn't matter whether the TBP had done anything – it would be an empty shell of a statute.
- S5 Is a qualification on s4; section 6 is a qualification/ exception of s5.
- i.e. in s6; "Nothing in this Act prevents" variation under s6(a) or (b).

Question: ***what about if there is no s5, and consequently no s6-7, and C pursues a Judgment against A and B, and THEN A and B vary the contract?***

- Debt would become a *judgment* debt and not a contract one – the debt is essentially merged.

Question: ***What if the TPB's position has been altered by the reliance of a 3rd Party? AND then the parties A and B try to alter the position?***

- Presume the provision is known
- Section 6(b)(iii) only refers to alterations by the TBP not by a 3rd Party – the provision in s5 regarding other 3rd parties is not replicated – is this a drafting deficiency.
    - **Therefore s6(b)(iii) is satisfied.**
- Note that the Law Commission reviewed these contract acts and suggested s6(b)(iii); "The position of the beneficiary had not been materially altered by the reliance of that beneficiary or any other person on the promise before the provision became known."
    - Suggested by DMAC!
    - If this were the law, subparagraph (iii) could not be satisfied as there has been material alteration by a 3rd party…

Contracts (Privity) Act 1982 s6; variation where there is express provision to do so

Nothing in this Act prevents a promise to which section 4 applies or any obligation imposed by that section from being varied or discharged at any time

- S6(a) by agreement between the parties to the deed or contract and the beneficiary
    - Makes sense – all parties agree

A promises B to pay C $100 in Return for B's promise to do a certain act. Shortly after B has carried out her promise, A and B agree that the $100 shall be paid to B Not C. C sues A to recover the $100. NOW; ***unless that variation is valid, A might have to pay again (twice)*** – pay C; though, that said A could potentially sue B. **Example continued (A, B, C) – if there was no material alteration to C's provision**

- As s5 does not apply**, because s6 and s7 are *qualifications to s5* they could not apply.**
- If a rule does not apply at all, then there is no point applying the exceptions to that rule.

- ***What about where the TBP will not consent, and there has been a material alteration***?
    - If under **s6(b)(i-iv)**, **there is an express provision that the Parties can vary the K at any time they like, provided the requirements are satisfied, regardless of whether C has materially relied on the section and does not agree with the variation**.
- S6(b) by any party or parties to the deed or contract if
        - (i) *deed or K contained (when promise was made) an express provision to that effect;*
        - (ii) *the provision if known to the beneficiary (regardless whether or not the beneficiary has knowledge of the precise terms of the provision);* and
        - (iii) *the beneficiary had not materially altered his position in reliance on the promise before the provision became known to him;* and
        - (iv) *the variation or discharge is in accordance with the provision*.
    - If the K contains an express provision, and all the requirements are satisfied, A and B can vary the K without C – and C would have no rights to recover; rights would be extinguished.
    - If s6(b) applies, then s7 might apply – BUT if s6 does apply, then no point going to court.

Question: ***What if the TPB's position has been altered by the reliance of a 3rd Party? AND then the parties A and B try to alter the position?***

- Presume the provision is known
- Section 6(b)(iii) only refers to alterations by the TBP not by a 3rd Party – the provision in s5 regarding other 3rd parties is not replicated – is this a drafting deficiency.
    - **Therefore s6(b)(iii) is satisfied.**
- Note that the Law Commission reviewed these contract acts and suggested s6(b)(iii); "The position of the beneficiary had not been materially altered by the reliance of that beneficiary or any other person on the promise before the provision became known."
    - Suggested by DMAC!
    - If this were the law, subparagraph (iii) could not be satisfied as there has been material alteration by a 3rd party…

Contracts (Privity) Act 1982 s7 Power of the Court to authorize variation or discharge

Note: only parties can apply under s7 – no reference to TPB

(1) where, in the case of a **promise to which section 4 applies** or of an obligation imposed by that section, -

- (a) **the variation or discharge of that promise or obligation is precluded by section 5(1)(a)**; or
- (b) it is **uncertain** whether the variation or discharge of that promise is so precluded, -

a court, **on application by the promisor or promisee**, may, if it is just and practicable to do so, make an order authorizing the variation or discharge of the promise or obligation or both on such terms and conditions as the court thinks fit.

(2) if a court –

- (a) **makes an order under subsection** (1); and
- (b) is satisfied that the beneficiary has been injuriously affected by the reliance of the beneficiary or any other person on the promise or obligation, -

the court **shall make it a condition of the variation or discharge that the promisor pay to the beneficiary, by way of compensation, such sum as the court thinks just**.

- Here, with injurious effect to TBP, the court MUST make an order.
- **Example with A, B and C; had C spent $50 on reliance of receiving $100, if court thought it was injurious *must* order that A and B pay back C.**

Question: ***Does the way in which s7 is drafted, help us work out the relationship between ss5 and 6? Is it a crosscheck as to the correctness of our current conclusions etc?***

- Subject 5 is subject so sections 6 and 7.
- Why is the right to apply to the Court confined to the two situations mentioned in s7(1).
    - Essentially, they did not want to give the Court the ability to vary or discharge – and thereafter a judgment debt rather than a debt on the promise.
- Can imagine situations where a party might say; "we don't think our ability to vary or discharge is negated" – but will still go to the court.
    - They don't actually need s7 – they already have freedom of contract.
    - In situations where there is no issue regarding 5(1)(a) you have the unfettered right to vary the contract however you please.

Question: ***Is there a right to apply to the court where the parties to the contract wish to invoke a provision of the kind referred to in s6(b) but they are uncertain as to whether that provision was known to the beneficiary before the beneficiary altered his position in reliance on the promise?***

- Here there is a good chance that the TPB has altered position in reliance of K
- Not because there is doubt as to whether the alteration to position has occurred, but because there is doubt as to whether the exception in s5(1)(a) found in s6(b) applies.
- If you put a reference to section 6 in section 7 it would be superfluous and simply confuse us.

Contracts (Rights of Third Parties) Act 1999 (UK) – English version of the Privity Act

- Based on a UK law Report Commission report.

- Set out in s2(1)(a-c) where parties cannot rescind or vary the K
  - (a) where TPB has communicated assent
  - (b) where promisor is aware TPB has relied on the term
  - (c) where reasonably foreseeable that reliance would occur and it has been relied on, that would suffice
    - no need for detrimental reliance.
    - Much easier for the parties to be stopped from varying – i.e. for TPB to prevent variation.

- Set out in subsection 3 of s2.
  - (a) all the parties need to do is have a clause for variation
  - (b) consent of parties in 2(1)(a-c) situations;
    - therefore, in this respect a party is much worse off under the NZ act than in UK – in UK provided you have the clause to do so.
    - Ultimately a 'contract out' provision.

Tutorial Questions and Answers – DMAC; Trimester One

Question 1 – Basketball.

Facts

It is the year 2018. A second New Zealand team, The Wellington Devils, has been selected to join The Breakers in the Australian National Basketball League.

The owner of the team, Richie Rich, a well-known multi-millionaire and basketball fanatic, has scored a coup. He has just signed up the former American NBA star forward, Kobe Bryant, for two seasons. The written agreement, which is drawn up somewhat informally and under some urgency, provides that Kobe will be paid, in addition to all travel and accommodation expenses, a salary of $200,000 per season, plus game payments of $5,000 for each game that he spends 10 minutes or more on court and a "win bonus" of $2,000 per game.

Kobe duly comes to New Zealand and he is a hit. The Devils win the league at their first attempt. However, despite the euphoria, Kobe's relations with Richie Rich are somewhat strained. This is because, when he first arrived in New Zealand, Kobe learned that Richie was intending to pay him the stated remuneration in New Zealand dollars, not the USA dollars that Kobe understood would be the currency of payment when his agent came to New Zealand and signed him up for The Devils. He threatened to leave immediately but decided to stay for one season when Richie agreed to increase the base salary by NZ$20,000 for the first season. This interim agreement was made on the basis that it was to be without prejudice to the right of either party to take legal steps during the off-season to enforce his understanding of the written "contract". Kobe does not trust Richie and suspects that he too originally understood that Kobe was to be paid in USA dollars but, depending on what the latter's agent has to say, this may be difficult to prove.

Questions

Discuss the following questions. You should assume that the initial transaction was entered into in New Zealand and is therefore governed by New Zealand law, and that in these circumstances the ordinary or plain meaning of terms providing for payments of sums of money in dollars is "New Zealand dollars".

(a) If Richie seeks to enforce a contract against Kobe according to his (Richie's) alleged understanding and Kobe is content to argue that no binding contract was formed at common law, what are the alternative bases on which the latter argument could be successful?

(b) In the event that Kobe seeks to enforce a contract according to his understanding of the written agreement, what are the alternative bases on which this argument could be successful?

Answers to Question 1

Smith v Hughes objective principle.

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would behave that he was assenting to the terms proposes by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Essentially, 2 limbs:

- When a party is trying to enforce a K, did they *actually* believe that those were the terms?
- AND would a reasonable man find the same thing?

Question One – Kobe Joining the *Devils* ANBL.

(a) R seeks to enforce C against Kobe, according to R's understanding, and Kobe is content to argue that no binding K was formed at common law, what are the alternative bases on which the latter argument could be successful?

- R knew that K was not assenting, there can be no meeting of the minds
- R should have reasonably known that Kobe was not assenting to the terms
    - Objectively, there could not be Agreement – no reasonable person would think that Kobe was actually agreeing to the K being enforced
- If both R and Kobe thought that their understandings were reasonable, then you find no K – no meeting of the minds.

(b) Kobe seeks to enforce K, according to written understanding of the written argument, what are alternative bases that this argument can be successful on?

- R intended to pay in USD
    - Needs evidence?
- If Kobe was lead reasonably to believe that the payment was to be made in USD, he will be able to enforce a K.

Question 2:

The following conversation takes place on 12 April:

> Borrower: Could you lend me $1,000 for a year from 1st May?
> Lender: I can let you have $1,000 on 1st May, but I'd need it back by 31st March next year. It's absolutely essential I have it back by then so I want you to promise me faithfully that, come what may, you will repay the money sometime next March.
> Borrower: Fair enough. I promise you'll have the money back before the end of March.
> Lender: Come round on 1st May and I'll have the $1,000 ready for you.

(a) On 28 April, Lender changes her mind and tells Borrower that she is no longer prepared to make the loan. What is the legal position?
(b) Suppose that Lender has in fact lent the money and that Borrower is now refusing to repay. What is the legal position?

Answer to Question 2:

(a) Lender changes Mind?
   a. Promise to repay a loan is not good consideration – by definition, a loan means you need to repay it.
      i. Borrow $1000, repay $1000 = not enforceable
      ii. Borrow $1000, repay $1001 = enforceable
   b. If the promisor promises to repay the loan with interest, or with a greater total sum, the promise would be enforceable – doing more than explicitly bound.
      i. Implied – historical relationship, or bank/ finance company.
      ii. Provision of collateral? Seems like valid consideration – unclear…
   c. Borrower could enforce as a *deed* provided the deed is consistent with Property Law Act 2007 requirements.

(b) Borrower refuses to repay
   a. Arbitrary rule is that Lender can enforce original promise to pay
   b. Consideration? Through not having that "thing" whilst borrower has it?

Question 3:

On 1 April Vendor offers to sell her car to Purchaser for $4,000. Purchaser asks for two days within which to make up his mind. Vendor agrees to keep her offer open for two days, provided that Purchaser pays a deposit of $50. Purchaser pays the $50 on condition that Vendor will refund it in the event of Purchaser deciding not to go ahead. On 2 April, Third Party offers vendor $4,500 for the car. Immediately, Vendor gives Purchaser back his $50. She tells Purchaser that her original offer to sell the car for $4,000 has been withdrawn but Purchaser can buy it for $4,500 if he wishes.

Does Purchaser have a legal right to buy the car for $4,000?

Answer to Question 3:

Objective principle

- Concerns agreement/ concensus between parties
- Actual subjective / objective consensus
- Intention as overarching consideration
    - 1. Actual mutual intention / agreement of the parties
    - 2. Objective intention/ agreement? *Smith v Hughes*
        - did the party seeking to enforce their understanding of the K actually and reasonably believe that the other party was assenting to be bound by their understanding
        - If SO the parties will be bound.
    - "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him [SUBJECTIVE ELEMENT WITHIN OBJECTIVE TEST], the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."
    - Apply the same principle when Acceptance occurs.

Question 3

- Promise to keep the offer open for 2 days
- Did purchaser provide consideration for this promise?
    - Purchaser has paid $50
        - The deposit is refundable
    - (a) purchaser is deprived of the use of money
    - (b) vendor has the benefit of the use of an extra $50

Part Payment Questions

Question 4

Discuss Law Clerk's reply to the following memorandum from Solicitor.

Memorandum to: Law Clerk From: Solicitor The following is a note of my telephone conversation yesterday with Henry:

"Henry rang 19 May — $4,000 owed to him by Ed — painted Ed's house last September for contract price of $4,000 all in — sent monthly accounts but got no response

— Early May Henry called on Ed — told him he had to have the money by end of month to avoid bankruptcy proceedings being brought against him by his own creditors — Ed said, 'I'm a bit pressed myself at the moment but I'll see you right within fortnight' — nothing heard till yesterday

— Ed's partner came to Henry's workshop — she offered cheque for $2,500 — said painting not finished in a tradesman like manner — Henry says work was first class — She said leave it to the court to decide 'in due course' — He said give me the $2,500 now and we'll argue about the $1,500 later — She wouldn't agree, wanted to get things cleared up once and for all — said $2,500 now in full settlement or get nothing at all till after court case — according to her, Ed was also in financial difficulties, he might go under himself before case heard — she said her offer was in the best interests of all concerned — Eventually Henry agreed

— She gave him cheque for $2,500 — Insisted on 'official' receipt saying 'in completion of account'

— Henry has witness who overheard conversation — Witness is his secretary who in the office out the back doing his accounts etc.

— Ed's partner didn't know secretary was there until conversation was over and Henry asked her to write out receipt.

Can he sue for balance of $1,500? Does it matter if he banks cheque?"

Henry is coming to see me next Monday.

Please let me know the legal position.

You may find that further information is needed on some points. If so, please ***identify what that information is and why it is important.***

Answer to Question 4:

- Issues in Part-Payment of Debt scenarios
    - 1. Accord
        - on the facts, pretty high degree of agreement
        - D has the right to take someone else to court – even if the other party is running close to bankruptcy and this will string it out long enough to bankrupt P
    - 2. Satisfaction

- Rule in *Foakes v Beer*
    - Part-payment/ payment of a lesser amount of a greater sum cannot be satisfaction.
    - In this case, $2500-part-payment of debt for $4000
- Limitations to this rule
    - (1) Liquidated Debt
        - Fixed sum – legally measurable.
    - (2) Undisputed debt
        - if a debt is genuinely disputed *F v B* does not apply
        - *Dalgetty*; genuine and honest belief that there is a dispute about the debt.
        - General situation – one party claims that the contract has not been duly performed.
        - "Although we would need more facts, there is a degree to which it seems there is no true dispute because D waited 8-9months…"
- Exceptions
    - (1) Introduction of a new element
        - (i) payment earlier
        - (ii) payment in a different form
        - (iii) Payment by cheque/ negotiable instruments
            - i.e. in this case would raise it and acknowledge it; i.e. "there has been payment by cheque in this instance, but this is no longer considered to be a new element."
    - (2) Composition with multiple creditors
    - (3) s92 Judicature Act 1908
        - (a) acknowledgement in writing of a receipt in Part Payment
        - (b) written by a creditor
        - (c) or someone authorised by the creditor
    - (4) Payment by a 3rd party
        - First of all, we don't have enough on the facts – we know that there was physical payment by a 3rd party, but this is not enough to establish this.
        - Were she paying out of her own account etc, this would be a more complex facts point – were they sharing an account it might be more difficult.
        - *Hirachund Punamchand v Temple* (1911) CA.
        - *D&C Builders Ltd v Rees* (1884)
    - (5) Promissory Estoppel
        - *D & C Builders v Rees* (2884)
            - Denning MR
                - Need action in reliance by the debtor, and it would be inequitable to allow the creditor to renege on their promise to accept less money.

- Dankwerts J; detrimental reliance to the person.

- *Homeguard*
  - Estoppel does not cover promissory estoppel
  - Believes that there is a temporal difference between part payment cases and classic cases – i.e. future liabilities (*High Trees*)
  - Unsure about the equitable estoppel principle – not yet sanctioned by the HOL – overturning *F v B*.
- *Collier v Wright*
  - Promissory Estoppel can apply in PP cases.
- NB: Keep in mind DMAC's views.

Application

Question 5:

Background Facts:

Sarah, a wealthy business woman, owns a block of flats in Thorndon. She lets the flats to university students during the academic year and to visitors to Wellington over the summer. 2016 has been a very difficult year for Sarah. Several of her tenants are always behind with their rent. Most eventually pay, but there are two law students, Alice and Amelia, who have been particularly difficult. In February Alice and Amelia signed an agreement to lease one of Sarah's flats for a term of nine months at a rental of $400 per week.

Questions:

(a) By early May Alice and Amelia are five weeks behind with their rent. When Sarah visits the flat and demands payment, the following conversation takes place.

Alice: "We're terribly sorry, but we're almost broke ... we only have a few hundred bucks between us till we get paid."

Amelia: "Yes, nearly all our money's gone on fees and textbooks."

Sarah: "I understand your plight but I'm afraid I'm going to have to turf you out."

Amelia: "Please Sarah, don't do that! I'll have to give up my law studies and go back to Wanganui. What kind of life is that!"

Alice: "Listen, I have a proposal. To enable us to make a fresh start will you agree to accept $1,000 in full settlement of the amount we owe?"

Sarah: "Don't be ridiculous. I'm not a student charity! I'm prepared to compromise at $1,800, but no less."

Amelia: "C'mon. Don't be so tough! ... $1,200?"

Sarah: "$1,700."

Alice: "$1,300?"

Sarah: "I must be mad, but $1,500 is my final offer. Take it or leave it .... And next time, believe you me, there will be no mercy!"

Amelia: "Done!"

Alice: "Yes, you're on, but you'll have to wait until next week when Amelia gets paid and Daddy pays my allowance."

Sarah: "I'm used to waiting!"

Amelia, whose favourite subject is Contract asks for and receives from Sarah the following written acknowledgment of the agreement:

To Alice and Amelia
I promise to accept the sum of $1,500 in full and final settlement of $2,000 rental owing at 12 May provided it is paid within the next week.
Sarah 12/5/14

Early the following week, Alice and Amelia hand Sarah a cheque for $1,500. It is banked by Sarah and duly honoured.

(b) In September, when Alice and Amelia have fallen behind yet again and they owe $1,600 in rent, Alice's father writes to Sarah enclosing a cheque for $1,000 and saying "I trust this will clear outstanding rental of $1,600". Sarah banks the cheque and immediately thereafter telephones Alice's father saying that Alice and Amelia will be evicted unless all arrears of rent are paid forthwith.

Answers to Question 5:

Question 6:

Analyse the validity of the following statements

Part (a)

Analysis of the judgment in H B F Dalgety Ltd v Morton [1987] 1 NZLR 411 reveals that Hillyer J would have found in favour of Mr Morton and therefore disallowed the appeal if either

(i) Mr Morton had made it clear that the cheque was being delivered in full and final satisfaction of the debt or

(ii) (ii) Dalgety did not send their letter stating that they intended to claim the balance of the debt until two weeks after banking the cheque.

Answer to 6(a).

- (i) Even if M. Morton had made it clear that the cheque was being delivered in full and final satisfaction of the debt, Hillyer J did not make the analysis that he would have disallowed the appeal.
- The rule in *F v B* applied. Here, there was no true dispute regarding the debt – there was no justification for M. Morton acting badly. Thus there was no consideration – there could not be accord and satisfaction.
- Even if the cheque had been explicitly sent in full and final satisfaction rather than communicating 'this is all I think the job is worth' as an offer, Hillyer J found that there was no acceptance on the part of Dalgety.

- (ii) Hillyer J did not explicitly say this – instead focussed on the fact that the cheque is part of a factual nexus;
  - "provided the letter was referred to was written at the time the cheque was received and banked, and that it made clear that the receipt and banking was not an acceptance of the statement that it must be taken in full and final satisfaction, that letter would have prevented the appellant being bound to accept the smaller amount in lieu of the larger."
  - There is an implication that a reply should be rapid in order to prevent a conclusion being drawn.

Part (b)

.(b) In Magnum Photo Supplies Ltd v Viko NZ Ltd [1999] 1 NZLR 395 the Court of Appeal indicated, in principle correctly, that

delay by the creditor in notifying the debtor that it intended to pursue a claim for the balance of the debt

would not necessarily amount to deemed acceptance of an offer by the debtor of part payment in settlement of the whole debt.

Answer to 6(b)

- YES.
- Banking the cheque is not going to be conclusive. *Magnum* endorsed *Dalgety* and overturned *Homeguard*.

- In *Magnum Photo Supplies Ltd v Viko NZ Ltd*; essentially whether this has happened is factual! Gault J: "Just as on any question of whether a contract is concluded, it is necessary to consider all the circumstances… the issue therefore is whether, by its solicitors, Magnum acted in such a manner as to cause Viko to reasonably believe that its offer was accepted before it was made plain… that there was no intention to accept."
    - Needs to have a real and reasonable belief
- This is an objective test; "Agreement should only be found in the absence of express confirmation only when the circumstances show that as the proper inference", with a subjective element; did the offeror believe and reasonably believe that the offeree had accepted the part payment issue.
    - Imparts the *Smith v Hughes* principles.
- A natural corollary of this is that a delay cannot be conclusive. Ultimately it is a factual issue.

Privity of Contract Tutorial Questions

Question 7:

Facts

A owes C $2,000 in respect of loans made by C to A while they were at university together. Shortly before he leaves New Zealand to take up a tennis scholarship in America, A tells his mother, B, about the unpaid debt. B replies that she will pay the debt in four monthly instalments of $500. However, shortly after paying the first instalment, B changes her mind and refuses to make further payments to C.

Question

Can C enforce B's promise under the *Contracts (Privity) Act 1982*?

Answer to 7:

- C isn't privy to the K – whether or not this is enforceable.
    - (1) need a promise contained in deed or contract
        - defined widely; deed or in writing, or orally or partly in writing and partly orally, or implied by law.
    - (2) must confer or purport to confer a benefit on a person
        - benefit is widely defined; immunity, advantage, limitation or qualification of an obligation
    - (3) Designated
        - named and identified by description, or reference to a class of persons
            - I.e. children of X
            - "the employees of X"
    - (4) who is not party to the deed or contract (NB, implicit anyway – if you are party can probably enforce it through the regular avenues).
        - the third party beneficiary of the Contract
        - whether or not the person is in existence at the time when the deed/ K is made
    - (5) the promisor shall be under an obligation, enforceable (by the designated party) at the suit of that person to perform that promise.
    - (6) Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person
- Enforceable?
    - No, its not contained in a deed, and there is nothing to suggest that A provided consideration

Question 8:

Background Facts

For many years Ned Stark has run a dairy farm near the South Taranaki coast known as Winterfell due to its exposure to bitterly cold southerly winds. He also owns a large block of land closer to the coast inherited from his father that is rather hilly and considered to be suitable only for sheep farming. Nevertheless, his neighbour, Jaime Lanister, who runs a farm bordering that block, has often expressed an interest in buying it. Ned has long resisted these overtures out of respect for his father who despised the Lanisters and also because he had thoughts that one of his sons might eventually be interested in farming the land.

However, in 2012, during the midst of an international economic downturn that resulted in falling prices for dairy products, Ned decided that he could not afford to resist Jaime's requests any longer and accepted Jaime's offer to buy the land for $450,000.

However, he was successful in negotiating a term of the contract stating that if Jaime wished to resell the land within the next five years he must first offer it to Ned's son, Robb, at the same price of $450,000 plus

(a) an allowance of $10,000 for every year that Jaime held the land and
(b) the value of any improvements to the land carried out by him.

Questions

(a) Identify and briefly explain three ways that the transaction between Ned and Jaime might have been structured so as to ensure that Robb is entitled at common law (including equity) to enforce Jaime's promise to offer the land to him, or at least ensure that he has an arguable case for being so entitled.

(b) Suppose that in 2016 Robb learns that Jaime has entered into an agreement to sell the land to an oil exploration company for $2 million. It transpires that recent geological surveys show that the land is highly likely to contain valuable oil and gas deposits. Ned, who is suffering from ill health, refuses to become involved in a legal dispute with Jaime, but Robb institutes proceedings to obtain (i) an injunction preventing completion of the sale to the oil company and (ii) specific performance of the term in the 2012 sale agreement. Will he succeed?

(c) Would your answer to (b) be affected if, in 2015, Ned and Jaime had entered into an agreement whereby the latter's obligation to offer the land to Robb was released in return for a payment to Ned of $500,000? At that time the relationship between Ned and Robb had broken down after Robb decided that he preferred to live and work on the Sunshine Coast of Queensland rather than work the family farm in the bleak conditions at Winterfell.

(d) Would your answer to (c) be affected if the term of the 2012 contract obliging Jaime to offer the land to Robb also stated that "this term shall not be varied or discharged without the written consent of the said Robb Stark"?

Answer to Question 8:

- (a) 3 ways to ensure Robb is entitled Common law (including equity) to enforce Jaime's promise to offer land/ has an arguable case
    - Assignment
        - Relevant promise to be made to *Ned* instead – as party to K he receives that right. Ned assigns that contractual right to Robb.
    - Trust
        - Structure the Agreement so that Ned Holds the right on trust for Rob
        - Jaime Promises the buy back the property for X price, to Ned as trustee for Robb the beneficiary.
            - Trustee – Ned; of the Trust Property for Robb the Beneficiary. Jaime
    - Deed
        - Agreement enforceable without consideration
        - Will not matter that Robb did not provide consideration.
    - Nominal Consideration
        - Robb furnishes some nominal consideration to bind him to it.
        - Provided sufficiency of consideration, he will be privy to the contract and will be able to enforce it.
    - Joint Promisee Principle – *Coulls*.
        - NOT the law in New Zealand – authority is HCA
        - Consideration can be given by one promisee on behalf of both.
        - 2. Conceptual Objections
            - (1) Provision of Consideration makes you party to the contract
            - (2) Confuses consideration as a requirement for formation of K, and performance of the K.

- (b) suppose in 2016 that Jaime has entered into an agreement to sell the land to a Co. for $2 000 000 → Ned will not get involved, can Robb obtain (i) and Injunction, (ii) specific performance?
    - Robb has an enforceable right as a 3rd Party Beneficiary.
    - Regarding s8 – injunction / specific performance; if s4 can be satisfied, then those remedies can be actualized by Robb.

- (c) Would your answer to (b) be affected if, in 2015, Ned and Jaime had entered into an agreement whereby the latter's obligation to offer the land to Robb was released in return for a payment to Ned of $500,000? At that time the relationship between Ned and Robb had broken down after Robb decided that he preferred to live and work on the Sunshine Coast of Queensland rather than work the family farm in the bleak conditions at Winterfell.
    - Looks like variation of original K! Valid in the sense that N waives right to first purchase for Son (Rob) in return for $500 000.
    - Looks like the parties should have the right to vary – under freedom of Contract; Rob is not going to have his buy-back right. Privity might get involved.
    - At (a) essentially established that s4 applies.
    - Section 5(1)(a);
        - where position of the beneficiary has been *materially altered by the reliance of that beneficiary or any other person on the promise* (whether or not that beneficiary or that other person has knowledge of the precise terms of the promise); the promise and the obligation imposed by that section may not be varied or discharged without that beneficiary's consent.
        - Has there been material variation? No

        - Seems there has been a valid variation.
    - Because the TPB can no longer enforce that the promise, the position is *different* to question b.

- (d) Would your answer to (c) be affected if the term of the 2012 contract obliging Jaime to offer the land to Robb also stated that "this term shall not be varied or discharged without the written consent of the said Robb Stark"?
    - Should come under s6(a) – rather than s6(b);
        - But here because s5 does not apply, because s6 and s7 are qualifications, will not apply.
    - BUT Ned and Jaime can essentially unmake the K at their desire.

Question 9:

Question *Take the following situation and discuss the main points that can be made in response.*

Bargain for TPB – who has not altered position in reliance on that promise.

Promisee has change of heart; no longer wants promisor to be bound in favour of TPB; promisee wishes to vary the K, promisor is agreeable; "*in these circumstances, no-one could reasonably argue that the contract should not be able to be varied without the consent of the beneficiary. Furthermore, to my knowledge no statutory reform of the doctrine of Privity in other jurisdictions prevents the party from varying the contract if the beneficiary has not materially altered her position in reliance on the promise*."

In terms of s6, the parties to the K cannot vary unless there is an express provision to provide for this.

- Parties can make an application under s7(1)(a) to vary the K, but only if the reason for their not otherwise being able to vary it is that the variation is precluded by s5(1)(a) *or it is uncertain whether the variation is precluded*

Thus an application can be made where the parties would otherwise have been entitled to vary the K pursuant to s6 but are not so entitled in the circumstances because the beneficiary has materially altered her position in reliance on the promise. The provisions of s7(1)(a) are therefore of no use in the example raised.

No doubt it could be argued that the parties have only themselves to blame

- It would have been prudent to insert an express provision in the K to deal with the question of variation or discharge
- However not all K are drafted by solicitors – and even if it were, the parties might have had reasons for not advising the TPB of the promise or any provision that might allow them to vary.

"This position is anomalous and deserves urgent attention by the Commission. It derives from the fact that the law reform committee responsible for the Contracts (Privity) Act decided to give precedence to the expectations of the beneficiary rather than the intentions of the parties

Answer to Question 9

When assessing Privity questions

1. Is there a contract?
    a. Doctrine of Freedom of Contract – parties have freedom to make, unmake and vary at will
2. Is there a TPB
    a. Where A and B make K
    b. C is TPB – who cannot do things themselves!
3. Can C satisfy s4 requirements
    a. Need to satisfy all of them
4. Is there a variation etc.
    a. Basic principle is Freedom of Contract. Privity Act
5. Need to go to s5(1)(a)
    a. Where material alteration on C's reliance of that benefit
    b. Or where someone else!
    c. BUT EXCEPTIONS
        i. S6(b) – essentially even if C has varied position, A and B can vary K circumstantially.
        ii. S7 power for parties to have Court intervene – court will decide whether or not to vary etc.

Answer:

- Misinterprets that starting point is s6; this is totally incorrect – instead we start at freedom of contract; s4 may be a limitation of this doctrine and s5 is a further limitation on s4.
- If there has been no material variation, then we don't even need to look at s6 – freedom of contract; can vary regardless.

- Section 7; why does it make sense to limit this section to the following:
    - (1)(a); where it is precluded by s5(1)(a)
    - (1)(b); where it is uncertain whether s5(1)(a)

- "furthermore to my knowledge no statutory no statutory reform of the doctrine of Privity… prevents the parties from varying the K if TPB has not materially altered her position in reliance of the promise"
    - in UK under Contracts (Rights of Third Parties) Act 1999
        - section 2(1)(b) "relied" rather than materially altered – an easier standard.
        - Section 2(1)(a) communication of assent from TPB will also preclude rescinding or reliance of the K;
            - In practise this is a method for TPB to enforce K
    - Under s2(3); similar to s6(b) – a lot simpler; this is ultimately a "contract out" provision; in practise it is easier to invoke that qualification.
- So holistically easier for TPB to enforce, and easier for Promisor and Promisee to assess the

Contract – Remedies, Breach and Misrepresentations

Remedies – in General

Equity vs. Common Law

In NZ the HC has always possessed both EQ and CL remedies – in UK only since Judicature Acts of 1973, 1975 have the HC had the same powers.

Note that initially specific performance was only granted where damages where considered *inadequate*; CL courts would not order K to be specifically performed due to CL judgement's being enforced on distraint of D's goods – always created monetary sum.

Introduction

Both *Misrepresentation* (BFT c11) and *failure to perform – "breach" of contract* (BFT c 18) may entitle one party to withhold performance or cancel the contract. This is simultaneously a *right* and also an effective remedy – in the sense it prevents a loss.

Common Law

- "Enforce K" – only where D is obligated to pay a fixed sum
    - **Right to "Enforce a K";** description of innocent party right following BK – in reality in NZ no right to enforce in the sense of compelling execution; needs a structured remedy.
- Damages to compensate for BK

Equity

- **Specific Performance**; typically given in Contract for the sale of land where the ***vendor*** repudiates.
    - In the same context, might go for damages between initial Cost of House, and *higher* cost of an alternative but equivalent house.
    - Essentially this reflects that *historically* land was viewed as unique – consider the disparity between this view and today, where it was commoditized.
- **Injunction**; another form of specific action – usually related to **negative covenants**
    - Example: **Lessee** and **Lessor** of stadium; contractual limitations on number of contracts that are held. Lessee decides to breach (NB this could be a commercial decision, or a mistake). Lessor could theoretically extort the lessee in order to gain some of the profits…
- **Cancellation**; where one party commits a serious breach/ breach of a concrete term. Under common law and Contractual Remedies Act, the other party can relieve themselves of the obligation to perform
    - Usually combined with an action for damages – acts as a prelude. One party repudiates, the other *cancels* then seeks damages.
- (Exceptionally) **account of Profits** even where there is no loss to Plaintiff.

Damages

Introduction - *Whether P can recover, raises two issues*

Subject to remoteness, damages should "***restitutio in integrum***". Another principle is the *Robinson v Harman* principle – that P can seek to recover *expectation interests*. It's difficult to see how any other damages would work.

- **Principle**: "*where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed*."
- When a BK; compensatory damages must automatically provide a monetary substitute to place the P in the previously occupied state.

- Implementation of damages can provoke judicial difficulty:
  - ***Fulton Shipping v Globalia Business Travel (The New Flamenco)* [2016]** is an example; charterers repudiate K with 2 years remaining; owners faced with this, accepted the repudiation (cancelled the K): couldn't get an exact substitute to the 2 year charter – "no available market". Decide to sell the ship. Get some US $24m. Still attempt to sue charterers for damages; claim 7.5mEuros. Charterers argued that the *value of the ship when the charter was due to end would have been only US $7m*; essentially, the company profited enormously and to provide damages and would put them in an even better position.
  - Arbitrator said that sale should be taken into account – no restitution – so owner appeals; Poppelwell J. Poppelwell J – makes the call that the two instances were separate; appealed by Charterer's – CA upheld arbitrator.
  - DMAC has written a paper about it – thinks that UKSC might allow appeal.

Quantification or ***measure of damage*** in monetary terms. Essential principle of ***"restitutio in integrum"*** – that as far as money can do it P must be restored to their *status quo ante* position (initial case was *Robinson v Harman* [1948] Exch 850) had the BK not occurred;

- Loss to Plaintiff
  - *Fuller and Purdue* (1936) *Classifications – essentially defunct but still used!*
    - ***Restitution interest*** – namely the right to restoration of a valuable benefit conferred on the other party; *prevents unjust enrichment*.
    - ***Reliance Interest*** – namely the right to compensation for ***loss due to steps taken by the innocent party in reliance upon the existence of the contract***, the object being to *restore the innocent party to the position he or she would have occupied* ***had the contract not been made***; and/ or
      - *"interest of the plaintiff in being reimbursed for the wasted expenditure incurred in reliance on the D's promise."*
      - No different principle applies where P seeks to recover for wasted expenditure rather than lost profit.
        - Reliance damages; expenditure in reliance of D – in the **<u>usual case</u>**, P's will argue that they were *induced* by the outcome of D's negligence, and should consequently pay damages for expenditure consequently incurred (in ***Watts*** it would be distinction between promise and actual value – 15 000pounds).

- However, the award – NB referenced in *Omak* – this is consistent with *Robinson* principle – strictly un-necessary to attach the label.
- Example: professional negligence situation fits in this.
- There is no actual reliance interest; this term is a synonym for "damages for wasted expenditure" (*Amann*).

- ***Expectation interest*** – ***namely the right to compensation for the loss of the bargain***, the object being to financially *restore the innocent party to the position which he or she would have occupied* ***had the contract been performed***.
- ***Restitution Interest***; *the plaintiffs interest in having restored to them any benefits conferred upon D pursuant to the K.*

- Rules regarding application
  - In principle, P should have free choice as to basis for quantifying loss suffered – this is law in England, apparently not in Australia.
  - **There is no objection to combining these interests subject to overriding rule that P cannot recover more than once for the same loss; *Depending on the facts all 4 interests may need to be recognized to restore P to pre-K Position***.
    - Example P cannot claim ***reliance*** and ***expectation*** where necessary to expend reliance on a K in order to earn profit – common – because then P would be *overcompensated*
    - Example P cannot claim *reliance* and *expectation* where reliance is expenditure to purchase a business and expectation is profits lost after lawfully cancelling the sale of a business.

- Separate "consequential loss"; where BK causes loss of property, or injury is caused – either physical or psychiatric. These are always recoverable subject to *remoteness*.

- Need to determine the precise loss – otherwise cannot restore.
  - Distinction between an **absolute contractual undertaking/ warranty** (*promise of a specific result*) and on the other a **promise to take reasonable care**.
  - i.e. **reasonable care**; think about the "promise" made by *service people* – who are implicitly under a K to take reasonable care.
  - The most prominent rules around these are from cases concerning Lawyers, Building Inspectors, and accountants

- *Ford v White & Co* (1964)
  - **Facts**: P bought land upon negligent advice from solicitors that the land was not subject to building restrictions. Sought difference between (i) the value of the land *without* the restrictions and (ii) the value of the land *as is*.
  - **Held**: Court denied the claim – the **measure is between the price paid and the actual value** – on the facts this was nominal! P had made a good bargain despite not getting what they initially expected.
  - **Explanation**: the **duty of Solicitors was to exercise *reasonable care*. P was only entitled to be restored to the position if reasonable care was taken. Here P wasn't *harmed* as a result of the want of reasonable care**.

        - Court said the claim could only be sustained ***if there had been a warranty***; if the Solicitors were in effect promising that the land didn't have a building restriction.
        - Tantamount to making D liable for warranting their view was correct.
        - If they had so warranted, then P would be entitled to a restriction free price of land – would find the difference sought above.
    - **Example to illustrate**: A sees picture for 100pounds. Consults expert. Expert states it is by an old master (negligent). A buys the picture but cannot find a subsequent purchaser who will pay more than 5pounds.
        - **Thus** is the measure of damages 95pounds of 49 995pounds?
        - The former; absence of a promise. Were there an ***absolute*** promise, would be the latter.

- Sometimes it will be too complicated to calculate damages from loss of bargain – the K might have been too complicated or speculative. In such situations, the best that can be recovered is expenditure incurred in reliance on or preparation for the K; expenditure that is wasted.
    - *McRae v Commonwealth Disposals Commission* (1951) HCA.

Remoteness of damage – whether the damage is something D should be liable for; the law draws a line that certain types of damage, albeit attributable to D, will not be compensated for – defines what is appropriate damage for recovery. Initial distinction was drawn in *Hadley v Baxendale* (1854).

- *Hadley v Baxendale* (1854)
    - **Facts**: Hadley owned a flour mill – crankshaft breaks. Takes the crank to a carrier, who delayed in transporting it to the manufacturer. As a result, there was a greater delay in the mill's operating – and as a further result a greater loss of profits.
    - **Held**: too remote. Carriers were unaware of this etc. Courts were never going to enforce the damages.
- **Traditional Rule**: if the loss was within the reasonable contemplation of D – the *kind of loss* – thought of as a likely or unlikely outcome of a breach. However, recent HL decision;
- *The Achilleas* (2009) 1 AC 61:
    - Under this a loss may be considered too remote even if it was of the kind considered by the parties. Stressed that the "reasonable contemplation" test will **usually** be satisfied but not always. ***D will not be liable if they haven't assumed or taken responsibility for the loss***.
    - This position was probably the traditional view; however in DMAC's view was buried below turgid judicial thinking. Example: No Court would hold a taxi-cab driver liable for damages after an unreasonable delay in transporting a passenger to a valuable meeting and caused the passenger an enormous commercial loss. Even though it was the *kind of loss* that could be contemplated, court would not order liability.

***Mitigation of Damage*;** general rule is that the P must take reasonable steps to diminish the loss. If they do so, then they can only recover the (*difference between the mitigated loss and the full loss*)

- Example: P is buying 1m shares at $1 000 000; market goes up – value increases to $1 200 000. Seller repudiates to avoid loss of $200 000. P waits 2 weeks – value increases to $1 500 000 – then sues! Court would find that full claim could not succeed as buyer is expected to take reasonable steps to mitigate the loss as soon as practically possible after the breach. Court would not allow full $500 000 – would only allow $200 000 as damages. Even if the shares had fallen back.
- **Damages will *crystallise* at the point that reasonable steps were taken to mitigate the loss.**

Watts v Morrow (1991) CA.

Facts: P's bought a house for 15 000 pounds more than its value – did so on the basis of a negligent building surveyor. Sought (amongst other things) the *cost of rectifying the defects that went undisclosed*.

Held; the proper measure of damages was not the cost of repairs, but the amount by which the *actual value of the house was lesser than the price*. **Price paid – Value**. Court said that the award of the cost of repairs would essentially give P's damages for breach of a warranty.

Reliance: If D's did job with due care P's wouldn't have purchased the house. Reliance damages; expenditure in reliance of D – in the usual case, P's will argue that they were *induced* by the outcome of D's negligence, and should consequently pay damages for expenditure consequently incurred (in *Watts* it would be distinction between promise and actual value – 15 000pounds). However, the award – NB referenced in *Omak* – this is consistent with *Robinson* principle – strictly un-necessary to attach the label. Because P's wouldn't have bought the house, *prima facie* the only damages available were those for wasted expenditure.

Usually the position will be that the P's wouldn't have entered the K. If P can show with evidence that they would have entered a *different* K with more favourable terms, then they argue for *loss of chance* – essentially, the distinction between the *price paid* and the *price they would have paid*.

- Such compensation might appear to be compensation for the deprivation of a full loss of bargain – "expectory" damages.
- In *Watts* if there was clear evidence that the P's would have got the house for 25 000 less than the price paid because of the valuation, they would have got that rather than price paid minus value (which conceivably could be nothing – could have paid less than market value despite the defects).
    - Compare this to a situation where D warrants that their advice is correct…

Example – based on *Watts*

Price paid; 500 000
Representative value; 535 000 (value if the representation had been true!)
Actual Value; 485 000
Price Would have been Paid (without promise); 475 000 – ***NB: would need facts to support.***

Hypothetical 1: P is able to establish there was a warranty to support the claim by the D; to put P in the position they would be in if the promise was true? Position they would have been in would be RV. Compare to what they *actually* have – AV; **therefore, damages should be 50 000**.

- NB: what about mitigation? If P had tried to rectify the problems? But repairs cost 60 000?

Hypothetical 2: No contractors warranty – simply the normal presumption of reasonable use of care. In this case, would be the **PP-AV; 15 000** – this is the actual award from *Watts*. Putting them in the position if the K had been performed would be averse to the presumption that they wouldn't have purchased.

Hypothetical 3: P's are able to establish they could have achieved the lower price (475 000); difference between PP - PWP; 25 000 would be the damages. Notice that proving loss of opportunity is still half of loss from damages.

Price paid; 500 000
Representative value; 535 000 (value if the representation had been true!)
Actual Value; 505 000
Price Would have been Paid (without promise); 475 000 – ***NB: would need facts to support.***

Hypothetical 4: P is able to establish there was a warranty to support the claim by the D; to put P in the position they would be in if the promise was true? RV – AV; 535 000 – 505 000 = 30 000pounds.

- Note; can claim *diminution in value* and *cost of repairs* as alternatives.

Hypothetical 5: No contractors warranty – simply the normal presumption of reasonable use of care. In this case, would be the **PP-AV;** 500 0000 – 505 000 = -5000. No damages following *Ford v White & CO;* **Explanation**: the duty of was to exercise *reasonable care*. P was only entitled to be restored to the position if reasonable care was taken.

- **Possible nominal damages** as punishment for the breach of duty to take care
- **Because AV exceeds PP** they haven't been harmed. as a result of the want of reasonable care.

Hypothetical 6: P's are able to establish they could have achieved the lower price (475 000); difference between PP - PWP; 500 000 – 475 000 results in **25 000 damages**. *But* this is increasingly improbable – not impossible but would be an extraordinarily good bargain.

- **Damages for the lost opportunity to get a better bargain**
- We can say that on the surface although the purchaser looked better off – that realistically he is also worse off in the sense he missed out on a better bargain; it ignores the "opportunity" cost

Warranty claim seeks restoration to the position if the claim was *true* where the BK claim seeks restoration to position.

Damages Calculation

<u>Long way;</u> <u>calculate **Promised Position – Actual Position; PP – AP**</u>
PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
AP = *sum of costs incurred + any additional breach related costs*

<u>Short ways; $B = $X + $Y +/- $ Z</u>
B = total benefits of the K for P
X = Prior expenditure to repudiation/ issue point.
Y = Future expenditure to achieve the K
Z = the amount of expected **profit** (**if +**) or **loss** (**if -**)

Method 1: B – Y

Method 2: X +/- Z
Z = (B – X – Y)

Either Method;
Deduct off-setting gains (Mitigation)
Deduct value of any part performance by the Defendant
Addition of costs caused by BK – legal costs etc.

McRae v Commonwealth Disposals Commission (1951) HCA.

Facts: McRae bought a wrecked oil tanker (CDC were involved in selling salvage etc. post WW2) for 285pounds. CDC had taken the position the tanker was lying on a named reef, and that it actually *had* oil left in it. Spent some 3000pounds trying to reach and salvage it. Neither the reef nor the tanker existed!

Issue: McRae couldn't calculate the *actual* value to him – too speculative. Impossible to prove loss of profits, so the plaintiff was restricted to recovering the expenditure wasted.

- He had suggested 300 000 pounds… was restricted to 3285 pounds!

Often cited as a case in favor of *reliance* damages: thought to be an example of the plaintiff being restored to his pre-K position. Instead, it can be accounted for as BK damages.

Principles:

- Where the benefit of the bargain is too speculative/ uncertain, you can claim damages for wasted expenditure.
- In calculating that, a number of other principles are recognized:
    - Expenditure must be that within the reasonable contemplation of the parties as likely to be wasted in the course of the defendant's breach.
- Although in a case like this, restitution will often have the effect of restoring the Plaintiff to his pre-K position, this is a *coincidence not the object of the award!*.
- Essentially there is no alternative measure
    - Damages for lost profits vs damages for wasted expenditure are simply two manifestations of the *Robinson* principle.
    - Justified on the basis that the law *assumes* that P would have *at least* recouped their lost expenditure.
    - That expenditure costs and potential profits are the closest approximation.
- Where, it can be proved that the plaintiffs made a *bad bargain* – that they would have made a net loss, they can only recover to the extent that the expenditure exceeds the loss. If there is no such loss, then only receive nominal damages.
    - The onus of proving that plaintiff's made a *bad bargain* lies on the defendant (either at all, or in part at least not recovered) – critical in the *Amann* case.
        - Majority favor this point; supported by the English Cases.
        - Some have argued it's not a strict onus, rather an evidential onus.
- An award for wasted expenditure, may include wasted expenditure *prior to the K – i.e. the Anticipation of the K* subject to the proviso that such expenditure would have been likely to have been incurred and wasted as a result of the breach.
    - Look at *Anglia Television Ltd*.

Anglia Television Ltd v Reed (1972) QB.

- **Facts**: P's made arrangements in advance of K; much expense. All of which was done before getting a leading man – Actor in TV play.. Found him; Mr Robert Reed (Brady Bunch). Agreed by Mr Reed via agent he would come to UK and do the shoot – availability for a month. Pulls out at the last moment (muddled bookings) and Anglia claimed for wasted expenditure after repudiation – couldn't find a replacement.
- **Claimed damages for wasted expenditure** – 2700pounds some 1900pounds of which was incurred prior to engaging the defendant.

- **Didn't claim lost profits**; perhaps too speculative/ uncertain.
    - Plaintiff may have too readily conceded that they couldn't substantiate a claim for lost profits – difficult to quantify lost profits from a play never produced. However well settled that, difficulty in calculating damages is not in itself a "bar" to claiming lost profits – the court ought to do the best it can(*Amann*). Previous *comparable* TV plays could probably have been used to *infer* profit in this instance.
- Whether the court would have *allowed* damages for lost profits when they would have been totally out of proportion to the gain that D stood to make is another question
    - "*court would lay at the door of the defendant*"
    - Can argue that the difficulty in calculating damages re. lost profits, and subsequent refusal masks a policy decision that Defendants ought not be saddled with massive costs ought of proportion with D's prospective gain.
- If the Plaintiffs *had* pursued lost profits, the court might have more closely scrutinized
    - Ps contention they were incapable of finding a replacement actor
    - Whether within reasonable contemplation of D that P would have to abandon the entire production upon repudiation…

- **CA** was happy to award damages for prior incurred expenses.
- **Judgment (Lord Denning): (page 5 B Onward);** "*If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also the expenditure incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken. Applying that principle here, it is plain that, when Mr. Reed entered into this contract, he must have known perfectly well that much expenditure had already been incurred on director's fees and the like. He must have contemplated – or, at any rate it is reasonably to be imputed to him – that if he broke his contract, all that expenditure would be wasted, whether or not it was incurred before or after the contract. He must pay damages for all the expenditure so wasted and thrown away.*"

- **Criticism from Academics:** awarding damages for prior expenditure is not consistent with either reliance or expectation interests; doesn't put the P in the position they would have been if the K had been made because obviously the expenses were already incurred –
    - (i) would have spent it in order to achieve profit,
    - (ii) not incurred in *reliance* on D, incurred in *hope* that D would contract!
    - Thus it is argued that there is no connection between either
        - (i) the formation of the contract or
        - (ii) its breach.
- DMAC thinks this criticism is incorrect.

- Employs the jargon of reliance and expectation damages rather than addressing it from first principles of damages law; where the real issue is quite straightforward – whether a plaintiff is entitled to recover for losses caused from the breach that are not too remote (at the time of the contract).
  - **Lord Denning**: D knew that pre-K expenditure would be wasted.
- Even if the loss is reasonably foreseeable (not too remote), it wasn't caused by the breach.
- Boils down to causation issue.
  - P's take a risk of expenditure occurred in expectation – especially if the expenditure cannot be recouped if the K doesn't materialize! It is *essentially* an investment.
    - They expect that
      - (i) K will be formed,
      - (ii) K will be performed,
      - (iii) that expenditure will be recouped.
  - Certainly not simply throwing money away… it is only *potential loss* in other words the P might be able to reimburse themselves. The risk was then removed once Mr Reed signed the K, and P's would have recouped.
    - The loss only arises once
      - (i) K is formed,
      - (ii) the K isn't duly performed…

- In essence, we are trying to say that in this case (and in others like it), the expenditure wasn't caused by the formation of K or its breach, that ***this is beside the point: the real question is whether the loss was caused by the breach***.
  - Clearly it was – the P's lost the ability to recoup expenditure *due to D's repudiation!* Especially considering this was within his reasonable contemplation there should be no issue on principle

CCC Films (London) Ltd v Impact Quadrant Films Ltd (1985) QB.

Case is best known for the authority that the onus is on the D to prove on the balance of probabilities that the wasted expenditure wouldn't have been recovered if the K HAD Been properly performed.

Facts: Ps purchased license to exploit and distribute 3 motion pictures; paid $12 000 USD. Recordings were delivered to the plaintiffs and the price was paid. HOWEVER, the tapes were immediately returned to D's who agreed to arrange insurance and deliver to another address. Ds breached K, tapes were lost. D's breached 2 subsequent agreements to deliver replacement tapes. P's claimed damages for BK.

- Damages; 12k expenditure. Claim upheld.
- Note; that this was essentially pre-K expenditure; initial expense of 12k was before the subsequent K to arrange insurance and deliver to munich.

Neither party had adduced evidence as to whether the expenditure would have been recovered let alone profits made!

Critical Issue: Who bore onus of proof? **Judge found (following Canadian and American Authorities) that it was fair to put the onus of proving the bargain was a losing one *on the defendant***. Included cases where:

- expenditure was in preparing to perform obligations (*The Mamola Challenger, Amann*), but also
- (ii) where Ds breach had *prevented* the Ps exploiting the right contracted for (*here*).

1. Foreseeable result of BK that expenditure incurred in acquiring license would be wasted.
2. This expenditure was in fact wasted – can't exploit films if you don't have them.
3. Furthermore, onus of proving that the Ps wouldn't have recouped expenditure was *on the Ds* and hadn' been discharged!

Outcome: Ps got judgment for 12k.

***The Mamola Challenger* (2011) QBD**. judgment by **Teare J**.
Omak Maritime v Mamola Challenger Shipping (2011) Bus LR 212

Facts: Omak agreed to charter Mamola's vessel for 5-years; never did. Instead *repudiation*; refusal to perform. Mamola *accepted* this and it allowed owners to charter elsewhere at higher rates

- **Repudiation described as "unusual" by Teare J**: usually one would expect the charterers to wish to retain the benefit of the charter-party (*as opposed to market falling and charterer's abort*) …

- **Daily rate under initial charterparty was US$13 700; market rate at point of termination was $21 347**. Essentially meant that **Mamola were able to earn more than $7.5k per day then otherwise would have earned**.

*Mamola still claimed **reliance** damages having **abandoned expectancy damages*** – wasted expenditure incurred in carrying out modifications to vessel required by the terms of the charter-party, no apparent residual value. *The gain resulting from the repudiation exceeded the amount wasted by the owners in fitting out the vessel for the initial charter*.

London Maritime Arbitrators Tribunal *upheld the claim*; awarded $86 534; notwithstanding owners' profit – expenditure would have been recouped after 12 days of hire…

- **Omak appealed**; grounds that no account was taken of the owner's *profit* and recovery of expenses – needed to do so when assessing damages.
- **Mamola cross appealed** – but *only on the basis that the first decision was correct – thus not addressed.*

Teare J *allows* the Appeal; ***owners had suffered no loss*** – confined to nominal damages

Scenario of this case is most relevant where P is claiming damages for BK for wasted expenditure (in reliance of K) where (i) prima facie the K was a losing one, or (ii) too difficult to determine the profits that were potentially going to be made. In The Mamola Challenger it was clear that the Owners were in a far better position than if the K was performed – the expenditure was recouped many times over.

Question really was whether *Robinson v Harman* applied!

Owners' arguments

- *Robinson* doesn't apply in a case where you are claiming wasted expenditure; that there are two different basis for damages.
    - (i) reliance interest; things you lost rather than were set to gain;
        - want to be put in the position they were in within
    - (ii) expectation interest; the money you were expecting to make had K been honoured.
- That because the owners would not have incurred this expenditure without the K, not only would they have been able to have (i) entered a more lucrative K, (ii) not spent some $86k outfitting the ship, (iii) not lost income while the boat was being outfitted.
    - This is totally untrue – essentially wants to be returned to pre K position.
    - Also thinks that there is a distinction between expectation and reliance damages.

Law

***Robinson v Harman* (1848)**; Parke B;

- **Facts**; P sought damages for BK to grant a lease; premises were worth more than agreed rent and P sought both expenses incurred and damages for his loss of bargain.
- **Principle**: "*where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed*."
- **Corollary**: "*an award of damages for breach of contract should not put the claimant in a better position than he would have been in had the contract been performed*."

***British Westinghouse* (1912)**; Viscount Heldane;

- **Facts**; Appellants supplied defective turbines to respondents; respondents then purchased superior turbines that mitigated or prevented the *initial* loss AND enabled them to save expenses later. Resulting **Issue**: whether that benefit should be brought into account when assessing damages.
- Adopted ***Robinson* principle** (above), **AND**; **Principle** there is a "duty of taking all reasonable steps to mitigate the loss consequent on the breach… [if this] action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act." This principle is pursuant to **principle one**.
    - HL held benefit represented by the expenses which would have been incurred had the turbines been better but which were saved by the better purchase should be brought into account when assessing damages.

***L Albert & Son v Armstrong Rubber Co* (1949) USA CA 2nd Circuit**; Chief Judge Learned Hand;

- **Facts**; purchaser sought damages for BK – for the cost of the foundation to put the machines on. Purchaser didn't prove earnings he was expecting, nor did D prove that P wouldn't have recovered this expenditure had K been performed; swung neither way.
- **Solution**; "On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed."
- **Consistent** with ***Robinson* principle.**

***Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) HCA**; Mason and Dawson CJJ;

- Onus of proving damages is on the plaintiff – amount awarded is objective not subjective.
- "the expressions 'expectation damages', 'damage for loss of profits', 'reliance damages' and 'damages for wasted expenditure' are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim."

Outcome

Teare J allows the Appeal; ***owners had suffered no loss*** – confined to nominal damages.

- **Tribunal Errors:**
    - Regarded (i) wasted expenses and (ii) claim for loss of profits, as independent claims which couldn't be mixed.
    - Actually, both claims are illustrations of *Robinson* Principle.

- **Solution**: In this instance reliance damages were contrary to ***Robinson v Harman*** in that they *put the owners in a* ***better position than they would have occupied had the Contract been performed****.* **This correct approach** requires *factual comparison* between
  (i) P's actual position after breach, and
  (ii) P's position if the contract had been performed
  AND
  (iii) Where steps have been taken to mitigate the loss following BK requires benefits obtained by mitigation to be set against the loss which otherwise would have been sustained.

  to ignore "offsetting gains" understates the actual position, and results in overcompensation.
  - This is due to Mitigation law – i.e. need to take reasonable steps.

Hypothetical: If Owner's *didn't* charter the boat out, and instead took the ship to the Mediterranean for a laugh, might be reasonable to …?

- ***No different principle to Robinson v Harman applies where P seeks to recover for wasted expenditure rather than lost profit***; endorsed [**at 34 and 53**] ***Commonwealth of Australia v Amann Aviation Pty Ltd* (1991)** view of damages for lost profits (***expectation***) and awards for wasted expenditure (***reliance***) as "*simply two manifestations of the general principle in Robinson v Harman*" [**at 86**] rather than discrete or alternative measures of damages that P may choose between [**at 82**].
  - Counsel for Owners thought terminology of 'election' highlights fundamental differences between the two claims.
    - **Doctrine of Election**; election is essentially that when faced with two different courses of action, must decide between the two. Where a party breaches, need to decide between the inconsistent rights of (i) accepting BK as repudiation or (ii) affirming the contract regardless.
    - Quite simply, have a ***right to choose***.
  - **Disagree with choosing interests;** "the language of election" and "the notion that *alternative* ways are open to a plaintiff in which to frame a claim for relief" are inappropriate.
- **Instead (as in HCA) <u>presumes</u> *recoupment* of "reliance interests" in expenditure reasonably incurred by P in performing or preparing to perform its obligations** – i.e. where it is too difficult to calculate profits**. Teare J thus concludes that *one overriding principle supplemented by a presumption of recoupment*.**
    - In substance this is the same as Treitel's crucial rule – delimiting the alternative of reliance recovery.

- **Re. Damages**; expectation and reliance losses are not separate; their award doesn't reflect distinct rights, only the actualisation of the principles from ***Robinson v Harman***; Contract Damages exist to replicate P's position had the contract been kept. Neither allow P to recover more than he had actually lost.

- Expectation and reliance are neither "fundamentally different" nor from different judicial basis' of claim; reliance is essentially a facet of expectation.
  - **Wasted Expenditure cases:** "… expectation loss analysis does provide a rational and sensible explanation for the award of damages in wasted expenditure cases. The expenditure which is sought to be recovered is incurred in expectation that the

contract will be performed. It therefore appears… rational to have regard to that position that the claimant would have been in had the contract been performed."
    - **Where Parties didn't enter K for profit (i.e. charity or for pleasure)**; "… the defendant will usually be unable to show that the expenses exceeded the benefit expected to be obtained from the contract and thus the expense will be recoverable as damages.

Critique and Questions from *The Mamola Challenger*.

Re. Mamola Challenger solicitors; why did they bring this case after their offsetting gains essentially put them in a better position….?

- **Terminology of "reliance" etc.** is "*unhelpful and misleading. Indeed, they may well have been the source of the decision by the owners' legal advisers in The Mamola Challenger to make what, in my view was an unsustainable claim*." (From DMAC)
- **Gauldron J** in *Amann*; "reliance damages" "*may suggest that compensation is to be awarded on the basis that he plaintiff is to be put in the position in which he or she would have been if the contract had not been made*." Where in reality, victim of BK has no entitlement to be restored to pre-K position; thus no *reliance interest*.
- ***The Mamola Challenger*** had factual offsetting gains, where the actual loss from wasted expenditure was wholly expunged.
- Reflects that **modern reliance analysis not only yields the same recovery as the expectation measure, but because its focus is loss caused by the breach, it *is* the expectation measure**: "*The reliance interest cannot assimilate the expectation view of causation without becoming the expectation interest*." (Michael B. Kelly)

Appears to have been assumed that if Owners had a true reliance interest and therefore could claim damages to restore them to the position they would have occupied had the contract not been made, they were entitled to recover re. wasted expenditure.

- There are not enough facts to make an informed comment on this assumption
- Scenario 1: if they had not entered into K (charter at $13 700) they would have entered into an alternative K at a similar rate.
    - If that were the case then since the *actual position* after repudiation was that they rechartered the vessel at the much higher daily rate of $21 347, they are in a better position than if the K had not been made and hence an awarded in respect of the wasted expenditure would overcompensate them.
- Scenario 2: if the hire rate in K, was lower than the market rate at the time and, if that K had not been entered into, the alternative fixture would have been at the higher rate eventually obtained, awarding the wasted expenditure would *not put them in a better position*.

Professor Treital was one of Teare J's lecturer's at Oxford; Teare J came to a conclusion contrary to Treital's view – despite his "unfeigned respect".

- ***No different principle applies where P seeks to recover for wasted expenditure rather than lost profit***; endorsed [**at 34 and 53**] ***Commonwealth of Australia v Amann Aviation Pty Ltd* (1991)** view of damages for lost profits (***expectation***) and awards for wasted expenditure (***reliance***) as "*simply two manifestations of the general principle in Robinson v Harman*" [**at 86**] rather than discrete or alternative measures of damages that P may choose between [**at 82**].
    - **Disagree with choosing interests;** "the language of election" and "the notion that *alternative* ways are open to a plaintiff in which to frame a claim for relief" are inappropriate [**at 85**] **Instead HCA presumes *recoupment* of "reliance interests" in**

expenditure reasonably incurred by P in performing or preparing to perform its obligations. Teare J thus concludes that one overriding principle supplemented by a presumption of recoupment – from *Amann*

- Treitel thinks that welding "two principles into one" with a presumption doesn't conceal the different interests. In substance, Teare J's principle from *Amann* is the same as Treitel's crucial rule – limiting the alternative of reliance recovery. Essentially Treitel is guilty of verbal trickery;
    - Because how can we sensibly say that there are two basis of recovery, BUT deny reliance when it would exceed expectation? Essentially say the same thing. You can claim reliance damages subject to expectation damages.

At paragraph 19; "the law permits…"; essentially continues to refer to "reliance damages" – which is misleading; Look to Gaudron J ruling at page 90

- We should thus consider *not* using reliance damages as terminology. Would be fine if we used it to mean *"interest of the plaintiff in being reimbursed for the wasted expenditure incurred in reliance on the D's promise."*
- But reliance interest is *redundant*; with clear losing K's is limited by expectation cap. So essentially this reliance analysis not only yields the same recovery as the expectation measure when you take the presumption into account, BUT because its focus is the loss caused by the Breach it *is the reliance interest*
- "*The reliance interest cannot assimilate the expectation view of causation without becoming the expectation interest*"

Note: it is stated that Omak committed a "**repudiatory breach**"; essentially a shorthand term. But it invites confusion between conceptually distinct grounds that allow an innocent party to discharge.

- Repudiatory breach means either:
- In Common Law could cancel K in 3 situations (codified in **NZ Contractual Remedies Act s7(2-4)**)
    - (i) Where one party **repudiates** – via words/ conduct indicates an intention to not perform or stop performing. For conduct to indicate, requires conduct that implies a lack of intention to perform.
    - (ii) Breach of an **Essential Term** – a term "expressly" agreed to demand exact performance every breach of that will be a ground to cancel the K.
    - (iii) (*although without repudiation or breach of essential term*) Serious breach; a **breach has occurred that substantially effects the K** – i.e. the benefit has been substantially lessened or the burden on the party has substantially increased.
- Essentially explains why its confusing; in *The Mamola Challenger*, it would have been sufficient to just say "there was a repudiation".

Paragraph 15; quantification of damages – "*Equally, if those expenses had already been incurred at the date on which the K was repudiated, to award those expenses in addition to damages for loss of bargain would put the claimant in a better position than he would have been in had the contract been performed."*

- Issue here is that earlier he said; Benefit expected to earn from performance of K less costs required to earn that B.
- Unless the expenses previously incurred have previously been deducted from the future necessary expenses to achieve the benefit, P will be undercompensated.
- If B – Y, then that's fine – as do not need to worry about already accrued damages.
    - ***Not the terminology*** that he uses.

- ***So*** he is correct *if the expenses previously occurred are deducted from those that have to be incurred*; i.e. B – Y; ignores X.

Commonwealth of Australia v Amann Aviation Pty Ltd (1991) HCA.

Facts: K entered into 1987; Amann to provide aerial surveillance services for 3 years to Commonwealth commencing 12 September 1987 *Amann only has 6 months to prepare...*

- Amann were awarded this K ahead of Skywest who were currently providing the service – were furious that they did not get re-employed.
- As Amann prepared – and imminently were going to deliver late – it seems that Skywest pressured the Government; threatened to sell planes, Government would be dependent on Amann.

Commonwealth repudiates K *first day of operations*;

- ***NB seems incompetent here – shouldn't terminate for performance of K. Cannot terminate for mere breaches; would need to show Amann repudiated themselves, OR even though they wanted to perform that Amann's BK were so serious that they deprived the innocent party of the whole substantial benefit. <u>How can this be established on the first day</u>***.
- Made clear that although Amann have breached, repudiation was premature.
- Breaches
    - Whilst there were breaches, there were only going to be some 2months were Amann weren't supplying perfectly… (of 36 months…) *so clearly not going to deprive the innocent party of the substantial benefits.*

Amann accepts and sues for damages.

- Merely the legal term for accepting the right to cancel the K. Accept the repudiation. Treat itself as discharged (with neither party being obliged or even entitled to perform it later).
    - "rescinding" is a *synonym* for cancellation. *Note that Rescinding a K means it is deemed to never have existed…*

BUT two obstacles to recovering damages:

- Chance (perhaps considerable – DMAC) that K would have been validly terminated inevitably; clause 2.24 allowed Secretary of Transport to cancel K if Amann failed after due notice to show why it shouldn't – Amann was in serious breach at the time!
- K contained no "**right of renewal**"; AND on the surface was a losing one!
    - Amann had just spend $5 281 521 (through an associated company) on Aircraft with a remaining value of only $917 329 – when it was no longer needed for coastal surveillance. Pre operational expenditure of $854 943 brought **net wasted expenditure to $5 219 135**
    - Security deposit of $113 000 and after cancellation of K would need to make termination payments totalling $143 039.
    - Total receipts from *performing K* would have been $17 107 462; to earn this would have required further expenditure of $15 801 899.
        - Thus total expenditure to earn $17 107 462 would equal $21 021 034; **net loss** of $3 913 572.
        - Prima facie this contract was a losing one!

- B = $17 107 462, X = **$5 219 135,** Y = $15 801 899, Z = $3 913 572
    - Additional costs incurred in preparation/ because of BK; return forfeited security deposit + termination payments = (113 000) + (143 039)

Thus, ignoring the contingent possibility that Amann lost the K, sum required to return Amann to starting position

- $1 561 612: *net wasted expenditure – expenditure that would not have been recouped if K had gone through (- a loss) + return of forfeited security deposit + termination payments*
- (5 219 135) – (3 913 572) = $**1 305 563** + (113 000) + (143 039) **= $1 561 612.**
    - This is the ordinary amount of damages that would have been recoverable – assuming no contingencies.

An issue here

- reference to $Y – further expenditure required doesn't marry up with the figures set out on page 6 by **Mason CJ** and **Dawson J** – the figures set out by the trial judge.
    - **Brennan J** sets out Y = $15 801 899
    - Trial J sets out Y = $15 433 420
    - **Difference of $368 479;** "if the contract had continued, Amann would have been liable t pay another $368 479 in respect of the acquisition of aircraft."
- This difference is explained on [**(100) page 74 at line 30**];

However; **HCA majority (4:3) upheld Federal Court decision; paid out**

- *net wasted expenditure + security deposit + termination payments*
- 5 219 135 + 113 000 + 143 900 = $**5 475 184 (+interest) – in the full court brought damages to $6.6m and by the time of HCA, would be approaching $7m.**

Judgment of Beaumont J: look at the table on [**(32) page 6**]

- thought that Net profits (lost profits…) would be $820 000 – divided this in half and awards $410 000 because he thought there was a 50% chance COA would repudiate legally via CL 2.2.4
- Why did he think that they would make a net profit?
    - Q: why would Amann be undercompensated?
    - A: **Beaumont J** did not treat the acquisition of the aircraft and the associated costs of fitting those aircraft as pre-operational expenditure incurred by Amann. This was because of the close relationship between the companies of Amann and CVC.
        - The reason this was done, was to enable Amann to get its finance in order – then once the deal came through Amann were going to purchase the debt; Amann were also obliged to indemnify CVC *hence why the other Judges treat the capital expenditure on the Airplanes as Amann's*.
            - Amann were liable for expenditure and had in effect incurred it.
        - if you add the $5 281 521 expended on the planes, to his figures, essentially get the same figures.
    - If you do this via. B – Y would come to a whole new figure;
        - Net profit + pre K expenditure; would put it in position if K was performed.
- Was he correct to divide the Award in half?

Judgment of Full Federal Court:

- Amann appeal – received full compensation for previous expenditure.
    - *net wasted expenditure + security deposit + termination payments*
    - 5 219 135 + 113 000 + 143 900 = $**5 475 184 (+interest) – in the full court brought damages to $6.6m and by the time of HCA, would be approaching $7m.**
- Full Court said that Amann can pursue ***reliance damages*** – BUT that such a loss couldn't be claimed if the K was a losing one.

    - however, they said (consistent with HCA) that the onus of establishing a loss was on the COA and this onus had not been discharged. The value of the prospect of K renewal had to be taken into account – this was not quantifiable, so virtually impossible for the commonwealth to rebut the onus.
    - Virtually impossible to say that the receipts of the intangible benefits were less than the expenditure incurred.
- **Majority** also addressed Clause 2.24; thought it was possible rather than probable that the K would be terminated. Trial Judges estimate of 50% was excessive. This was because; Trial J didn't take into account the term of 2.24 which obliged the Secretary of Transport to give due notice and pay attention to the interests of both parties.
    - came to a 20% chance of termination; too unlikely to justify reduction of damages.
- **Shepard J dissented;** [**(35) page 9 line 15**]

Majority; Mason CJ, Dawson, Brennan, Gaudron JJ.
Dissenting; Deane, Toohey and McHugh JJ; not only dissented from Majority but within themselves.
DMAC thinks that Deane J provided the best Judgment; holistically outcome might be wrong apparently.

Awards
410k Trial J
2.7m Toohey J (dissenting in HCA), Shepard J in Federal
3.9m McHugh J (HCA)
4.4m Deane J
5.5m Majority award; favoured by 5 judges.

COA Appeal;

- starting point was that Amann couldn't recover at all; such an award is only justified where the nature of the BK is to render proof of the loss as impossible.
- **Relied on the non-existent Tanker case** – *McRae v Commonwealth Disposals Commission*.
- Went on to say, if severe difficulty of calculation suffices (case like this) then actually there is no difficulty, as per these figures there was a clear losing bargain. In this case it was not possible to attach value to chance of renewal – Amann had no right of renewal; so award loss of bargain damages – which is $1 561 612.
- They should really get nothing because the Commonwealth would have cancelled within a short time and cancelled validly – Amann would get nothing (nominal damages).

Judgments at the HCA:
Mason CJ and Dawson J (Joint):

- Amann was entitled to damages for BK re. reasonable expenses incurred in reasonable reliance – "**wasted expenditure**"; such recovery is consistent with *Robinson* as law ***presumes*** Amann would *at least* recover expenditure if K was performed.
- **Burden to displace presumption on D**: needed to establish that expenditure would have been wasted regardless
- Burden was not discharged – despite difference in receipts and net loss of $3.9m – due to "strong" prospect of renewal, loss of which was within parties contemplation as probable consequence of BK… couldn't show that ***renewal + $17.1m < expenses incurred ($21m)*****.**
    - **NB didn't use term of impossibility.**

- No discount to damages due to issue 1 above; full court assessed the **probability of cancellation at only 20% - statistically improbable, so why impugn damages**.
- ***Further summary***
    - award of the claimed wasted expenditure was consistent with *Robinson* because the law presumes P would recover expenditure. Burden to displace hadn't been discharged; due to strong prosect of renewal. Damages shouldn't be impugned on statistically improbable chance of valid cancellation.
- Page 10, line 9; Damages recoverable as lost profits (expectation) are constituted by the combination of expenses reasonably incurred + net profit.
    - Damages are awarded for loss of chance = **X+Z**;
    - **inconsistent with Para 15 in *The Mamola Challenger*; if expenses had already been incurred, to award those damages as well as loss of bargain would put P in a better position than he would have been**.
        - this is fine if he is referring to B-Y.
        - However, if some other costs have *already* been incurred then it would undercompensate P to *not* award "X" damages.
    - watch out for Y dollars;

Question: are there any exceptions to the presumption of recoupment?

- "Aleatory" contract; "*it would not be appropriate to apply the presumption for the reason that inherent to the entry into such a contract is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit*."
    - "In the case of aleatory contracts, damages are awarded for loss of a chance and the burden of establishing the existence and loss of this chance as a result of a defendant's breach lies on a plaintiff although, as has already been observed, mere difficulty of estimation does not relieve a court or jury, in appropriate cases, of the task and responsibility of placing a value on the chance loss."
- *Aldwell v Bundey*
- *Chaplin v Hicks*;
    - **Facts**: Advert for a competition to find actresses – Chaplin submits a photo; gets through to the top 50 (first cull) then *denied* the chance to interview to go through to the top 12 (final cull).
    - **Sued for loss of a chance**; received a serious award.
- Prior Year
    - DMAC: Triathlete is disqualified in the final stretch – in the top 3; he had spent some $5000 on training – the award was some $20 000. Aleatory contract. He can recover through *loss of a chance* – more than the money expended through not working etc.
- BUT if recoupment doesn't apply to "gamble", then what is different with this scenario and McRae v Commonwealth Disposal Committee;
    - Tanker wasn't sold with a guarantee – no promise it contained value, merely "its been said there is some oil"
    - P would have had no complaint if the Tanker *was there* on the reef but had rusted away and there was no oil.
    - P had essentially taken a gamble.
    - Essentially because there was a promise there *was* a tanker.
- ***QUESTION: McHugh J thinks that the principle is crap – contrary to empirical evidence etc. people make bad bargains etc. Thinks its alien to evidence rules?***

Question; reason as to why it might be unfair not to discount damages awarded for chance of cancellation under cl 2.24.

- Judges basically justified the award of the full amount instead of $1.5m, because there was a chance of renewable – a valuable commercial bargain. IF they had received the full K this would have been a lot more valuable. Judges took into account the chance of renewal to augment the damages but ignored the 20% chance that there would have been no damages at all.
    - This is the point made by **Brennan**; "substantial" but "unquantifiable"
    - Could argue that Amann were thus overcompensated.
    - Seems that **Deane J** took this into account in reducing damages by 20%.
- Relied on *Hadley v Baxendale* when taking chance of renewal into account
    - [**Page 44 (18/4)**]; Essentially there is only one principle here;
    - if more loss is known to D, then D will be liable for more damages.
    - "Problem" here (critics): *Hadley* is usually used to *limit* the scope of damages rather than extend it; here it is used as a method of including some damages.
        - Brennan J doesn't rely on *Hadley*.
        - DMac doesn't think there is a problem; the profit from a renewal, where much of the expenses were already incurred, was a Benefit that performance of the K would have provided to Amann.
        - DMAC suggestion: the judges could have made the point that the benefit was plainly not too remote – that it was something that both parties would have contemplated.

Brennan J (**majority**): *NB, DMAC thinks this judgment is more sophisticated than CJ+J above.*

- Essentially treats in the same manner as **Mason CJ** and **Dawson J** (Joint) but reasoned that prospect of renewal of K was an "**implicit benefit**" that was "**substantial**" but **unquantifiable**.
    - Unquantifiable; "*It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on another basis, and, in so far as the Commission's breach of contract itself reduces the possibility of an accurate assessment, it is not for the Commission to complain*."
        - from *McRae's* case.
    - This is the same at [**(59) 33/45**] and [**(60) 34/11**]
- Meant that D was unable to discharge onus of proving ***renewal + $17.1m < expenses incurred ($21m).***
    - It's not clear whether Brennan J intended his impossibility train of thought – might have been looking at practical difficulty…. Holistically it doesn't matter really concerning the situations in which the principle of Recoupment existed.
    - BUT it's unlikely that Mason and Dawson would agree…
- Treated 20% chance of cancellation as relevant to value of *Amann's* contractual benefits; but that didn't enable Commonwealth to discharge onus – unable to establish that even 80% of net benefits was less than the expenditure incurred by Amann.
    - "*Even if the Commonwealth be held to have proved that there was a 20% possibility that the contract would have been terminated under cl 2.24, that finding does not enable the Commonwealth to discharge its onus.* ***The Commonwealth remains unable to prove either that $B - $Y is less than $X or that 80% of ($B - $Y) is less than $X***."
    - treating the 20% chance of valid termination as relevant to value of Amann's contractual benefits.

- Doesn't seem right to DMAC
  - wasn't just relevant to benefits Amann would receive; if that risk materialised Amann would not have got any damages at all.
  - thinks Brennan J should have calculated the prima facie damages then deducted the 1/5 chance that nothing be reflected
  - **Q: what if the damages would have been something... I.e. valid cancellation with a clause stating that Amann would have received 500k in good faith…**

- Because the prospect of renewal was an ***implicit benefit*** the Commonwealth had impliedly promised that there was a chance of renewal.
  - Example: Hairdresser who is dismissed.
  - However, it's not that there is a promise, it's an inherent benefit to the awarded K; a consequence of the bargain…
  - ***Dmac Question***: why did he need to treat it as an implicit benefit before it could be brought into account?
    - because he used $B as representative of what P *would have been entitled to*
    - Compared to Deane J;
      - Amann had *either* the prospect of (1) renewal, or (2) of re-selling the planes – written down book value of less than $1m (despite spending almost $5m on them) – at a *much higher value*.
      - loss of those two alternatives were *consequential* loss
      - in the context of Amann's claim for wasted expenditure, he viewed renewal as a consequential benefit that needed to be brought into account to whether Crown had Rebutted the principle of recoupment.
    - Different to the "implied term"
    - Look at example (pages 25 and 26); hairdresser who is deprived of both wages and the tips from customers.
      - can say that tips were implied benefit; DMAC doesn't think it is necessary – it's merely a benefit of the K that should be allowed for when compensating via damages.
- Interesting that Brennan at page 32; paragraph below line 15; DID Refer to the prospect of the *value of the planes themselves being enhanced*; he was only doing it in the context of a summary of Amann's argument: Not unequivocal agreement (***note that he did agree with the rest of what Amann said***).
  - Gaudron and Deane JJ took this as an *alternative formulation* of benefit.
  - it would be highly artificial to argue that the enhanced value of the planes (either to Amann or a new supplier) would be an implied benefit.
  - Arguably unnecessary to talk about implied promise.
    - Interesting that Deane J's judgment contained no reference to that requirement.

- **Question; what if it was impermissible to take into account the prospect of renewal?**
  - $B would only include remuneration payable by the commonwealth; further consequence that Amann could only claim for damages for wasted expenditure rather than loss of profit; there would have been no principle of recoupment at all.
    - P would have needed to establish how much better off Amann would have been; $1 561 612.
    - would this be discounted
  - No longer impossible to undertake an assessment of damages

- "*Had Amann borne the onus of proving its damages as expectation damages, the assessment would have had to allow for the possibility that the power to terminate under cl 2.24 would have been exercised. That possibility, assessed at 20% by the full court, would have reduced those damages*."

Deane J (**dissenting in the result**): *Dmac thinks this dissent is Correct.*

- Didn't regard chance of valid cancellation as solely relevant to determination of net valuation of benefits; **in his view presumption of recoupment (of expenditure if K was performed) and risk of cancellation was essentially an 80% chance of recovering wasted expenditure when combined**. This is explained at [**(73) 47/46**];
- **Thus reduced recovery by 20% - to approx. $4.4m (+ interest)**; thinks Amann would have been overcompensated;
- **Core argument begins at**: [(72) 46/ second paragraph]
  - Problem 1: if Commonwealth had used cl 2.24 – Amann would have got nothing
  - Problem 2: if the K was not renewed AND the planes couldn't be sold at above book value, the K would have been unprofitable; Deane J goes on to point out that Amann didn't regard the K as a one-off; agrees with other judges that if K had continued Amann would have been in a favourable position to receive another K. ***Issue*** was putting a monetary value on that!
    - Re-Emphasises the importance on the principle of recoupment; if Amann bore the onus of proof there would have been a cap to the damages they could receive. Since they had the benefit of the presumption it *became* the commonwealth's problem.

Toohey J (**dissenting in the result**):

- **Disagreed in holding commonwealth was under burden to prove K was losing one** instead found a ***mere evidentiary onus*** (simply means that they need to point to evidence that *prima facie* leads to conclusion they are arguing for – here need to show losing bargain) onus that was clearly satisfied considering *prima facie* loss of $3.9m.
  - **disagrees with the presumption of recoupment** – which effectively puts strict onus on D to prove K was a losing one.
  - Compare to; of the ***strict legal onus*** was on Amann would need to show that B – Y at least met expenditure that would be incurred and would need to show a value attributable to prospect of renewal or value of the planes over their written down book value.
- Thought that **fair compensation (in his view this was the task of the court)** considering the various **contingencies** (chance termination + chance renewal) was **damages awarded by full court should be halved**; **$2 737 539 (+interest)**; very similar to Shepard J in Full Court

Gaudron J (**majority**):

- Actually agrees with Toohey J that there was **only mere evidentiary onus on D**; didn't lead her down the same path of balancing contingencies.
- Thought it **impossible to say K would be unprofitable**; ***principally***: aeroplanes would have been worth much more than their written-down book value at end of K.
  - Given that at the end of 3years, the planes might be worth more than they were bought for the expenditure might well have been recouped.
- **Dismissed the prospect of valid termination pursuant to Cl. 2.24 as unlikely – agreed with Mason CJ and Dawson J.**

McHugh J (**dissenting in result**): *DMAC thinks this is the most "interesting" judgment*.

- Arrived at $3 989 899 (+interest), which is close to **Deane J** finding $4.4m (+ interest).
  - Awarded ***expectation*** damages…
- **Rejected *presumption of recoupment* that Amann would *at least* recover expenditure** if K was performed
  - **Contrary to commerce**; business people frequently make bad bargains
  - **Contrary to history of law of evidence**, seen an increasing **rejection** of these presumptions and "**artificial forms of reasoning**"
    - "*… the history of the law of evidence has seen an increasing rejection of presumptions and other artificial forms of reasoning in favour of allowing tribunals of fact to give such probative force to evidentiary materials as they think fit having regard to all the circumstances of the case*."
    - **BUT** the **presumption of recoupment** is pretty well entrenched – certainly applies in cases like *Amann* or *CCC Films*; we will examine some situations where it doesn't."
- ***Reliance damages could only be justified if D's breach made it too uncertain to ascertain whether P would have made net profit etc***.
  - Not satisfied; no express promise that if Amann performed K it would obtain a commercial advantage to enable it to earn profits in a later K (1990)

- **Amann's damages were therefore assessed through orthodox loss of bargain approach by comparing**
  - *Actual position vs. position if K was performed*
  - **Maximum prima facie of $1 305 563**
    - Net wasted expenditure vs. loss on full performance
    - **5 219 135 – 3 912 572 = $1 305 563**
  - **BUT** arrives at **$4 695 563**; treated Amann's borrowing costs of **$3 390 000** as a **pre-acquired expense**. Deducted this sum from amount of future required expenses
    - **1 305 563** + **3 390 000** + **Breach related costs** [**113 000** + **143 049**] = **$4 951 612**

- Then **consistently with Deane J**, held that there must be **deduction for the 20% chance** of cancellation. Note his only inconsistency was disagreement with presumption of recoupment.
  - **Issue**: thought that termination payments were immune from the discount? Why?
    - Answer: **Presumably because they were a *consequential loss* caused by BK**
    - Issue: but if valid termination pursuant to cl 2.24, the full termination payments would have to have been covered by Amann.
  - Instead of awarding **(0.8) * $4 951 61 ($3 961 290),** awards **(0.8) *$4 808 563+$143 049.**
  - ***So; Deane J deducted 20% from the reliance damages* (including expenditure occurred and the $113 000 security deposit – which could *actually* be described as a restitution interest if you wanted…)*, but not from the consequential loss* damages – the $143 049 "indemnity" interest. If the Commonwealth pursuant to cl 2.24 terminated the K validly, they wouldn't have got anything! so: damages total of $3 989 899 – overcompensation of $28 609. If being mean; would award as - $3 961 290.**
- **How did McHugh Get here?**
  - Figures
    - X = $8 609 135

        - 5 219 135 [Brennan J] + **3 390 000**
    - Y = $12 411 899; (Brennan J – 15 801 899 – **3 390 000**
    - Z = 3 913 572
    - X + Z
        - 8 609 135 + (-3 913 572) =
        - $4 695 563; + Termination payments and security deposit = **$4 951 612**
    - B – Y;
        - 17 107 462 – 12 411 899 + 113 000 + 143 049.
        - $4 951 612
- ***McHugh attributed the $3 390 000 borrowing costs as pre-incurred rather than to be paid later; logic being that it is an assumed debt. So; reduces Y and increases X proportionally – the same prima facie loss - $3 913 572*.**
- Explained; effectively this is Brennan J's prima facie damages + 3 390 000. Implicit in the question; if McHugh is right the majority are wrong – should have put the borrowing costs under X dollars. Thus, the majority undercompensated Amann; should have been compensated for; **$8 609 135 + 113 000 + 143 000**
    - Majority essentially gave full expenditure + consequential losses.

Extra *Amann* discussion.

<u>Question 1: Comparison of Calculable damages</u> – between Mason CJ and Dawson J vs. McHugh J.

- **Mason CJ and Dawson J**
    - *"Damages recoverable as lost profits are constituted by the **combination of expenses justifiably incurred** by a plaintiff in the discharge of contractual obligations and any amount by which **gross receipts would have exceeded those expenses**. The second amount is the net profit."*
    - in **Brennan J's** formula this is ***$X + $Z* – or**
    - **(previous amount expended) + (amount of profit or loss that would have eventuated)**

*McHugh's approach **appears** to be inconsistent with Mason and Dawsons award of damages but is not; they are both achieving the same common goal; putting P in the position they would have been if the K had been performed.*

- **McHugh J**
    - "*Where the breach of contract occurs after the plaintiff has incurred expense in preparing or performing the contract, the plaintiff's loss is ordinarily the difference between the **value of the benefits which it would have received under the contract**, as and from the date of breach, **and the expense which the plaintiff would have incurred, as and from that date, in performing its own contractual obligations**."*
    - **Example**: "*If a plaintiff has expended or incurred liabilities of $100 000 prior to breach and would have received $200 000 in the future if the defendant had performed its contractual obligations, the amount of the plaintiff's damages is the **difference between the $200 000 and the expenditure which the plaintiff would have incurred in performing its future obligations**. The $100 000 already expended or incurred is irrelevant*."
    - Essentially goes for **$B - $Y or; Benefits P would have achieved if K was performed – further expenditure required. Note that Brennan J used the $B - $Y as well.**

<u>Question 2</u>: assuming no contingencies, *prima facie* damages are **$1 561 612**

- $1 561 612: *net wasted expenditure – expenditure that would not have been recouped if K had gone through (- a loss) + return of forfeited security deposit + termination payments*
- (5 219 135) – (3 913 572) = $**1 305 563** + (113 000) + (143 039) **= $1 561 612.**
    - This is the ordinary amount of damages that would have been recoverable – assuming no contingencies.
- *<u>Examine as the separate "Interests"</u>*
    - Expectation Interest: *prima facie* loss; **-$3 913 572**
        - Net expectation interest;
    - Reliance Interest: **$5 219 135** (aircraft and establishment costs).
        - in the sense of expenditure wasted as a result of BK.
    - Restitution Interest: **$113 000**
        - This could be classified as part of reliance interest; security deposit would surely not have been incurred except in reliance of the contract….
    - Indemnity Interest: **$143 049**.
- Calculate; (Reliance – Expectation) + Restitution + Indemnity
    - (5 219 135) – (3 913 572) = $**1 305 563** + (113 000) + (143 039) **= $1 561 612.**

<u>Question 3</u>: If The K was no longer *prima facie* a losing one and Amann was suing in the ordinary way for loss of bargain damages, how would this have affected the outcome?

- **Net expectation would be *positive* figure instead of a loss**.
- Cou**rt *probably* wouldn't have awarded further sum for an "even more valuable" contract**; McHugh J: "*… since it is common ground that, in the circumstances of the case, damages for loss of the chance are impossible to assess, Amann concedes that it could not obtain any expectation damages for that loss of chance*"
- **Still likely that the majority would have discounted the award by 20% due to cl 2.24**; Brennan J; "*Had Amann borne the onus of proving its damages as expectation damages, the assessment would have had to allow for the possibility that the power to terminate under cl 2.24 would have been exercised. That possibility, assessed at 20% by the Full Court, would have reduced those damages*."
    - **can be explained that expectation interest and reliance interest are the SAME.**

<u>Question 4</u>: **examination of McHugh calculation of damages compared to Brennan J (Majority)**

<u>Question 5</u>: Look at "presumption of recoupment"; does it apply in every case where it is too tricky to calculate consequential loss damages?

- I.E. *Amann*; A are spending money on planes – all expenditure incurred would be covered by the consequential income received from the COA.
- or *CCC Films* where expenditure was incurred in order to exploit the right that was the property of the D – and from which *if all went well* the expenditure would be recouped…
- Doesn't mean that it would be applied in every case where this happened.
    - *Ti Leaf Productions Ltd v Baikie* (2001) CA.
        - **Facts**: were going to make a film – martial arts; T entered K to rent part of farm from B. Problems arose. New K – apparently included good faith case about not making public comments criticizing each other; B made public comment in Timaru paper.

        - **Lead to Ti Leaf's investors pulling out**! This was apparently foreseeable… Lots of money was expended with no film produced… T wanted over $1m for costs incurred on pre-production work.
        - **Argument**: Presumption of Recoupment.
        - **T loses at HC** – Judge (Pankhurst J) said that the project had lost its way; would not have been completed etc. Expenditure would have been wasted regardless. BUT there *was a presumption of recoupment* that had been rebutted.
        - **T appeals to CA**: Arguments (1) upset findings of fact, (2) not only is there a presumption of recoupment BUT B's must show *beyond a reasonable doubt* that they wouldn't have profited. (3) in effect B are *estopped* / precluded from arguing that they wouldn't have made a profit.
        - **CA outcome**: one thing to put onus on B, another thing entirely to do so on such a highly speculative business move.
- What is the difference between this case and *Amann*?
    - The expenditure would not have been recouped through the K with the B's – that was a mechanism; would not have recovered the expenditure.
        - the anticipated profit earning venture was not through the K with B.
    - one way of explaining this is to say; if the film had been completed they wouldn't have "made a profit" from the *tenancy* agreement.
- Look at *Yam Seng*;

Question 6: Re. Professional negligence situation;
"…*the amount of wasted expenditure will be the appropriate measure of damages in such a situation because it, having been established that the client would not have entered into the subsequent contract if proper advice had been given, it is not sensible to speak of loss of profits*."

Question 7: Difference between Brennan J figures and Trial J figures (used by Mason + Dawson)?

- "*if the contract had continued, Amann would have been liable to pay another $368 479 in respect of the acquisition of aircraft*."

Damages Calculation

Long way; calculate **Promised Position – Actual Position; PP – AP**
PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
AP = *sum of costs incurred + any additional breach related costs*

Short ways (Brennan J From *Amann*); $B = $X + $Y +/- $ Z

B = total benefits/ revenue (K price) of the K for P
X = Prior expenditure to repudiation/ issue point: pre-breach expenditure, wasted expenses.
Y = Future expenditure to achieve the K
Z = the amount of expected **profit** (**if +**) or **loss** (**if -**)

Method 1: B – Y

Method 2: X +/- Z
Z = (B – X – Y)

Either Method;
Deduct off-setting gains (Mitigation)
Deduct value of any part performance by the Defendant
Consequential loss; Addition of costs caused by BK – legal costs etc.

Damages Calculation Questions in Workbook

Question 1: B = 100 000, X = 0, Y = 90 000, Z = +10 000

- B – Y = 100 000 – 90 000 = $10 000 damages
- (ii) X +/- Z = 0 + 10 000
- Damages = prima facie $10 000 (without interest)

Question 1 *extension*: P moves on immediately to a new project; would this affect the damages *prima facie*? Is this mitigation? Could argue it's an independent decision, but if this was so – where P could have not entered the same K.

- Dealer contracts to sell car for 50 000; dealer profit is 10 000. Buyer buys car. Dealer orders car in reliance. Buyer repudiates. Whether the dealer could recover lost profit depends on further facts:
  - Whether supply exceeds demand – if so then dealer can recover lost profits; loss value seller.
    - Truly a loss of bargain *even if a later sale comes up*
  - However, if demand exceeds supply, then the second sale is a true substitute – dealer was never going to sell, and no loss of bargain could be recovered (only nominal damages).

Question 2: B = 100 000, X = 20 000, Y = 70 000, Z = 10 000

- (i) B – Y = 100 000 – 70 000 = 30 000
- (ii) X + Z = 20 000 + 10 000 = 30 000.
- Prima facie, damages before mitigation = $30 000

- Mitigation = $10 000 pre-payment, + $5000 salvaging
- Damages – Mitigation = Real Damages
- = $15 0000

Question 2 *extension*: P; K with D to build a building – 100 000. D Repudiates after P has spent 20 000. It would have cost P a *further 90 000* (on top of the original 20 000); a bad bargain. D has paid nothing and P cannot salvage anything from the 20 000.

- Long way;
  - PP = 100 000 – 110 000 = -10 000
  - AP = 20 000.
  - PP vs AP; -10 000 – 20 000; 20 000 + (-10 000)
    - Damages prima facie = $10 000.
- Quick way.
  - *B – Y*; 100 000 – 90 000 = $10 000
  - *X – Z*; 20 000 – 10 000 = $10 000.

Question 3: Produce Question; we need to *assume* the anticipated total value of $1600. We will also assume she has *paid* for everything else (1000 for produce, 150 for transport, 100 stall, 100 staff, 50 disposal).

B = 1600, X =1400, Y = 0, Z = +200

- Long way; gross expected profit of $250 – her *actual* position is she has lost $400...
- (i) B – Y; 1600 – 1000 + 50 (disposal) = $650
  - B = all expenses currently incurred + all future expenses +/- profits expected.
- (ii) X + Z; = $650.
  - X = 150 + 100 +100
  - Z = 250
  - + 50 breach related costs

If the buyer HAD already paid for the produce, would receive more. In this case, would receive compensation for the expectation, reliance, indemnity, and restitution interests.

- Expectation; 250 net profit
- Reliance; 350
- Indemnity (compensation for other out of profit losses); $50 for disposal
- Restitution; $1000.

In practice, the $1000 would be reliance interests as it was a pre-requisite to complete the Contract.

- (i) B – Y; = 1600 – 0
- (ii) X + Z; = 1400 + 200
    - X = 1000 (expenses) + 150 (transportation) + 100 (market costs) + 100 (wages)
    - + 50 (trash)
- Prima facie damages will equal $1600.
    - This makes sense – Seller has *received* 1000, buyer has *wasted* other money.

Question 3 ***variation***: what if Seller can show that due to a flux of prices, the total receipts for the day would only have been $1200 rather than $1600. This evidence is established. Buyer concedes this, but still claims "in the alternative" damages for wasted expenditure including disposal costs. Assuming she hasn't paid the price of the produce, Buyer attempts to get $400 (150 + 100 + 100 + 50).

- Earlier we would have given her $650, now her total revenue has fallen by $400… give her $400 less in damages.

- **Long way**; PP = -$150 (B = 1200, X = 1350 – 1000 + 150 +100 + 100), AP = -$400. So compensation of $250.
- (i) B – Y; 1200 – 1000, + 50 (disposal costs) = $250
- (ii) X – Z; 350 – 150 + 50 = $250.

- Reliance interest was *historically interpreted as restoration to pre-K position*; there is no entitlement in BK to be restored to the K – the wrong is not the formation of K, the wrong is the BK: we are compensating for harm done from the failure to perform.
    - Courts will never knowingly put a P in a better position than whether they
- *If there were truly a reliance interest, she would receive $400 – would put her in a better position than if the K were performed. She has no entitlement to this position.*.

Question 4 *Variation*:

- K is repudiated before anything is invested; B – Y; 100 – 80 = $20
- BUT if P has already spent 40 of (X+Y) then need to award wasted expenditure plus net profit – as Mason + Dawson prefer.
    - Mason + Dawson; would award
    - X + Z; 40 + 20.

Question 5: B = 100 000, X = 10 000, Y = 55 000, Z = (B – Y – X) = (100 000 – 10 000 – 55 000) = 35 000

No possible mitigation costs

- (i) B – Y; 100 000 – 55 000; = $45 000
- (ii) X + Z; 10 000 + 35 000 = $45 000

- (iii) (long way)
  Long way; calculate **Promised Position – Actual Position; PP – AP**
  PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
  AP = *sum of costs incurred + any additional breach related costs*
    - PP = 100 000 – 65 000 = 35 000

- AP = -10 000.
- PP – AP = 35 000 - -10 000; 35 000 + 10 000 = $45 000

- Therefore, regardless of method of calculation, prima facie damages without interest are equal to $45 000.

Question 6:

- K1 (initial K): B = 80 000 (2000 x 40p.unit), X = 0, Y = 30 000 (2000 x 15p.unit), Z = +50 000

- K2 (Changed Price of Production): B = 80 000, X = 0, Y = 42 000 (2000 x (15 + 6)), Z = +38 000.

- K3 (at repudiation) B = 80 000, X = 9000, Y = 33 000, Z = 38 000.
  - (i) B – Y; 80 000 – 33 000; Damages are prima facie $47 000.
  - (ii) X + Z; 9000 + 38 000; Damages are prima facie $47 000
- Mitigation = $12 000 (8000 advance payment + 4000 salvage)
- Therefore, damages are = $35 000.

  Long way; calculate **Promised Position – Actual Position; PP – AP**
  PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
  AP = *sum of costs incurred + any additional breach related costs*
  - PP = 80 000 – 42 000 = 38 000
  - AP = -9000 + 12 000 = 3000
- PP – AP = 38 000 – 3000 = 35 000.

- **Explanation**:

Question 7:

- K1 (initial K): B = 140 000 (2000 x 70), X = 0, Y = 85 000 (10 000 + 75 000 at 37.5 p.unit), Z = 55 000
  - Change of price; Y now = 77 000 (10 000 + 67 000), Z = 63 000
- K2 (at repudiation); B = 140 000, X = 67 000, Y = 10 000, Z = 63 000.

- Mitigation
  - 20 000 advance payment + 50 000 – (salvage K value) = +70 000
  - consequential losses = 3000 (storage) + 5000 (agents fee) + 5000 = 13 000.
- Total mitigation change = -70 000 + 13 000 = -57 000

- Damages (first instance)
  - B – Y; 140 000 – 10 000 = $ 130 000, - 57 000
    - 73 000
  - X + Z = 67 000 + 63 000 = $130 000
    - 73 000

- **Explain**: prima facie damages are $73 000.

Question 8:

Note; here it is the person *providing* the service. Because we cannot conceptualize the loss here – it's a fountain – it is unclear as to what that is worth.

- K to A: B = 5000, X = 2500, Y = 4000, Z = (B – X – Y), = -1500
- K to B: B = 6500, X = 2500, Y = 2500, Z = 1500.

  Long way; calculate **Promised Position – Actual Position; PP – AP**
  PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
  AP = *sum of costs incurred + any additional breach related costs*
    - **PP** = 0 – 5000
    - **AP** = -6500;

- PP – AP; (0 – 5000) – (-6500); -5000 – -6500; = $1500
- *prima facie damages will be $1500. Note that essentially B is getting an above market deal in the first place AND damages to restore him to that position!*
- ***Question: how to calculate via Brennan J formula***?

Question 9:

Long way; calculate **Promised Position – Actual Position; PP – AP**
PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
AP = *sum of costs incurred + any additional breach related costs*
- **PP** = 0 – 30 000
- **AP** = -(33 000 + 3000 + 5000) = -41 000

- PP – AP; -30 000 – -41 000; = $11 000
- *Prima facie damages will be $11 000.*

Tutorial Questions – tutorial worksheets

Question 3:

Initial K;

- B = (500 x 65) 32 500. X + Y = 25 000. Z = 7 500.

K at repudiation; *things to note; manufacturing price goes up, Z goes down – now prima facie a losing K*

- B = 32 500, X = 10 000, Y = 25 000, Z = -2500.
- Mitigation
  - 10 % K = 3250 + onsell materials = 2000
  - total mitigation = 5250
- Brennan
  - B – Y – Mitigation
    - 32 500 – 25 000 – 5250 = $2250
  - X + Z – Mitigation
    - 10 000 – 2500 (losing K) – 5250 = $2250
- Long way
  - Total mitigation is equal to $5250 – loss is equal to 10 000 - $5250 = $4750
  - losing K, would have lost $2500
- PP – AP
  - PP = $-2500, AP = $-4750
  - -2500 - -4750
  - = $2250.

Question 4:

Initial K; B = (500 x 60) 30 000, X + Y = 20 000, Z = 10 000

K at Repudiation; dollar changes; so (X + Y goes down), Z goes up.

- B = 30 000, X = 17 500, Y = 0 (K was completed) Z = 12 500
- Mitigation = 13 000 (income)
  - Income of 15 000 (replacement sale)
  - additional *losses* of $500 (transportation)
- Brennan J
  - B – Y – Mitigation
    - 30 000 – 0 – 13 000
  - X + Z – Mitigation
    - 17 5000 + 12 500 – 13 000
  - Both routes; prima facie damages = 17 000.

Question 7 (a)

B

19 000 000

X

500 000 +
4 500 000 (net loss on aircraft – i.e. 6 000 000 expended – 1 500 000 residual value)

= 5 000 000

Y

3 025 420 (fuel)
3 600 000 (salaries/ wages)
398 101 (remaining pre operational expenditure)
4 000 000 (maintenance)
400 000 (facility expenses)
408 000 (legal expenses / miscellaneous aircraft related expenditure)
410 000 (insurance)
368 479 (acquisition)
3 390 000 (borrowing costs)

= 16 000 000

Z

= (B – X – Y)
= 19 000 000 – 5 000 000 – 16 000 000
= -2 000 000
prima facie a losing K

Consequential losses

100 000 (security deposit)
150 000 (termination payments)

= 250 000

B – Y

19 000 000 – 16 000 000
= 3 000 000
+ 250 000 consequential losses

X + Z

5 000 000 + -2 000 000
= 3 000 000
+ 250 000

prima facie recoverable damages will be $3 250 000.

Question 7(b)

Mason CJ + Dawson J

damages
5 000 000 (X)
+ 250 000 (consequential losses)
= $ 5 250 000

Explanation

Endorsed the presumption of recoupment; Amann was entitled to damages for BK re. "wasted expenditure" (Reliance damages). Because of the unquantifiable "strong" prospect of renewal, D couldn't discharge the probative onus on them to show Amann's expenditure was wasted.

Viewed Full Federal Court finding of 20% chance of valid cancellation as statistically negligible – did not want to impugn damages.

Because of these contingencies, neither $B nor $Z Could be calculated.

Brennan J (Majority)

Damages
would have awarded the same as Mason and Dawson CJ.
$ 5 250 000.

Explanation

Treated *very* similarly to Mason and Dawson but reasoned that prospect of renewal was an *implicit*, "substantial" but unquantifiable benefit. The COA was unable to discharge onus of proving that

$B - Y < X$

Brennan J treated the 20% chance of cancellation relevant to the *value* of B but this still didn't enable the COA to discharge onus

$0.8(B - Y) < X$.

Toohey J

Damages

awarded 50% of the Majority.
O.5(5 250 000)
$ 2 625 000

Explanation

Disagreed COA was under probative onus to show K was losing one; instead an evidentiary onus – this will be established due to prima facie loss of $2 000 000. Thought that "fair

compensation" was to consider the contingencies (chance of termination + chance of renewal) and half the majority.

Gaudron J

Damages

awarded majority
$ 5 250 000

Explanation

Agrees with Toohey that there was only an evidentiary onus on the COA – but didn't balance contingencies. Because she thought that the aeroplanes would have been worth more than their book-value at the end of the K, impossible to say that the K would have been profitable.

Despite finding an evidentiary onus re. profitability, was content to simply agree with Mason and Dawson re. possibility of valid termination.

Deane J

Damages

80% of majority award
0.8 (5 250 000)
= $ 4 200 000

Explanation

Chance valid K under cl 2.24 was not solely relevant to determination of benefits; thought that presumption of recoupment + chance of cancellation was an 80% probability that Amann would recover its wasted expenditure (reliance damages)

This was because;

If the K wasn't renewed, and planes *couldn't* have been sold at above book value, then K would have been unprofitable.

But, couldn't quantify the commercial advantage Amann was in due to preparation etc.

AND if COA had used cl 2.24 Amann would have received nothing; thinks this is a superimposed risk over the whole K.

McHugh J

Damages

prima facie damages
3 000 000 + 3 390 000 + 100 000
= 6 490 000

0.8 (6 490 000) = $5 192 000, + 150 000

$5 342 000

Explained

Awards *expectation* damages and treats planes as pre acquired *entirely*. Rejected presumption of recoupment as contrary to both commerce and the trajectory of evidence law. Reliance damages could only be justified if D's breach made it too uncertain to ascertain whether P would have made net profit; this couldn't be satisfied.

Therefore, assessed damages through orthodox loss of bargain damages – compared actual position to position if K was performed; to this McHugh added the borrowing costs as a pre-acquired expense.

Consistently with Deane J, McHugh then deducted 20% chance of valid K cancellation (pursuant to cl 2.24), however did *not* reduce termination payments – presumably because they were consequential to the BK (note this actually is not consistent with law).

7(c); impermissible to take into account prospect of renewal and that there was no justification for reversing the onus of proof; what would this do to Mason and Dawson, and Brennans' judgment?

- Brennan J
    - $B would only include remuneration payable by the commonwealth; further consequence that Amann could only claim for damages for wasted expenditure rather than loss of profit; there would have been no principle of recoupment at all.
        - **P would have needed to establish how much better off Amann would have been; $1 561 612 in the real case; on these altered facts would be 3 250 000**.
        - would this be discounted? Yes.
            - No longer impossible to undertake an assessment of damages
        - "*Had Amann borne the onus of proving its damages as expectation damages, the assessment would have had to allow for the possibility that the power to terminate under cl 2.24 would have been exercised. That possibility, assessed at 20% by the full court, would have reduced those damages*."
        - Damages would thus be $2 600 000.
- Mason and Dawson JJ
    - Damages would stay at 3 250 000.

Question 6(a).

- B = 21 300 000
- X = 4 500 000
    - 5 500 000 (planes) – 1 400 000 (salvage) + 400 (pre op expenditure)
- Y = 15 500 000
    - 3 200 000 (salaries) + 498 101 (pre op exp.) + 4 000 000 (maintenance) = 400 000 (facilities) + 410 000 (insurance) + 408 000 (misc. vehicles) + 2 825 420 (fuel) + 3 390 000 (borrowing costs) + 368 479.
- Z = 1 300 000
- Consequential Losses = 200 000.

Question 6(b).

- Starting point: In *Amann* the HCA assessed "reliance damages" because the presumption of recoupment coupled with the contingent commercial benefit of regaining the K meant that it was too difficult/ uncertain to assess "expectation" damages. In essence, because reliance and expectation damages are one in the same and here there is a prima facie "winning K", we will simply be assessing damages.
    - Note that all of the judges would have added interest to the final figures we will find.
- Mason CJ + Dawson J;
    - Calculate expectation damages as X+Z; 4 500 000 + 1 300 000 + 200 000
    - 6 000 000 (+ interest).
    - Took no account of chance of cancellation under cl 2.24 into account; thought a 1 in 5 chance was too negligible; didn't state what a large enough chance would be. On this basis no real basis to take a 1 in 4 chance into account.
    - Thus no discount.
- Deane J
    - Used B – Y + CL
    - treated the chance of cancellation under cl 2.24 as relevant;
    - 21 300 000 – 15 500 000 + 200 000.
    - 6 000 000 x 0.75 = 4 500 000 (+ interest).
- McHugh J
    - Different basis of calculating damages in that he accepted the 3 390 000 of borrowing costs as already incurred – a responsibility that they had accepted. Thus proportionally, X increases by the same amount as Y decreases.
    - McHugh discounted the damages awarded by the chance of termination under cl 2.24 but apparently arbitrarily he didn't discount termination payments; hypothetically this could be due to the security deposit being essentially a reliance interest (rather than a restitution one…), but the termination payments (indemnification interest) being consequential on the Commonwealth's repudiation. This can be criticised for not recognising that had the K been cancelled legitimately, Amann would have got nothing towards this cost!
    - (3 390 000 + 4 500 000 + 1 300 000 + 100 000) x 0.75
    - = 6 967 500 + 100 000 = $7 067 500 (+ interest).
- Brennan J
    - Used B-Y + CL and didn't discount; however he stated that if Amann were proving expectation damages that he might have discounted pursuant to Cl 2.24; had Amann borne the onus of proving expectation damages they would have had to allow for the chance of cl 2.24 being utilised; he accepted the Full Federal Court amount (20%) which here is 25%.
    - This makes his awarded damages the same as Deane J!
    - 21 300 000 – 15 500 000 + 200 000.
    - 6 000 000 x 0.75 = $4 500 000 (+ interest).
- Note that in this fact scenario, there would have been no majority!
    - McHugh would have awarded 7 067 500
    - Mason, Dawson and Gaudron would have awarded 6 000 000
    - Deane and Brennan 4 500 000
    - Toohey 3 000 000.

Misrepresentation

Starting Point

During negotiations and at K formation, the parties will make statements / promises to each other. Some statements will be incorrect; some promises will not be honored – the "victim" of this will want a remedy.

- either to escape K or claim damages (compensatory) for the false statement or promise not honored.
- whether there is a remedy (and which one) will depend on other things – the status / category the law attributes to the particular statement or promise;
    - what category does it belong to;
    - what legal status does the statement or promise enjoy?

Distinction between Incorrect Statement and Broken Promise

incorrect statement is, in law a misrepresentation.

- Statement: ***relating*** *to a verifiable (past or existing) fact that is* false;
- These also be promises in the sense that the representor accepts contractual accuracy for the statement; i.e. may be such a promise as the statement of intention to do something.
    - These are **terms of the contract**
- **Example**: House is on concrete foundations, has a new roof.
- **Example**: (Past fact); turnover of the business last year was $X.

Broken promise

- Promise: *referring to statement of intention that amounts to an undertaking to do or refrain from doing something in the future*.
- A promise to do something or refrain from doing something is not a breach of contract in the sense that failing to do it is a misrepresentation.
    - **Example**: D promises to do X; then doesn't.
    - If that promise wasn't honored, as such wouldn't call it one.
- A promise to do or refrain from doing something is only a representation to the extent that the promisor is implying their intention;
    - Can say that the *misrepresentation* is to the extent of the purported intention.
    - The statement might be a misrepresentation if the Promisor *never* had the intention of carrying out the promise.
        - On this case, is *fraudulent* the misrepresentation is the *promisor's intention*.
    - However, it is rare that the promisee can establish this dishonesty. Usually, the promisee wants to enforce the representation in this instance rather than receive a remedy for the misrepresentation of the state of mind.
    - In order to succeed in action for a breach of promise, the promisee must establish that it is a contractually binding term – that it is part of the K

Historical Treatment; finding a promise to be a misrepresentation

Historically – OBJECTIVE test; is it reasonable to infer that promisor intended to be bound (*assuming legal responsibility for the promise*). If the promise is **sufficiently unequivocal** and is **proven**, then it is likely the court will find intention to be bound.

Historic obstacles that CL placed in the way; **Parol (*extrinsic*) Evidence Rule** (still exists in diluted form): ***oral*** *evidence is inadmissible to add to, vary or contradict the terms of the written contract.*

- Where parties didn't record the promises in their written agreement; law assumes that *only written statements are intended to be binding*.
    - NB DMAC thinks this is a misrepresentation of the contractual formation process.
- In many cases this has prevented "**just outcome**" i.e. Court believes the P but refuses to accept evidence and thus tacitly accepts *fraud* on the part of D.

Equity comes to the rescue to some extent; **Equitable Remedy of Rectification**:

- Where oral promises were "forgotten" Equity would provide relief via **rectification** – i.e. puts it right. Would be unconscionable for P to seek to enforce K that doesn't reflect true intention of the parties.
- Thus notwithstanding the absence of the promise from the writing the courts would simply say "this is a part of the K" and will write it in. ***Where a promise was not included in the K due to a mistake, the court would write it in***

There were also many cases where promises were ***deliberately exempted***. One of the mechanisms to ensure enforcement was the **collateral contract**; whereby they inferred the separate promise was treated as a 2ndK – the consideration for which is the primary K.

- **Example**: oral/ informal promise (collateral K) and sale of land (principle K).
- Courts treated this as a way to get around Parol evidence rule.
    - Because they aren't adding terms – the written K contains all of the terms relevant and this oral K is separate.
    - Totally artificial – parties only intended one K. "*We are not adding terms; the second K is merely consideration for the primary K*."

But later, found that the **PER** was difficult;

- Later the court recognizes that don't need to invent a collateral K to get around **PER**. No reason in principle why parties cannot have a partly written and partly verbal K – unless there is a statutory requirement; **example** the sale of land (Property Law Act).
    - Courts got around **PER** by saying it only applied re. written K.
    - So the initially strict rule was boiled down to a presumption that if a document looks to be a complete record of the whole deal it should be treated as the whole deal.
    - BUT this can be rebutted – once court hears the evidence and believes it that promises not in the writing existed and were objectively believed and represented then it would take this into account.
- **Example**; passage of goods for ship at sea – on top deck; prior to K owner of the goods obtained *unequivocal promise* to keep goods *below deck*.
    - Nowadays, courts can say "will not allow writing to overrule what was said because this is the real K."

Entire Agreement Clauses

Position in the UK; Entire Agreement Clause – i.e. "Everything is contained within this written contract". Such clauses are conclusive, ***but*** can be **circumvented;** (**1**) Through a collateral contract – the extra terms consist of K2, (**2**) Mistake – once the oral terms have been clearly proven, there must be a mistake in the written contract.

Position in NZ re. Entire Agreement Clauses;

- **section 4 Contractual Remedies Act**; will only be conclusive where it is reasonable to treat the clause as conclusive and all the circumstances; look to
    - **Value** of the transaction
    - **Bargaining strength** of the parties.
    - **Legal advice** received by both parties.

Silence is not a misrepresentation – can strike a good bargain even when you know the other party doesn't know everything (Exceptions: some K's need to disclose full knowledge – such as Health Insurance K; need to disclose all medical evidence; medical K are K of the "utmost good faith")

CL position in NZ prior to Statutory Reforms (Contractual Remedies Act **and** Fair Trading Act).

Two dominant types of Misleading statements; (**1**) statements incorporated into K, were ***terms*** (**2**) unincorporated statements were ***mere*** **representations**; no right to relief unless P could show fraud or dishonesty – in particular no right to damages - had to show misrepresentation was a term of a K.

- Obstacles (above) get in the way. Gave rise to problems as well…

Incorporated Statements – Terms of the K

Gave right to relief via K measures;

Mere Representations – 3 categories

Innocent misrepresentation, common law wouldn't allow enforcement or remedy; Equity softens this through *rescission*.

- Equity softens the harshness of the common law – shouldn't allow the misrepresentor to enforce a K; either will deny Specific performance or more commonly allow ***rescission***. Unconscionable to allow enforcement.
- **Curious**: could get the "drastic remedy of rescission" for a ***statement*** where had it been a ***term*** would only have given a right to damages.
    - Essentially, the remedies became imbalanced – DMAC thinks this might have contributed to the need for statutory reform.

fraudulent misrepresentation; rescind K and gain damages for the tort of deceit.

- Situation 1; lie – knowledge of the falsity of the statement
- Situation 2; absence of belief in truth (don't know if it is) but don't know its false either.
- Situation 3; Recklessness – not caring either way.

Negligent misrepresentation; *Hedley Byrne v Heller* (1963) HL.

- Initially no distinction was drawn between purely innocent misrepresentations and *negligent* misrepresentation. *Hedley Byrne v Heller* clarified this.
- A negligent misrepresentation is a:
  - representation made without belief in its truth,
  - that is in breach of DOC owed to representee.
  - within a special relationship
- *Hedley Byrne* wasn't concerned with a "special relationship" arising through a K – it was concerned with a different special relationship.
  - wasn't clear whether there was a special relationship between 2 contracting parties.
  - this has been clarified now.
  - Still requires a *special relationship*
- *Example*
  - Property developer makes statements re. floor space/ materials re. apartments being built – it is reasonable to infer that the PD is *assuming responsibility* for the accuracy of the statements!

Terms

Warranty;

- A minor term of K – there is no basis for *cancelling* the K as it is relatively minor. V can only seek damages; but can do so for any breach.

Condition / essential term;

- An essential term "going to the root of the K"; V can get both damages and rescission
  - this is because a BK in this sense deprives V of the real benefit of the K.
- Example: Car dealer sells a "new car" V finds out that for short periods it was twice owned by other owners. Court is likely to say that it is a fundamental term that it is new. So terminate K and claim damages. Damages might be; amount over and above the purchase price to obtain a new model.

Innominate Term/ Intermediate Term/ Hybrid Term/ Honk Kong Term…;

- Some breaches may or may not
- Example: Ship is chartered – term of K that the ship is seaworthy; that term might be breached in minor ways (i.e. lack some safety stuff, or some documentation temporarily), OR it might be a ***serious*** breach (i.e. a rusty hull which will split); in the latter instance this has very substantial effects.
  - NOTE this is why the COA termination was wrongful in *Amann* – essentially they terminated too quickly.

Damages in both types of subcategories are different – the remedy has different objectives.

Unincorporated Statements

- **NM** and **FM** are both ***torts*** – the V is complaining about harm caused through reliance on the actionable and wrongful misrepresentation;
  - **reliance damages?**
- **we ask; how much worse off is P due to the wrongful conduct.**

Incorporated statements

- this is damages for BK – where the wrong is the breach of the promise;
- V is not saying they have been caused a reliance harm, rather that they haven't obtained the position they would have if the misrepresentation were true.
    - **Expectation damages?**
- Thus, for breach of a term we ask how much better of P would have been if the K had been performed. The right infringed is for an interest. V is entitled to demand the financial equivalent of the position they would have been in if representation was correct.

Note; **<u>statements that have no legal consequences</u>** – a "mere puff" exaggerated commendation that nobody could take seriously; NB is this ***subjective*** *or objective – what about older people? the feeble minded? the morons that hold back society?*

- Some of the older cases re. Mere puffs wouldn't be taken the same way today!

Statements of **<u>opinion</u>** will have no legal consequences; although they necessarily represent a statement…

Procedure; P might (a) try and establish *fraudulent misrepresentation*, then *negligent misrepresentation* or finally *innocent misrepresentation*.

- FM = rescission and damages
- NM = rescission and damages
- IM = rescission.

NOTE talking about rescission via Mere Representation in the sense that the entire K is entirely set aside and done away with; deemed never to have existed – this is because *equity* sees the K as not agreed with. Compare to rescission used in the **term** sense where it means to simply set aside the K – no obligation to continue.

Clef Acquitane **example – Art dealer (page 139)**

A offers to sell to B a Manet for $1m – B is induced to purchase thinking he can sell for $2m. Painting is a fake worth $1000.

- Damages in deceit is; ***the difference between the price paid and its actual value*****.**
  - $1m - $1000 = **$999 000 in damages.**
- Damages if a contractual warranty is given is; ***the difference between the price paid and the value had it been genuine*****.**
  - $2m - $1m = **$1m in damages**.
  - ***Problem here is that he has taken into account the price paid – we compare the actual position with the purported position*****.**
  - ***He should actually receive $2m - $1000; $1 999 000 in damages*****.**

Price paid in these cases should not be considered if there is a warranty!

Sometimes if you are calculating K damages the price will come into it; **Example**

A offers B house for $2m; A reneges when house values increase by 20-30%. B sues for damages after accepting B's repudiation. B pays $2.5m to acquire house in the same area.

- **The Damages B will receive will be the difference between the promised position and the position he ends up in – so $500 000.**

Vary facts; Even if the Manet was *genuine* painting was a lesser work; market value was only $700 000

- Award in Deceit would be: 1 000 000 – 1000; 999 000.
- Award under K warranty: 700 000 – 1000; $699 000 to put him in the position he would have occupied.
- **Here B has made a *bad bargain***

A offers to sell to B a Manet for $1m – B is induced to purchase thinking he can sell for $2m. Painting is a fake worth $1000.

- **Variation; proved that B would have bought a MONET *instead of* the Manet; on sale at $1m and it can be established that the market value was $800 000; in other words, if this K hadn't been entered into B would have entered *another* losing purchase. Look at Yam Seng case.**
- Damages in deceit is; ***the difference between the price paid and its actual value*****.**
  - $1m - $1000 = **$999 000 in damages; he would have lost $200 000 on the alternative transaction so simply remove $200 000 from the prima facie $999 000 damages.**

We are only concerned with alternatives in tort damages.

Contractual Remedies Act 1979

Misrepresentation is not defined in the Act; we take it at its CL face value – a statement that purports to be fact.

CRA 1997 Overview

Purpose was to rationalize and simplify the common law by **providing the same remedies for MR and BK**. Damages for **MR** are recoverable under the Act on the same basis as for BK; provided for in **section 6** (in many respects is the key provision of the act).

The effect was to ***abolish the distinction between Mere R and TK***. Process of **assimilating** these remedies is in **sections 7** and **8**; enact a set of rules governing ***Cancellation* of K** and **requisite criteria to be satisfied** – these criteria are the same for MR and BK!

Section 7; Statements giving rise to the right to cancel.

Under **section 9** the **Courts are given powers of wide relief** to grant remedies dependent on the "justice of the case".

- Restitution matters come down to *judicial matters*.

Statements giving rise to damages - categories

- Statements with no legal consequences.
- Statements giving rise to damages; ***important***; no need to prove that a representation is a TK – under s6 can get damages as if it was a term. For practical purposes abolishes the difference between terms and representations.
    - Misrepresentation
        - either Fraudulent or Negligent.
    - Breach of a term
        - We still have some statements remember that will be "promises" to do or refrain from something. O
        - Or alternatively something *in the written K* – i.e. We hereby warrant that the Businesses profit last term was X
        - However, P still needs to show that this was part of a K – this can be hard; essentially means that the **CRA97** may give rise to scenarios where promises result in a lower tier of punishment…
    - Breach of a collateral K
        - as an alternative to a Breach of Term, can use collateral K – gets around the PER.
            - *so PER is somewhat redundant?*

Section 6 of CRA97

Summary

- **Abolishes actions for FM and NM (can get per se damages for an IM)**; removes the need for P to show MR – don't need to categorize it as either a term or collateral K! subject to **ss4 and 5** P has statutory right to ***damages*** regarding an innocent MR made by the other party.
    - Previously, for MR could only receive *rescission* – no right at all to recover damages.
    - Under the **CRA97** the law is entirely different – remedy is damages.
        - Right to Cancel has been restricted.
- Actionable MR ***per se*** gives right to **KD;** no longer necessary to establish BK, no longer possible to bring tort actions. **Philosophy**; where D makes MR that induces P to enter K, should be responsible for that irrespective of fault.
- Removes "take it or leave it"; no longer needs to decide between K under-compensation or drastic rescission.
- Necessarily, because IM, FM, NM were amalgamated then the damages were changed to *TK* damages (i.e. BK) – the **tort of deceit** was essentially abolished.
    - measures were seen as important to help simplify the law – *note that nobody told the Parliamentarians of this act when they Passed the Fair Trading Act later*.

Conditions of Liability/ action;

- (1) show there was an MR
- (2) that MR (1) was made "by or on behalf of" another party to K (D or D's agent)
- (3) that MR (1) induced K entry.

Recover *Contract damages*; Damages under Section 6 is to be assessed as if the MR were *T.K*; But can no longer sue in tort.

- Nowadays, victims of MR usually have the ability to pursue the **Fair Trading Act** remedies.
    - There is a "statutory tort" under the FTA; so can't mislead or deceive – will need to pay damages; court can award damages for "loss suffered"
        - loss suffered is essentially the *tort measure of damages*.
    - Not uncommon for people to pursue both damages under **s9 FTA** and **s6 CRA97**.

Section 6(1)(b); cannot recover damages from "***that other party***" for **deceit or negligence re. MR**:

- Suppose the MR is by an *agent* who made the statement NM or FM;
    - (1) only the ***Contracting party who is responsible for the MR who is liable*** to pay damages under s6, as if the MR was a TK.
    - (2) only the Contracting Party who cannot be sued in Tort.
        - **personal Tort liability of Agents and 3rd Parties is *unaffected* by s6**.
    - Example
        - Real Estate Agent continues to be liable for FM or NM. Can't sue the agent under the **CRA97** – they aren't a *party* to the act; but you can sue them in tort.
        - Real Estate Agent's MR's make the *vendor* liable
- Liability may arise from a statement not made by the party, but by its agent.
    - **Section 6(1)**; MR "***by or on behalf of***" another party.
    - Real Estate Example Continued:
        - So a Real Estate agent statements that are FM or NM, may make the *vendor* liable in damages payable to the purchaser under s6. So Vendor can be sued for NM or FM by the purchaser;

        - So agent might be ordered to indemnify the Vendor if it is the agent's fault; so the agent has a fixed liability in quantum with the damages.
            - what about if the Agent is bankrupt?
            - there are examples of people going bankrupt for the FM or NM of their Agent.
        - The position would be reversed; if the Vendor passed on MR to agent, and agent became liable the Vendor might need to pay.
- Issue: "innocent misrepresentation made negligently"; seems to be an oxymoron
    - how can we have "innocent misrepresentation" *fault*.
    - At CL all non-fraudulent MR were treated as innocent; there was initially no remedy for IM until *Hedley Byrne*.

Differences between Contract Damages (KD) and Tort Damages (TD)

KD are designed to put P in the *post-K position* (forward looking!); P is being compensated for loss of bargain damages. This is assessed through **Purported Position – Actual Position.**

TD are designed to achieve *restitutio in integrum;* to put P in the pre-tortious-wrong position (looking backward!) and compensating for P's "**out of pocket losses**". This is assessed through **Expenditure – Actual Value**.

Recovery of Tort damages vs. Contract Damages under s6 CRA97 – the K measure

1. P will recover greater damages under **s6 CRA97** where, had the **R** been true his *assets would have increased or situation improved*. In this sense, **s6** enables a P who hasn't suffered a loss to be put in position he would have been – thus obtain benefit. ***Look to DMAC criticism 2; this can result in P being overcompensated at the expense of D***.

- Example: P is induced to buy land – NM – by D's *now insolvent* real estate agent; P buys the land for 100 000; the land is still worth 100 000 but if the **R** was true, land would have been worth 200 000.
- in the absence of a proven lost opportunity, P would have recovered no damages under tort measure, but now recovers $100 000 under KD in s6.
    - Now, may not be an unfair burden – at CL if P could establish that MR gave rise to Collateral K. However, collateral K would be with the *insolvent real estate agent*.
    - agents do not have authority to bind their principals contractually – REA only have *apparent* rather than *actual* authority; D could recover the damages he has to pay P from the agent, but agent is now insolvent.
    - this is a serious burden put on D
- P previously had 100 000 in the pocket, now has land! P previously had land, now has money! this money is now *gone*.

- Example: Art dealer; Where A Offers B a Manet. Says he will accept $1 000 000 for it – B thinks this is a good deal evidentially, if it were a real Manet would be worth $2 000 000; turns out to be a fake (duh). Evidence is established that unequivocally, A couldn't have known it was a fake; neither FM or NM, however it only has a value of $250 a pack of smokes and a box of

beers (highest bid that was made on it…). The K stipulates that none of the risk is on A regardless – call it an industry standard.

- B's interest of $1m – (250, beers and smokes) is retrievable.
- BUT s6 would put B in the position if the K was *real*; term of K… thus, A is liable to pay $2m – (250, beers smokes)
- ***Can it thus be said that in instances like this – where P has an "expectation" measure due to MR, that the effect of s6 acts as a "Warranty" did in the above fact scenario from Clef Acquitane?*** *Restitutio in integrum* seems valid ($1m – smokes/ beer and 250) but becoming B's guarantor less so…

Case Example: *Marlborough District Council v Altimarloch* (2012) SC.

- P will be worse off under CRA because the *tort* measure of damages is barred in instances where there are no K damages;
  Example: P buys D's house for 500k relying on D's MR that zoned for School; Actual value of the house is 450k and the reputation of the school is not such that the house would have been worth more if D's representation was true. As a result of buying the house, P is 50k out of pocket.
- Here, in tort could claim prima facie 50k.
- Under **section 6 CRA97**, there are no damages at all – court needs to ask how much better off P would have been if the MR was true, and here it makes no *financial* difference. This effectively means that D could lie provided that the value didn't change… ***Q: what about***
- TD; Price paid – value; 500 000 – 450 000 = 50k
- KG; Promised position – actual position? 450k - 450k; the 50k is *imposed by P*.
  - In this example, and the previous one, no damages are recoverable for the loss suffered even though the loss would have been avoided if the **R** was not made.

Case Example: *Capital Motors v Beechum* (1975) HC.

2. Sometimes, the "benefit of the bargain" will mean that KD and TD are the same; where the amount required to restore P to *status quo ante* is the same required to put him in the position he would have occupied post-K;

- either the K wouldn't have *improved* Ps resources or would have at least restored retention of status quo.
  Example: D induces P into purchasing a Painting; premise that it is a Manet worth 2 000 000; actually a Manet worth 1 000 000!
- Under **s6 CRA97**, P will recover the difference –1 000 000; this is ***also*** P's out of pocket loss!

3. P may not be better off under **s6** in situations where if **R** was true, position would be too uncertain/ speculative to examine or the contract measure is otherwise inappropriate – will only receive TD to *restitutio in integrum*.

- ***McRae v Commonwealth Disposals Commission* (1951) HCA.**
- ***Anglia Television Ltd v Reed* (1972) QB.**
- ***Commonwealth of Australia v Amann Aviation* (1991) HCA.**

4. P will recover less damages than under pre-Act law are those where he is induced to enter a losing K *irrespective of the MR*.

Example: P buys land from D due to **R**; pays $100 000 thinking that half the land is covered in timber; half of this only (quarter of the land is covered!) As a result, the land is worth $60 000. Evidence that if the **R** was true, land would be only worth $80 000.

- prima facie under TD; 40 000 (Price paid – value)
- Now, receives only $20 000 under KD (**s6 CRA97**);
    - This is literally half the expected amount recoverable under tort…

Variation to Facts; P can establish that but for D's MR, P would have offered and D would have accepted the land at price of $50 000.

- Damages in tort; price paid vs. price that would have been paid.
    - 100 000 – 50 000 = 50 000 *prima facie damages*.
    - P could recover the lost opportunity, even if the value of the land was the same as (or more than) the value of the land.
- such an award could be made, even if P had made a good bargain! Even if the land was worth $100 000; in which case Price paid and value are the same.
- *Clef Acquitane v Laporte Materials (Burrows)* (2001) EWCA.
    - Fraudulent K was a *lucrative K* but would have been even more lucrative without the MR. P recovered the price paid for goods in question and the lower price that P would have paid! ***Historically***, the court would have said that it was a K position – realistically was *restitutio in integrum*.

5. There could be instances where there is no *causal* connection sufficient to find **KD** – however; **TD** do not require an immediate causal connection between the MR and the loss; it is sufficient to show the MR has induced an *alteration of position* (such as K entry) and that loss flows from that altered position.

Example: P is induced to buy shares in co. by D's NM or FM that X (wealthy entrepreneur) has invested in co. P loses most of her money when the co. collapses; BUT it still would have collapsed even if X had invested!

- Can only pursue under **CRA97**; if acting for D can merely say – there is no *causal connection between MR and loss* – to put P in the position she would have been in if the MR were true doesn't result in compensation!

DMAC Criticism of Section 6

DMAC thinks that section 6 is misguided; 2 problems arise by the decision that damages were to be assessed by the Contract measure.

***Critique One**: the essential complaint of most victims of MR is that they have been wrongfully induced to enter K they wouldn't have if the MR hadn't happened.*

- they want it *undone*; the complaint is not "you broke your promise and must put it right", rather that the complaint is that they wouldn't have entered the K.
- Thus want damages for *reliance on representation* rather than *putting the statement right*.
- QUESTION: is this not the same thing?
- Since **section 6** is about reparation, the compensation is to ***rectify the statement***; will often lead to greater recovery (sometimes to an unfair degree) than P would receive under **tort**.
    - But in other cases, they have prevented recovery at all.

Example – First case in NZ for tort that recognized Damages recoverable for NM made by one contracting party to another;

***Capital Motors Ltd v Beechum* (1975) SC.**

Illustrates the theoretical availability of damages for NM in *tort* where damages are greater than the amount recoverable under BK. If this case came up again, would not recover damages due to **section 6**; the effect of the Act is to deny damages in tort!

Facts: D bought a car on MR (salesperson) that car hadn't had previous owners – it actually had 6… claims damages for MR; **was awarded $100**… the difference between the Price Paid and its Actual Value. **P had paid $1400 for a car worth $1300**.

Appealed: Seen by **Cooke J**:

- *Hedley Byrne* applied in respect of NM made from one party to another.
- Prima facie looks like a case with simple application – look at $K damages. The $100 put him in the position he would have been in if the MR was true in *both tort and Contract* at surface
    - Tort; P paid $1400 for car with Market Value of $1300 (result of multiple owners)
        - Recovers the difference; $100, and puts him in the positon he would have been.
    - Contract:
        - Amount required was prima facie $100; PP-AP.

BUT the first owner was a rental car company – ***this*** was what had altered the value. Thus, if the action had been brought in breach of Warranty as a TK, P could only recover nominal damages – the MR was not the cause of the loss! **Even if the MR had been true and the car had only had 2 owners, P would still have suffered a loss**!

- In Essence, P had made a *bad bargain*. But he could still recover in Tort… Essence of P's complaint is that he wouldn't have bought the car without the MR; and consequently need to be compensated for altering his position.
- **Doesn't need to be a causal connection between MR and the loss which is required by K law**. So the decision of **Cooke J** was correct, but problematic regarding Contract damages. And in modernity, would have to pursue under **CRA97**.

***DMAC Critique Two**: where the availability of (the equivalent of) **loss of bargain damages results in greater recovery than under the TD**, such damages could result in an **unfair burden being imposed upon D**. Here **s6** allows for a greater recovery than the original situation – where it would be rectified.*

- Effectively can be argued here that we are compensating for P's ***expectation*** interests and simultaneously in some instances acting as an *insurer* for P!

Case Example; *Marlborough District Council v Altimarloch* (2012) SC.

Facts: Representation was made by **agents who had no contractual authority** to bind principals contractually; **A purchased land in Marlborough at $2 675 000. Land was to grow grapes for wine**.

- note that this case was *complex*, and there were tortious elements as well.

- A had purchased after being **assured negligently by Vendor's** (1) **estate agent and** (2) **solicitors**, that the **land had resource consents permitting extraction of some 1500 cubic liters of water per day** for irrigation (a necessity for the grape vines). In reality, because the land had been subdivided **there were only rights for some 750 cubic liters**.
- Because of this the actual value of the land was $2 550 000,
  - PP = $2 675 000, AP = $2 550 000; and RV = $2 950 000 if R was true.
  - PP – AP = 125 000
  - These figures were found by the trial judge; but by the time it got to the SC, the cost of building the dam had *doubled*. The difference between AV and RV was *far higher*.
- **A found this out, went for damages under s6 of the CRA97**. Vendors were liable for the representations of their agents; despite being utterly innocent of the foul! Were thus technically liable for enormous damages.
- SC by 3/2 majority found damages of over $1m. **This represented the cost of purchasing *additional water rights* AND the cost of building a dam in which to store water for the future; these were the only ways of preventing future shortfall**.

Law

- Probably correct in the sense that **s6** makes MR part of the K.
- Compare to *Ruxley*? In this case it wasn't so wholly unreasonably expensive to build the dam.

David is concerned with D overcompensating V

- (**1**) Agents were joined as 3rd parties by the vendors ("defendants to the defendants"); and were actually ordered to compensate for the burden imposed on them. The agent was ordered to indemnify the vendors. Ended up needing to compensate for over 1 000 000.
  - Variation; the Agents were not worth suing – totally insolvent. Here the Vendors who were completely innocent would have needed to pay more than $1m out of their pocket… this deprives them of *40%* of a hard earned asset.. '
- (**2**) award of over $1m would be entirely unjust! CJ Elias referred to the disparity between the sum of $1m and the Price Paid differential and Represented value differential; the value of the land with and without the represented rights.
  - there is no doubt where CJ Elias' sympathies lay; she thought this was a "*Ruxley*" case where awarding the cost of cure was far too high.
  - **DMAC disagrees**; in Ruxley there was no difference between actual value and represented value. Here there was a substantial one. Perhaps, her sympathies would have been better directed to get parliament to reassess s6.
- Theoretically, the vendors were almost deprived of 40% of the asset. Historically, the purchasers would have been confined to their out of pocket loss – they wouldn't have been given the benefit of a bargain.

Section 7 of Contract Remedies Act 1979.

In line with objective of the act, the ability to terminate the K has been severely limited. The Act changes nomenclature from ***Rescission* to *cancellation***; the explanation (succinctly) is that **cancellation** only halts the K (neither party is required or entitled to perform the K further);

- Example: If bought a business, wouldn't be entitled to receive damages after *cancellation* – would need to go to court under Section 9
- ***So no absolute entitlement of what was conferred under K…***

Statements "giving right to cancel" are handled under **Section 7 CRA97**.

- (aside from Outright repudiation of K)
- Essential representations and TK;
    - expressly or impliedly agreed to be essential.
    - Example: Parties agreed that the truth of a representation is essential, then it is a TK.
- Misrepresentation and Breach having "substantial effects"
    - set out in the Act -

Fair Trading Act 1986

Introduction; 7 years after passing the **CRA97**, parliament passed this Act without even considering that is undermines its purpose!

Section 9 FTA; "*No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*."

- **Strict liability** – effectively a ***statutory tort***.
- Only **applies to conduct in *trade*** – essentially must be in a business context. Representation in selling a house or car on Trademe wouldn't be covered – if it was by a motor dealer or real estate agent, would be covered.
- One ***advantage*** under s9 FTA there is no need to show culpability in terms of either **Fraud or negligence**; this is a form of **Strict Liability Tort**.
    - One of the consequences of this section is that is has **essentially superseded the previously available common law action for MR**; do not need to show negligence or carelessness or breach of DOC as was necessary under *Hedley Byrne v Heller*.

***Civil* Consequences of contravening s9 is set out in section 43**;

- Essentially the court is given a wide discretion to make a variety of orders where a Person (A) has suffered damage or is likely to suffer loss from another person (B).
- These orders include (amongst other things)
    - subsection 3(f); order B to pay damages to A – compensatory *tort* measure for the losses incurred as a result of the conduct.
- an order can also be made relating to C – another person who was indirectly or directly knowingly concerned in or involved in a contravention of a relevant section
    - Effectively a person could be made liable to pay damages under s9 (including a vendor) who is not actually acting in trade….

- for example: I supply the wrong information to real estate agent knowing it will be passed on to prospective purchases – I'm not in trade; but can be liable as an accessory under section 43(1)(d);
  - this only applies where D has MR – knowingly takes advantage.
  - DMAC is unconvinced

Section 45; conduct of servants or agents

- essentially conduct within the scope of an agents actual or purported authority is deemed to be the action of the principal.
- Q; is the conduct *acting in trade*?

Curious elements of the FTA remedial provisions;

- (1) During passage of the Bill, Parliament deleted a provision that would have conferred a statutory right to damages for loss caused by misleading conduct; **DMAC thinks this was a mistake**! As we essentially copied the Australian equivalent, seems that they read an Australian Textbook that discussed an overlap (both referred to damages) between s43 and the provision giving a separate right to damages. Read this as meaning that the section conferring the right to damages was superfluous.
  - **Direct Consequence; instead of statutory right to damages for loss caused by misleading conduct (as in Australia), s43 provides for *judicial discretion*, part of which permitted damages.** CA in NZ has stressed discretionary element to damages under s43; both ***whether to award*** AND its ***quantum***.
    - Ordinarily, P will get the award – but strictly it is within discretion, and thus enable more discourse.
  - There was no conscious decision to remove damages as a statutory right; it was a mere mistake.
  - **Q** is it not ironic that to prevent this overlap, might have created the same one in NZ…?
- (2) **No attempt was made to harmonize the new schemes of remedies with the reforms enacted through the CRA97**; seems that CRA and s6 right to damages were "*simply overlooked in the rush to copy the Australian Act* – DMAC"
  - consequently, there are many situations where P will have **alternative remedies** under s6 of CRA and s9 of FTA.
    - Process; usually court works out relevant damages under either and the plaintiff chooses.
  - Undermines the holistic purpose of the CRA redefining the area of law.

Initially contentious area – measure of damages under s9

- In many of the early cases induced Party to enter into K with representor (or 3rd party**); question arose whether the Party was**
  - **Entitled to be put in the position they would be if the representation was true (KD/ expectation loss/ loss of bargain damages**),
  - **or the alternative view under which the award was limited to reliance loss (TD/ compensatory for the harm done**).
- DMAC thinks this should be a non-issue; examining the statute it is clear that the intended reading "damage caused" is the outcome; TD.
  - several cases have adopted the view that you can get K loss of bargain damages – expectation damages!
  - disapproved in *Cox & Coxon Ltd v Leipst* (1999) CA

Cox & Coxon Ltd v Leipst (1999) CA.

DMAC thinks **Majority are correct** (Gault, Blanchard, Henry JJ) (Minority Richardson P, Tipping J)

- "*minority dissent is not convincing at all*…." – DMAC.

Facts: Respondents bought lifestyle block with small orchard; in doing so they were provided property production and income statements at the pre-purchase inspection. Statement included that the property had rights to sell 58 boxes of pears – for $12 000; in reality previously had sold for $8800.

Majority held; that **P's claiming damages for MR can only claim for the damages that stem from reliance on the K. P cannot claim damages under the FTA in respect of benefits or advantages that would have been gained if the representations had been true**.

- [**(161) 21/3**] Citation from HCA in ***Marks v GIO Australia Holdings Ltd* (1998) HCA**; dealing with the equivalent Australian statute;
  - "The bare fact that a contract has been made which confers rights or imposes obligations that are **different from what one party represented to be the case does not demonstrate that the party that was misled has suffered loss or damage**…
  - A party that is misled suffers no prejudice or disadvantage **unless it is shown that that party could have**
    - acted in some other way
    - (or refrained from acting in some way)
  - which would have been of **greater benefit or less detriment** to it than the course in fact adopted."
- [**(162) 22/ 44**] from Gault J; "**Section 9** of the Act [FTA] prohibits conduct**, it does not render representations binding**. It is s6 of the Contractual Remedies Act **which in New Zealand has that effect**. The representation, if it induced entry into a contract, gives rise to a claim as on breach of contract with the measure of damages appropriate for that."
- [**(166) 26/ 19**]; "*Section 9 creates a duty not to mislead…*
  - *money may be awarded to make good or compensate for, loss or damage which has been caused by the breach…*
  - *remedy by way of monetary award is to put the wronged party in the same position as he or she would have been but for the wrong.*
    - [Where MR results in K] *for purchase of property the position to be restored is that which would have ensured had the MR not been made…*
  - *Had there been no MR, that is no breach of duty, there is no logical basis for asserting the purchasers here would have obtained the benefit now claimed.*
    - *If they would not have purchased at all, then prima facie the loss would be based on the difference between the value of the property and the price paid, or in some circumstances, the loss of an opportunity to buy a different property.*
    - *On the other hand, if they still would have purchased, the resulting loss could only be one arising in some collateral way, such as lost opportunity to buy at a reduced price or some other direct out of pocket consequence*."
      - **<u>Point XX</u>: this is DMAC's interpretation of what would happen with *Clef Acquitane* in NZ Law.**

- "Section 43(1) does not purport to make a representation enforceable against a representor. It says there is liability for loss or damage resulting from the representation…

- To hold that misrepresentation inducing a contract can give rise for expectation damages under s43(2)(d) is to turn on its head the whole rationale of the measure of damages for a civil wrong….
- In short there is no justifiable basis for construing s43(1) in such a way as to give a representee a right to enforce a representation which is misleading."

- DMAC Translation of Page 26:
  - If you can prove a lost opportunity - that you would have been even better off still if the misleading statement had not affected you, you can receive that instead.
    - I.e. where you are induced to buy property, worth what it was paid for it, BUT for the misleading conduct you could have secured it for a lower price, then you have still technically suffered a *loss*.
    - Look to *Clef Acquitane SARL v Laporte Materials (Barrow) Ltd* (2001) EWCA.
    - Point **XX above**.
  - An alternative available measure of tort damages where the facts justify that finding.
    - Finding that P has been denied the chance to make a better bargain.
  - Also means that a contentious case – such as *Clef Acquitane* could be decided the same way in NZ under the FTA!

Clef Acquitane SARL v Laporte Materials (Barrow) Ltd (2001) EWCA.

NB – remember this is under tort of deceit; essentially gone under NZ law…

Facts: Clef entered a K with Sovereign; Clef were obliged under K to purchase Sovereign's products and market and distribute them – this was induced under a FM concerning the discounts available to Sovereign's UK trade customers. The FM was a downright lie. Clef were told that the discounts that were allowing were the lowest discounts permissible! In fact, sovereign charged much lower prices.

- This means that they were locked into an agreement to pay higher prices than they would have been able to negotiate if the truth was told.
- **Council for Sovereign argued this was an illegitimate mechanism to achieve *expectation* damages (loss of bargain). Agreement was still profitable**; however, was not as profitable as it would have been if the truth had been told; if this was the case then Clef would have been able to negotiate lower prices, and make more money! **This is a *loss***.
- **EWCA awarded over 370 000 pounds (well over $1m NZD).**

This was not a loss of bargain claim, but a claim for being induced into entering K where if no MR had been made they would have been in a better financial position.

- This is a measure of harm done; if the facts reach the mark for Tort damages.
- Normal Measure – Price Paid – Value.
- If you can show you were deprived of the opportunity to secure a better bargain then can recover in respect of that!
- Although, *Clef Acquitane* was a tort case in deceit, the principle was applied in a context for a claim of damages.

Court essentially finds that P can suffer harm despite being better off; if the harm hadn't been committed could/ would have secured a better K.

Hypothetical; where purchaser buys property on MR from agent on behalf of the vendor. Induced.

- I.e. as to where the boundaries were, the features of the house, whether it was subject to a building restriction.

Cause of Action	Vs. Vendor	Vs Real Estate Agent
CRA – s6	Purchaser will have an action against the vendor under s6 CRA; V is liable for the RA. This is partially due to the fact that REA have *ostensible authority* for their statements; the Purchaser can rely on these.	REA is not a party to K; purchaser cannot pursue. If the REA ***exceeded its authority*** **(thus breaching K with vendor)** then the vendor will have a claim against the REA will *ideally* (i.e. might be insolvent) be responsible to **indemnify** the Vendor or compensate the vendor; realistically case will proceed similar to ***Altimarloch*** and REA will be ***joined as a 3rd party.***
FTA – s9	Need the vendor to be ***in trade***. • LAC or Land trust? One man company If the vendor is in trade, then he could be liable *even without knowing about the misrepresentation.* A *vendor without a business context* will not be liable. If it is merely a **private individual** where will they be liable? • If the vendor comes within **s43(1)(d)**; broad. • i.e. if **V** passed on false information can be liable.	Will be **liable**; they are a professional acting in trade. Job is to act responsibly and effectively. The REA's conduct is what induces the 3rd party into the K. **Can be sued under FTA but not CRA**. This can be vital – especially if the *bargain was not a losing one*; then when receiving TD the REA will be liable for nominal damages.
Tort (FM/ NM)	Possible action in NM or FM? No. Purchaser cannot be sued in tort. **Under s6(1)(b)**; no entitlement via FM or NM *unless* within CRA!	However, purchaser can sue the REA; within CRA s6(1)(b); omits to remove the ability to pursue ***the other parties i.e.*** REA in tort; Disadvantage of tort; need to establish liability if can find a NM + DOC or FM then REA will be liable in tort… note that the **same result can be achieved via s9 of FTA**; doesn't require fault, but under **FTA**, due to *discretion* might not receive desired outcome.
Breach of TK; *Conceivable but unlikely unless R was incorporated into K.*	Unlikely to arise; because REA cannot be making a representation that would have authority to bind a vendor. If there was a *term* that included the MR then would sue simply on BK.	

Comparison of Damages in Tort and Contract

KD are designed to put P in the *post-K position* (forward looking!); P is being compensated for loss of bargain damages. This is assessed through **Promised Position – Actual Position.**

TD are designed to achieve *restitutio in integrum;* to put P in the pre-tortious-wrong position (looking backward!) addressing the question "but for the tort's commission" how would P have fared; compensating for P's "**out of pocket losses**". This is assessed through **Expenditure – Actual Value**.

Tort Damages – damages under FTA s9

1. Primary situation; most cases.

   Price Paid – Actual Value

   (Ppd – AV)

2. Where there is a prima facie a winning contract, but P *lost an opportunity*; i.e. in *Clef Acquitane*

   Price Paid – Price Would have Paid

   Ppd – Pwp

3. Where P prima facie would have entered into an *alternate* losing K;

   TD(K1) – TD(K2);

   (Ppd – AV) – (Pwp – AV)

Contract damages – Damages under CRA s6

1. All cases calculate via the typical formula of:

   Promised Position – Actual Position

   PP – AP.

   PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*

   AP = *sum of costs incurred + any additional breach related costs*

2. Remember in K damages we are *not* looking at alternative K's that could have been entered – reflects the *forward looking* element.

Misrepresentation Question:

Under s6 CRA get Breach of K measures. Under s9 of FTA we get the tort measure.

Question 8 Tutorial Sheet:

(a) Breach of Contract Measure
- PP = 185 000, AP = 150 000
- PP – AP = 35 000.

Tort Measure
- Price Paid = 100 000
- Actual position = 150 000
- No damages – *prima facie* P hasn't made a loss; *restitution in integrum* demands no compensation.

(b) With modification.
- Breach of K measure
    - No change. The figures are the same in terms of value.
- Under the FTA, can argue that because P missed an "opportunity" of the $10 000 – *restitution in integrum*, despite the fact P profited needs compensating for that.

(c)
- Contract Damages
    - PP = 75 000 and AP = 60 000; still having spent 100 000;
    - Damages = 15 000; P has made a *bad bargain*.
- Tort damages
    - Price Paid = 100 000, AP = 60 000
    - Damages = 40 000

(d) Variation where P *could have entered another K*.
- Contract damages
    - completely uninterested – the same damages from (c)
- Under Tort damages
    - Difference between PP and AV; in the losing K would have only lost 20 000.
    - so mitigate – (40 000 – 20 000) = $20 000,