A Review of Contract Decisions in Manitoba, 1988-89-90

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I. INTRODUCTION

THERE WAS NO COMMENTARY on contract decisions for the 1988 season in the first Annual Survey of Manitoba Law because of a lack of sufficiently interesting or noteworthy cases. By including the 1988, 1989 and part of the 1990 years, however, I have been able to find seven cases worthy of remark. The majority of contract cases decided in this time span are simply too slight to tell us anything as observers of the law and its development. They are so often simply findings of fact with quick conclusions. Seldom is there any reference at all to authority and almost never any discussion of context or policy. Such cases are of interest only to their participants and have no wider meaning.

The seven chosen cases are from both the trial and appellate courts. They concern seven different aspects of contract law and are, for various reasons, deserving of attention. Perhaps the scarcity of noteworthy cases over such a long time would suggest that contract law is indeed moribund if not dead,[1] but these seven cases indicate the continued presence of a spark of life.

II. PRIVITY OF CONTRACT: *MOSS V. RICHARDSON GREENSHIELDS OF CANADA LTD. AND DAVIES*[2]

PRIVITY OF CONTRACT is a well-entrenched but certainly not a well-loved principle of our law. Waddams refers to the doctrine as "pure formalism unworthy of a mature legal system,"[3] and elsewhere it has

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[1] Gilmore, *The Death of Contract* (1974).

[2] [1989] 3 W.W.R. 50, 56 Man. R. (2d) 230 (Q.B.).

[3] Waddams, *The Law of Contracts* (2nd ed.) 1984 p. 201.

been argued that privity is inconsistent with every theory of contract law.[4] Nonetheless, the rule has been applied in all its rigidity by the Supreme Court of Canada as recently as 1980 in *Greenwood Shopping Plaza Ltd. v. Beattie*[5] to exclude third party benefits.

The case of *Moss v. Richardson Greenshields of Canada Ltd. and Davies*[6] somewhat resembles *Greenwood* but Darichuk J., while referring in passing to that decision, found privity to be no bar to a defendant desiring the protection of an exemption clause in a contract to which he was, allegedly, not a party.

In *Moss* the plaintiff had an account with the corporate defendant, entered into December 27, 1985. He wished to trade in a certain market (O.E.X. call options) and required a broker knowledgeable in that area. The corporate defendant referred him to the defendant Davies who became the plaintiff's exclusive broker for all of the plaintiff's many transactions over the following month. On January 28, 1986, the plaintiff gave Davies an order by telephone to sell 200 call options on the Chicago market. About twenty minutes later, the plaintiff called to revoke the sell order. The defendant Davies handled both these orders according to the established routine of the corporate defendant. Because of an unprecedented problem with the electronic system for transmitting orders, however, there occurred a delay of which the defendant Davies was unaware. The plaintiff's orders, along with everyone else's, were then transmitted to Chicago, in series, by telephone and the sell order was there executed before the countermand arrived. The result was that, although the plaintiff's options were sold above his stated limit price, had there been no sale he would have earned $30,000 more by waiting one more day to sell. He argued that the defendants had been negligent. The defendants, because of the delay caused when their electronic system "crashed," could in theory have stopped the sell order in time or never have telephoned it to Chicago at all.

Confronting the plaintiff was a clause in the Options Trading Agreement which he had signed when starting his account with the corporate defendant:

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[4] Flannigan, "The End of an Era (Error)" (1987), 103 L.Q.R. 564.

[5] (1980), 111 D.L.R. (3d) 257 (S.C.C.).

[6] *Supra*, note 2.

Gentlemen:

This letter supplements the Customer Trading Agreement which I have signed ... In consideration of your handling such business for my account, I agree as follows:

1. You shall have the right to determine whether an order is acceptable and to limit positions which you are prepared to undertake for my account, and at your discretion to require options to be traded on a cash only basis during the last ten days prior to expiry of such options. You shall not be liable to me for errors or omissions in the execution, handling, purchase, exercise, or endorsement of any option contracts including qualifications as to time for my account unless caused by your gross negligence or wilful misconduct ...

The plaintiff argued that the defendant Davies could not claim the protection of this clause because of the principle of privity of contract; that is, the contract being between the plaintiff and the corporate defendant, Davies was a stranger to it, and faced full liability for ordinary negligence. Darichuk J. found no gross negligence[7] and that Davies was a party to the contract and dismissed the action.

The matter of third parties and exemption clauses or "vicarious immunity" was extensively canvassed by the House of Lords in *Scruttons Ltd. v. Midland Silicones Ltd.*.[8] There, a negligent stevedoring company wished to take advantage of a limitation of liability clause in a contract of carriage of goods by sea, between the owner of the goods and the shipping company. This shelter was denied by the House of Lords on the basis of the privity principle. In *Canadian General Electric Co. v. Pickford & Black Ltd.*[9] the Supreme Court of Canada accepted that *Midland Silicones* correctly stated the law for this country too. These cases involved entities employed on a one-time basis by a contract party to perform a certain task; for example, in *Midland Silicones* to unload cargo from the ship at its destination port. These entities are, vis-a-vis the contract party, independent contractors, or sub-contractors.

Privity in the context of exemption clauses has also been levelled at servants of contract parties to expose them to liability for their negligence even though their employers are contractually immune. In

[7] I do not comment on this aspect of the decision, it being outside my area of interest.

[8] [1962] A.C. 446.

[9] [1971] S.C.R. 41.

Adler v. Dickson[10] the plaintiff was physically injured while attempting to board a ship, through the negligence of some employees of the transportation company. The plaintiff's ticket excluded liability for the negligence of the company. The plaintiff succeeded against the careless servants who were held not to be covered by the clause for lack of privity.

Akin to this case was *Greenwood Shopping Plaza.*[11] The plaintiff was the lessor to a Canadian Tire outlet of space in a mall. In the lease, the plaintiff was obliged to secure fire insurance and contracted not to grant subrogation rights against the Canadian Tire franchisee to the insurer. Two employees of Canadian Tire negligently caused a devastating fire while welding. The action represents the claim of the insurer against these two tortfeasors on a subrogation basis. The defendant workers attempted to hide behind the lessor's promise in the lease to their employer, but they were unsuccessful. The Supreme Court of Canada held them to be strangers to the lease agreement and therefore vulnerable even though their employer could have invoked the clause had it been sued.

In *Greenwood* the defendants raised the so-called agency argument which, if successful, would have brought them within the charmed circle of protection. The argument had been suggested in *Midland Silicones* by Lord Reid and is to the effect that on certain conditions, it can be found that when one of the parties contracts, it does so both for itself and at the same time as agent for another. By ordinary rules of agency law, then, this 'other' becomes a principal to the contract and may directly claim applicable benefits. The agency argument conditions are that:

> ... (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.[12]

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[10] [1954] 3 All E.R. 397 (C.A.).

[11] *Supra*, note 5.

[12] *Supra*, note 8 at p. 474 per Lord Reid.

All four conditions were met in *New Zealand Shipping Co. v. A.M. Satterthwaite & Co.*[13] and an exemption clause in a bill of lading was extended by the Privy Council to limit the liability of negligent stevedores. This exception to the privity rule has been adopted in Canada in *Dyck v. Manitoba Snowmobile Association*[14] which was not a carriage of goods case, and in *Int. Terminal Operators Ltd. v. Miida Electronics Inc.*,[15] which was. Both of these cases involved third parties who were independent contractors, not employees; stevedore/warehousers in the latter case and a race-course official in the former. *Greenwood*, of course, pre-dated these cases but did recognize the agency argument. The Supreme Court of Canada, however, in *Greenwood* found itself unable to apply the agency principle, unfortunately, because it appears that the Court did not have before it a full transcript of the trial evidence and therefore had no evidentiary basis upon which to find the agency link.

It seems, then, that the door has been left open in Canada to utilize the agency argument even where employees are involved, as opposed to independent contractors. Still, the road to vicarious immunity is not smooth because of Lord Reid's fourth requirement that there be consideration flowing from the third party. Where this party is an independent contractor, consideration is relatively easy to find. In *New Zealand Shipping* and *ITO*, for example, the third parties provided the essential work of unloading and storing cargo, respectively. In *Dyck* the race-course official performed a service without which the snowmobile competition could not have occurred. Much harder to see is what consideration the two workers in *Greenwood* provided in the context of a lease agreement between their employer, a Canadian Tire franchisee, and its landlord. Whereas the plaintiffs in the other "agency" cases clearly required and would have asked for such directly beneficial services as unloading, storage and officiating, what would the landlord in *Greenwood* have asked for but that the rent be paid by the tenant? This point was not raised in *Greenwood* but it should not be overlooked. It highlights the essentially artificial, ponderous and exacting nature of this so-called exception to privity. Far better would

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[13] [1975] A.C. 154 (P.C.).

[14] (1982), 136 D.L.R. (3d) 11 (Man. C.A.); aff'd. [1985] 4 W.W.R. 319 (S.C.C.) with no real discussion.

[15] [1986] 1 S.C.R. 752.

be a head-on confrontation with privity and an honest admission that its time has come and long since gone. Instead, we have continued recognition of the doctrine and contortions to avoid it.

Moss is, thus, refreshing. Although Darichuk J.'s reasoning and analysis are far from exhaustive, his conclusion makes eminent good sense. The stockbroker, Davies, he said, was not a stranger to the contract and based his decision on internal indications of the clause itself and on some externalities of this contracting milieu.

The document itself was addressed to "Gentlemen," not to the corporate entity. It called for the defendant's "handling" of the account and provided for exercise of judgment and discretion in determining "whether an order is acceptable," when to "limit positions" or to "require options to be traded on a cash only basis." These factors contemplated active participation in the transactions by an entity capable of such thought processes, a human being. Darichuk J. recognized that in the instant business, stockbrokers are crucial and, given that corporations can only act through human agents or servants, the language of the clause must have been meant to include the account executive, Davies. Externally, Darichuk J. noted that the plaintiff requested a broker with expertise in the area and dealt with him exclusively and very closely (the plaintiff telephoned Davies every half hour on a daily basis). Most telling, thought Darichuk J., was that Davies himself negotiated and granted volume discounts on commissions to the plaintiff. These discounts came directly from Davies' own pocket. The unavoidable implication here was that Davies was a party to the agreement.

Presumably, Darichuk J. thought it was unnecessary for him to consider the *Greenwood* case as binding. It is the case most closely resembling *Moss* because it involved employees and not independent contractors and was not a case of carriage of goods complete with a bill of lading including a standardized "Himalaya" clause purporting to cover servants, agents and/or independent contractors. In *Greenwood* the agency argument foundered for lack of evidence (as did the allegation of a trust). McIntyre J. of the Supreme Court of Canada did not appear even to consider the argument that the servants were covered by necessary implication in a clause granting a benefit to their employer.

It is to be hoped that Darichuk J.'s approach will not be confined to the facts of this particular case. Perhaps the nature of this business, necessarily involving as it does, a close personal relationship between the customer and the stockbroker, easily leads to the implication of intention to include the broker as a party. On the other hand, the

basic fact remains that any corporate entity cannot perform contracts except through human agents or servants. Slavishly to apply the rule of privity so as to differentiate the corporate and human players in this context means that bargained promises may often be circumvented *via* tort actions against employees. If employees are found liable to customers for various losses, no doubt good employers will undertake to foot the bill. In the result, the plaintiff achieves coverage it had bargained to forgo and the defendant ends up paying despite a promised immunity. Surely the more sensible approach would be automatically to identify employees with their employers in this context so as not to upset commercial expectation and balance and not to encourage lawsuits against mere employees.

This approach was taken in *Greenwood* at the lower court levels. The aspect of the lease in question could only be made meaningful, said the lower courts, if its provisions were extended by implication to cover employees of the Canadian Tire franchisee; otherwise, a mockery would be made of common sense, commercial practice and labour relations. MacKeigan, C.J.N.S. said, "I would think an employer in such a case as this, and its employees (who may well include principal shareholders) and their union, if any, would take for granted the intent to protect the employees from liability and not merely the corporate entity, the employer."[16] If a contract party is willing to forgive imperfections in performance, it makes sense that the forgiveness should extend to those who actually do the performing, the workers.

The agency argument probably would not have worked in *Moss* given Lord Reid's first two requirements, although clearly any problem of consideration moving from Davies is non-existent. Davies agreed to reduce his own remuneration by negotiating lower commissions for the plaintiff on account of volume trading. Darichuk J. has nicely avoided any convoluted approach of agency or trust, by going to the heart of the matter and indicating that the doctrine of privity really makes no sense in the context where the third party is an employee.

It may be that in some cases such as *Adler v. Dickson*,[17] using the doctrine of privity would allow for a recovery felt to be justified but

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[16] 99 D.L.R. (3d) 289 *sub. nom. Greenwood Shopping Plaza v. Neil J. Buchanan* at 295 (N.S.S.C.-App. Div.).

[17] *Supra*, note 10. Compare, however, *Dyck v. Manitoba Snowmobile Association*, *supra*, note 14, where there was physical injury to the plaintiff and yet the Court applied the agency argument to extend protection to the tortfeasor, an independent contractor.

otherwise contractually precluded. Physical injury, however, is a far cry from purely monetary loss and, in any event, such cases are probably better approached by attacking the exemption clause itself rather than skirting it through the doctrine of privity.[18] Retention of privity as a strategy in the odd case of recovery for physical injury caused by careless workers, as in *Adler v. Dickson*, is too high a price for our legal system to pay, and, in any event, the *Dyck* case shows that it will not always work.

The doctrine of privity really brings nothing of value to our law of contract; on the contrary, its tendency is to allow parties to thumb their noses at obligations willingly undertaken while, at the same time, retaining contractual benefits. Over fifty years ago, the U.K. Law Revision Committee called for the law to be changed with regard to privity[19] and only recently the Ontario Law Revision Commission in its important *Report on Amendment of the Law of Contract* recommended legislative abolition of the rule against third party rights in contract.[20] It is time.

III. EXEMPTION CLAUSE: *AURORA TV AND RADIO LTD. V. GELCO EXPRESS LTD.*[21]

EXEMPTION CLAUSES[22] are a ready source of court cases. One more occurred in *Aurora TV and Radio Ltd. v. Gelco Express Ltd.*[23] and resulted in the judge colourfully condemning the clause as "gobbledygook."

The plaintiff, in August, 1988, retained the defendant to transport from its place of business in Brandon to Calgary, Alberta, a used video cassette recorder (VCR). A Gelco representative attended at Aurora's

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[18] Arguably, an even better way would be to outlaw exemption clauses where individuals suffer physical injury or death by reason of negligence as has been done in the U.K. *Unfair Contract Terms Act 1977*, (1977) c.50.

[19] 6th Interim Report, 1937, Cmd. 5449.

[20] 1987, p. 71.

[21] (May 10/90) 89-02-226 (Man. Q.B.).

[22] Such clauses are variously referred to; I use "exemption clauses" although "limitation," "exclusion," "exoneration," "exculpatory" might be just as apt.

[23] *Supra*, note 21.

premises and the defendant's standard form bill of lading was completed. The plaintiff's employee did not read the bill of lading before initialling it in the space marked "Shipper's Signature." The defendant's employee did not point out any terms and conditions of the bill. The VCR was never delivered in Calgary, or anywhere else, and no explanation was ever forthcoming as to its disappearance.

The defendant accepted responsibility for this loss but claimed that its liability was limited to $4.41 per kilogram of weight according to the bill of lading. It had also provided that the customer could declare a higher valuation for goods to be transported and pay 3% per $100.00 of declared valuation but the plaintiff had not done this. The VCR had weighed about 5 kg. and had a value of $699.95. The defendant offered $10.00.[24]

The plaintiff sued for the full value of the VCR in Small Claims Court and succeeded. The defendant appealed to the Queen's Bench where Oliphant J. upheld the lower decision.

The limitation relied on by the defendant had two parts. On the front of the waybill appeared, "Maximum liability of $4.41 per kilogram computed on total weight of the shipment unless declared valuation states otherwise." At the foot of the front page, "TERMS AND CONDITIONS ON REVERSE SIDE" was printed in red ink. On the back, under the heading "Declared Valuation" were three paragraphs. The first repeated the $4.41 per kilogram figure and explained that it could be replaced for a payment of 3% per $100.00 of declared value. The third paragraph asserted that the bill of lading represented the sole contract between the parties. It was the second paragraph upon which the case turned:

> This limitation of liability shall apply notwithstanding any disclosure of the nature or extraordinary value of the goods, the amount of any loss or damage, including without limitation consequential, indirect or incidental damages including loss of earnings or profit, in any manner resulting, whether or not from negligence, from loss of or damage to the goods and/or delivery,[25] failure to deliver or delay in delivery of the goods for which the carrier may be liable.

Oliphant J. concluded that the clause was inadequately brought to the attention of the plaintiff at the time of contracting and, therefore, was to be disregarded. He went on to say, however, that even if proper

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[24] Should the figure not have been 5 x $4.41 = $22.05?

[25] Should this have been "*mis*-delivery"?

notice had been given, he would still have allowed the plaintiff to recover fully, for on construction of the contract, the clause could not have been intended to withstand the effects of fundamental breach of the contract.

The judge's conclusions on the notice issue are noteworthy. Especially interesting is what he did not say or even take into consideration: he was dealing here with a signed document. Signatures have long been regarded in the law as the very best evidence of assent, vulnerable only to the forces of misrepresentation or duress. In *L'Estrange v. F. Graucob Ltd.*, Scrutton L.J. said:

> In cases in which the contract is contained in a[n] ... unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application where the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or I will add, misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not.[26]

In more recent years, this strong statement has been somewhat modified. An important case is *Tilden Rent-A-Car Co. v. Clendenning*[27] where the majority held the defendant's signature not to represent a binding consent to a particular exemption clause contained in a car-rental agreement. *L'Estrange* was noted but the court, *per* Dubin J.A. found that a signature will not avail where a party is aware, or should be, that the signer has not, in fact, assented to all the terms or where there would be no reasonable expectation of such a clause being in such a document. In *Tilden*, crucial considerations were that: the clause was "unusual and onerous," "stringent" and completely inconsistent with the over-all purpose for which the contract (for extra insurance) was entered into; the transaction was carried out at speed because of the plaintiff's advertised policy of doing business so as to put the customer into the car as soon as possible, by discouraging a reading of the agreement or any discussion or explanation of it by Tilden employees; the exemption clause was on the reverse of the signed portion of the document in very small type, almost illegible on the customer's copy; a consumer was involved.

Clearly, only the small type consideration applied in *Aurora*. The clause is not at all unusual or onerous and is not inconsistent with the

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[26] [1934] 2 K.B. 394 at p. 403.

[27] (1978), 83 D.L.R. (3d) 400 (Ont. C.A.).

over-all purpose of the contract. After all, the defendant does not purport to eliminate all liability, but merely to limit it to a certain dollar amount unless the customer wishes to purchase additional coverage. In *Tilden* it was the additional insurance coverage itself which was then, unexpectedly, reduced to nothingness by the clause in the event of certain matters not brought to the customer's notice. That is not the case in *Aurora*. If added coverage were purchased, its amount would not be reduced.

Furthermore, the atmosphere of contracting was widely different. The plaintiff was contacted in its own premises, not in a busy public setting, and could have taken time to read the waybill. We know of no policy of the defendant to hurry the transaction or to stifle discussion.

Finally, the plaintiff was no consumer needing the protection of the court against a more sophisticated and experienced commercial concern. The plaintiff was itself a commercial concern, perhaps a small one, but no "babe in the woods." No doubt such a business is well aware, on its own behalf, of legal matters such as liability, limitation of liability, contractual documents and insurance.

It would have been highly desirable for Oliphant J. to have considered the status of the signature in this context, given that he based his decision on lack of notice. The authority he cited on notice was *Firchuk v. Waterfront Investment and Cartage Ltd.*,[28] a case involving a signed document, it is true, but also featuring a consumer signatory with limited ability to read or understand English. The case pre-dates *Tilden* and, in any event, turns as much on other concerns as it does on notice. Far more relevant would have been *Atomic Interprovincial Transport (Eastern) Ltd. v. Geiger (Paul) Trucking Ltd.*.[29] The matter involved was not an exemption clause but rather a clause in a contract between the plaintiff hauling business and an independent contractor hired to haul for the plaintiff. The defendant's representative had signed a standard form, non-negotiable contract in 1975. In 1977 a new clause was inserted into the contract so that if a surcharge (premium rate increase) were added to the plaintiff's insurance policy as a result of any accident caused by the defendant's driver(s), the defendant would have to reimburse the plaintiff. The defendant's representative did not read the 1977 contract but was told by the plaintiff's agent that it was just the same as the earlier one. On

[28] (1969), 8 D.L.R. (3d) 337 (Ont. Co. Ct.).

[29] (1987), 47 Man. R. (2d) 42 (Q.B.).

this assurance, the defendant signed. This scenario was repeated in 1978. An accident in 1981 triggered off the clause, but the defendant refused to pay the $44,000 surcharge imposed on the plaintiff.

DeGraves J. found the defendant not bound by the agreement. He approved of *Tilden* to the effect that a party cannot rely on unusual or onerous clauses in a contract where that party knows or ought to know that they do not accord with the intentions of the signer. Indeed, there is a duty to call such clauses to the attention of the contractor or make reasonable efforts to do so. He also found that the plaintiff had misrepresented the 1977 and 1978 contracts to the defendant by omission in failing to indicate the new clause and that, therefore, apparent consent by the defendant was nullified. It is doubtful that *Atomic* really applied *Tilden* because misrepresentation has long been judicially acknowledged as a disruptor of signatures. Insofar as *Tilden* was being applied, its application would seem to rest on the presence of unusual, onerous or stringent clauses.

Even a reference to *Nikkel v. Standard Group Ltd.*[30] would have been preferable to Oliphant J.'s silence, although it is a disappointing "analysis" of the signature question. There a consumer signed a contract to purchase materials for building a quonset on his farm. He made it abundantly clear that time was of the essence and yet no suitable material was ever delivered to him in sufficient quantities to build the quonset by his deadline date. The plaintiff repudiated and asked for return of the purchase price. The defendant pleaded clause 7 which stated *inter alia* that specifically excluded was any warranty that the goods were suitable for the purpose intended by the buyer. Morse J. was referred to *L'Estrange* by counsel but merely said he preferred the *Tilden* approach, without saying what he thought that was, or why it was pertinent. Speculation suggests that Morse J. thought the clause onerous as it would have relieved the defendant of any obligation to deliver suitable materials in the specified time, which was of clear and basic importance to the plaintiff. As well, he had earlier noted that the document was meant to be signed on its front but made no reference to any terms being on the back. He concluded that the defendant had not taken reasonable steps to bring the clause to the plaintiff's notice and could not rely upon it. Also, it should not be forgotten that a consumer was involved on the one side and a commercial concern on the other.

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[30] (1982), 16 Man. R. (2d) 71 (Q.B.).

From Oliphant J.'s complete disregard of the signature in *Aurora*, are we to conclude that in Manitoba a signature is not even a factor to be considered in the question of contractual notice? *Tilden* cannot be said to have erased all meaning from signatures. Morse J.'s decision in *Nikkel* is too insubstantial and unconsidered to be adopted as a precedent and *Atomic* seems really to have been based on misrepresentation and, in any event, still requires the unusual and onerous before upsetting a signature. Oliphant J.'s analysis of the notice question is, therefore, inadequate.

Supposing the signature to be a matter of indifference, other aspects of the notice issue must be considered. What is required is that reasonable notice be given; actual notice is not needed. For two reasons Oliphant J. concludes that the defendant's efforts to notify fell short. First, there is the question of physical 'noticeability.' Oliphant J. said the print was too small to be read easily without magnification. Also, there was the fact that the heading for the clauses did not indicate that they contained limitations. On the other hand, this small print was not the only indication of limited liability. The front page of the bill of lading stated the $4.41 per kilogram maximum and there is no suggestion that it was illegible or "hidden" under an innocent heading. It might be said that a reasonable recipient of such a document ought to know that *some* kind of limitation is involved and perhaps ought to ask about it, especially in a commercial context, as here. Red lettering alerted those who would bother to read, to the terms and conditions on the back. If it is the smallness of the print itself which disqualified the clause, it is a pity we do not know how small the type was.

The second facet of Oliphant J.'s notice decision is an intriguing one. Assuming that enough had been done, physically, to draw the clause to the plaintiff's attention, there was, nevertheless, a failure of notification because the clause was incomprehensible. The usual question raised about the contents of an exemption clause, is whether they are sufficient in scope to cover the event liability for which is being excluded or limited. It is in this context that the *contra proferentem* rule of interpretation is useful. So often the defendant has acted negligently and seeks to avoid liability through a clause in the contract. The wording will be 'read against' its proponent and if it can refer to some other form of liability, it will be held not to apply to negligence. Only if the clause is clearly and unambiguously related to

negligence[31] will the court allow it to erase or cut down liability for such activity.

In the clause in *Aurora*, the reference to negligence was explicit. Oliphant J., however, found the clause unclear and ambiguous, although he omitted to say in what respect. Legally, the clause appears to be very wide in its compass, covering all damage or loss, direct or indirect, caused by negligence or elsewise and stemming from loss or injury to the goods or from delivery problems. Yet, Oliphant J. called it "legal gobbledygook." He found it "incomprehensible in its attempt to cover almost every possibility."[32] Since the wording was so comprehensive, it must be that Oliphant J. found it grammatically non-viable. Admittedly, the clause is dense and hardly accessible, even after several readings. It is a long sentence, difficult to parse. I think it means that, beyond the $4.41/kg. or other declared value, the defendant will not bear its legal responsibility for loss or damage of any sort:

(direct)	or	(consequential, indirect or incidental including loss of earnings or profit)

which, in whatever manner:

(negligent)	or	(non-negligent)

results from:

(loss or damage to the goods)	or	([mis?]-delivery, failure to deliver, or delay in delivery)

or some combination of these.

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[31] Or by "necessary implication" refers to negligence. See e.g. *Consolidated Plate Glass (Western) Ltd. v. Manitoba Cartage & Storage Ltd.* (1959), 20 D.L.R. (2d) 779 (Man. C.A.).

[32] *Supra*, note 21 at p. 24.

Arguably, some sense can be made of the clause but Oliphant J. was impatient in the face of such verbiage. If the wording is not immediately plain, the defendant has simply not given reasonable notice; "... the notice cannot, in my opinion, be said to be reasonable if the clause is unintelligible because of its complexity."[33] This finding raises the questions: To whom must the clause be comprehensible? What standard of grammatical availability is it to meet? Should it be plain enough for the most unsophisticated consumer or for another commercial enterprise? Could legal wording ever be plain enough for some? When will wording cease to be "gobbledygook" and take on enforceable meaning?

Cases on notice have usually been concerned with such things as size, placement and timing of alleged notices, not with their grammatical complexity. One has every sympathy with the idea that notices should be understood by those to whom they are directed. One would not wish, for example, to stand puzzling in front of some warning sign as, meanwhile, a hideous danger gathered itself to pounce. Similarly, clauses in contracts of a standard form meant to cover almost all classes of customer and levels of transaction value, should explain themselves. Short of legislated wording, we cannot have answers to the questions raised by Oliphant J.'s second requirement of notice but it may have the salutary effect of causing drafters of exemption clauses in standard form contracts to be ever mindful of that wonderful goal - clarity.

Oliphant J. continued his judgment, however, to say that in the event reasonable notice had been given, he would still have concluded against the defendant. The reasoning concerns the "doctrine" of fundamental breach. This concept has enjoyed a lively history since its birth in *Karsales (Harrow) Ltd. v. Wallis*[34] and I do not propose to retrace it. Suffice it to say that Oliphant J. accepts, following the Supreme Court of Canada in *Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.*[35] that it comes down to a matter of construction of the contract. Even where a breach can be said to extend to the very foundation of a contract, the parties may have anticipated this and contracted about it. It may be that they agree to forgive such breaches

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[33] *Ibid.*

[34] [1956] 1 W.L.R. 936 (C.A.).

[35] [1980] 2 S.C.R. 718.

entirely or to limit liability for them. It is understood, especially in a commercial setting, that parties make their own insurance arrangements in the full awareness that certain contractors do not agree to become insurers of property whenever they become involved in some fashion with it.[36] Where fundamental breach has occurred, an exemption clause may yet operate, if it is clearly meant to cover the mishap. It seems the basic question is whether these parties, in these circumstances, on an objective analysis, intended this clause to govern.

Oliphant J. cited several cases on fundamental breach in the context of carriage of goods and concluded that, following *Cathcart Inspection Services Ltd. v. Purolator Courier Ltd.*[37] and not following *Lotepro Engineering and Construction Ltd. v. Air Canada and Canadian National Railway Co.*,[38] failure to deliver at all qualified as a fundamental breach. He agreed that the question whether such a breach was covered by an exemption clause was a matter of construction and adopted the test as set out by Grange J.A. in *Cathcart*: whether, looking at the contract as a whole, it is fair and reasonable to attribute to the parties the intention that the limitation clause should survive, notwithstanding a fundamental breach by the party in whose favour it was drawn. The clause must be read *contra proferentem*, of course, and must clearly convey its intent.

In *Aurora* there was no evidence to explain the disappearance of the VCR and the defendant admitted that it could have been stolen by one of its employees. Following *Punch v. Savoy's Jewellers Ltd.*,[39] Oliphant J. said that where loss is inexplicable and theft is a real possibility, the carrier of goods should be liable unless there is a clear exemption for loss through theft by employees of the carrier. The clause in *Aurora* was too unclear to cover such theft and so the plaintiff was entitled to recover the full value of the VCR. This conclusion seems inescapable. The parties cannot be said to have contemplated loss through theft by the defendant's workers. There is no apparent reference to it in the clause; rather, loss is contemplated through damage or delivery problems caused by carelessness, not the deliberate misdeeds of employees.

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[36] *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] 2 W.L.R. 283 (H.L.).

[37] (1982), 139 D.L.R. (3d) 371 (Ont. C.A.).

[38] [1982] 2 W.W.R. 630 (Alta. Q.B.).

[39] (1986), 54 O.R. (2d) 383 (C.A.).

IV. NON EST FACTUM: *CAMPBELL ET AL. V. SOOTER STUDIOS LTD.*[40]

IN CONTRAST WITH the total disregard of the existence of a signature in *Aurora, Campbell et al. v. Sooter Studios Ltd.*[41] dealt with a plea of *non est factum* where the existence of a signature is the crux.

The plaintiffs, through their predecessor, had leased space in a shopping mall to the defendant under a three-year lease from 1984 through to June 30, 1987, at a rent which ultimately reached $577 per month. The plaintiffs drafted and sent to the defendant a proposed new three-year lease through to June 30, 1990, at a rent beginning at $700 per month and escalating to $900 per month. The defendant was unreceptive to such a large increase in rent. It altered the term of the lease to one year and made a corresponding change in total rent from $28,000 to $8,700. The document was signed and returned to the plaintiffs. They signed, not noticing the changes, although they did see that the defendant's corporate seal had not been affixed. The lease was sent back to the defendant to cure this omission. The seal was affixed and the document went back to the plaintiffs who only then realized what they had signed. They immediately protested but the defendant remained in possession, paid $700 a month and vacated the premises as of June 30, 1988.

This action was brought, *inter alia*, to recover double rent for 1987-88, for the prior lease had included that penalty for overholding. The defendant took the position that it had been in occupation as a tenant under a valid one-year lease at a rental of $700 per month.

In an objective analysis of the offer and acceptance, the court found that such a lease existed. The offer by the plaintiffs was for a three-year lease. The defendant counter-offered for a one year agreement and the plaintiffs, apparently, accepted when they signed and notified the defendant. Jewers J. relied only on a passage from *Chitty on Contracts*,[42] to establish the law that the subjective views of the parties to contract formation are irrelevant. The plaintiffs' argument that there was no contract for lack of a true meeting of minds quickly, and unsurprisingly, failed.

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[40] (August 22/89) 88-01-28813 (Man. Q.B.).

[41] *Ibid.*

[42] 25th ed. p. 25.

The plaintiff, however, relied on the principle of mistake in signing a document, *non est factum*, in seeking to be excused from this ostensible contract. The plea is that the party was the victim of such mistaken understanding that the signature, usually such a powerful totem in the law, ought to be regarded as void.

It is seemingly odd and even out of place for this plea to be made in a case where the original two parties to the document are the only ones concerned. *Non est factum* has usually been raised only in situations where an innocent third party has relied upon a document apparently duly signed but which is actually the product of a fraud. The signer, who has also been defrauded, will be driven to argue the voidness of the document so as to withstand the intervening third party rights. Fraud allows for rescission of a contract induced by it, but rescission will not be granted once equity's darling heaves into sight. Only mistake rendering the original document a nullity will help the signer.

In *Campbell*, a two-party case, the basic problem is in high relief: there was no fraud here. Certainly, the parties had had a prior three-year lease and certainly, because of telephone conversations and correspondence, the defendant well knew that the plaintiffs were thinking always in terms of a three-year lease renewal; nonetheless, there was nothing fraudulent or misleading in what the defendant did. The defendant was found not to have said or done anything in advance to indicate agreement to the plaintiffs' proposals. The changes were made legibly on the plaintiffs' own document. Granted, the defendant did not include a covering letter or in any other way point out its alterations, but no real argument could be made that there was any legal or moral requirement to do so. The defendant had no way of knowing that the plaintiffs were not in fact agreeable to the terms of its counter-offer. If the plaintiffs made a mistake here, they did so on their own and through no inducement by the defendant.

The court, however, treated the case as one of potential *non est factum* and reviewed the law. Unfortunately, the review is a cursory and inadequate one, as it does not take into account or even refer to crucial case law of the last twenty years.

The court referred in a long quotation to Cote, *An Introduction to the Law of Contracts*[43] in which the author explains that a basic test for *non est factum* is that the pleader must have mistaken the very kind of document involved. An error as to its contents, no matter how

[43] 1974, p. 140.

egregious, is irrelevant. Particular emphasis was placed on one of Cote's examples, "... mistaking a one-year lease for a 99-year lease would not do, for that would be an error as to a mere term of the transaction."[44] Jewers J. concluded that the plea of *non est factum* is:

> ... only available where the mistaken party is under a misapprehension as to the very nature of the document, and not merely as to its terms - no matter how important those terms may be. In this case, the plaintiffs were well aware that they were signing a lease for certain premises, and so knew, essentially, what they were signing although they were mistaken as to some important terms.[45]

In light of the review of *non est factum* by the House of Lords in *Saunders v. Anglia Building Society*[46] in 1971, this "character/contents" test is now highly suspect. It was clearly jettisoned in *Saunders* for a more flexible approach; that is, the document signed must be "fundamentally" or "radically" or "totally" different from the one contemplated but need not be different in kind before the doctrine can be invoked. In the Supreme Court of Canada, in *Marvco Colour Research Ltd. v. Harris*[47] decided in 1982, it was unnecessary to discuss this question and Estey J., for the court, left it open, but did take note of the changed United Kingdom position.

With respect, the new approach seems preferable to the old. Surely Cote's example sets out the essential poverty of such a test. It could be quite as devastating to find oneself in a 99-year lease instead of a one-year lease, as to discover one had entered a sale as opposed to a lease. Should it really matter that the misrepresentation is of a specific kind, so much as that it causes an important (or fundamental, or radical) blunder?

There has never been any judicial sentiment that *non est factum* should be easy to establish. The power of the signature is not readily eroded and besides, innocent third parties ought to be able to rely on apparently good signatures for reasons of business efficacy. This new direction by the House of Lords might then seem to signal a weakening of these values. The House of Lords, however, in *Saunders* also

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[44] *Ibid.*

[45] *Supra*, note 40 at p. 9.

[46] [1971] A.C. 1004 (H.L.).

[47] (1982), 141 D.L.R. (3d) 577 (S.C.C.).

spoke extensively about the other prong of *non est factum*, the carelessness of the signer. Earlier case law, especially *Carlisle & Cumberland Banking Co. v. Bragg*[48] had established that carelessness in signing was no bar to *non est factum* except where what was signed turned out to be a negotiable instrument. The House of Lords firmly rejected this notion and overruled the *Carlisle* case. The negligence of the signer is most relevant, no matter what the type of document signed. The court made it clear that, in this context, the word "negligence" was used in the general sense of "carelessness" and not in the legal, tort sense.

The degree of carelessness which will preclude *non est factum* may not yet be clear, but its role in this doctrine has now also been firmly established in Canadian law. In the *Marvco* case, the Supreme Court of Canada approved of *Saunders* and overruled an earlier decision of its own, *Prudential Trust Co. Ltd. v. Cugnet*,[49] on this point. *Marvco* suggested that where a literate, competent adult signs, there is an estoppel at work. The onus is on such a person to rebut the presumption created by the signature that it is an indicator, of the very best sort, of assent.

If the plea of *non est factum* might have been relaxed as to the nature of the mistake made, it has been tightened with respect to the question of the signer's negligence. This seems to be the appropriate focus. Given that the error is a serious one, what excuse has the signer for failure to take care before signing something? This makes the plea no less rare in succeeding but bases it on a more rational enquiry.

In Manitoba, since the *Saunders* case, the state of the law of *non est factum* has been re-examined. None other than Dickson J.A. (as he then was) pondered what effect *Saunders* would have, in *Commercial Credit Corp. v. Carroll Bros. Ltd.*;[50] but left the matter open and found the plea available on either of the new or old bases. In *C.I.B.C. v. Shotbolt*,[51] Kroft J., on the facts, found the defendant signer not to have been careless. He referred to *Saunders*, apparently with

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[48] [1911] 1 K.B. 489 (C.A.).

[49] (1956), 5 D.L.R. (2d) 1 (S.C.C.).

[50] (1971), 20 D.L.R. (3d) 504 n. (Man. C.A.). Dickson C.J.C. was part of the panel that heard *Marvco* but merely concurred with Estey J. and gave no separate reasons.

[51] [1981] 5 W.W.R. 738 (Man. Q.B.).

approval, on the question of the relevance of negligence, since he devoted much of his judgment to deciding whether the defendant could have been careless enough to have precluded the plea, surely an otherwise otiose task. As for the character/contents test, it is not clear what Kroft J. thought. He used the phrase "fundamentally different" but then also said that if a party "failed to understand the precise meaning and content of a document, but did have a good idea as to its nature and purpose, then the defence will not succeed."[52] In the case, the signer was misled into thinking an indemnity agreement form was merely a character reference for his sister-in-law who was purchasing a mobile home. The blunder would seem to meet either the old or the new test.

After *Marvco*, the Manitoba Court of Appeal had occasion to consider *non est factum* in *National Bank of Canada v. Digest Reporting Services Ltd. et al.*[53] and clearly followed that decision. The majority (Matas and Philp JJ.A.) agreed with the trial judge that the defendant signer, a 67 year old woman with very poor hearing and only a Grade IV education, had not been so careless in signing an unread and unexplained guarantee of her daughter's business debt to the bank, as to bar a plea of *non est factum*. As well, the majority found that the plaintiff was derelict in its own duty to take care and could not be classified as an innocent third party. Huband J.A. dissented. To him, the mother had been amply careless; she may have had limited formal education but she had been in the work force for many years as a practical nurse, understood the meaning of words such as "guarantee," was under no pressure, had in no way been misled about the paper she was asked to sign, knew it was to help her daughter's position with the creditor bank, and did not take the opportunity to read it or even have it explained, out of indifference or laziness. He also found no fault on the plaintiff's part. With respect, the dissent seems the better view on these facts. In *Marvco*, Estey J. had said the question of negligence would, of course, involve a canvass of the circumstances of each case, but that it would require something "exceptional" to excuse an adult literate signer for not reading a document or having it explained.

To return to *Campbell et al. v. Sooter Studios*, the decision seems inexplicable. There is no dearth of clearly relevant and essential case

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[52] *Ibid.* at p. 748.

[53] (1985), 35 Man. R. (2d) 284 (C.A.).

law in Canada or in Manitoba and yet Jewers J. was content to base his decision on a single text book reference now considerably out of date. In fairness, because of the Supreme Court's failure to deal with the character/contents test in *Marvco* and given that the *Commercial Credit*, *Shotbolt* and *National Bank* cases cannot be said to have changed the law on the point, it might be said that it is still the law in Manitoba. On the other hand, the concept has long been the subject of adverse criticism by commentators[54] and has been discredited and discarded in *Saunders*. Such a change in thinking should not have gone unremarked by the court in *Campbell*. Maybe the difference between a three-year lease and a one-year lease is not radical or fundamental or total, but the old test should never have been applied without any discussion. Is the old character/contents test still the law, then, in Manitoba, despite the winds of change in other jurisdictions, or was the court in *Campbell* unaware of those winds?

I think the correct result was achieved in *Campbell*, but the better basis for it would have been negligence. Instead, there is only one brief reference to the fact that the mistake here could easily have been avoided "if they [the plaintiffs] had taken care to check over the lease before signing it."[55] Indeed the plaintiffs would have been hard pressed to mount any sensible argument against the obvious conclusion that they were careless. They were all experienced businessmen who were so versed in commercial lease matters that they drafted their own legal documents. No one misled them. They were under no pressure to sign and could have examined the lease at their leisure. If they noticed the absence of the defendant's corporate seal, what prevented them from noticing the defendant's changes? These signatures had to stand.

V. STATUTE OF FRAUDS: *DECORBY V. DECORBY*[56]

IF THE PRESENCE OF A SIGNATURE in one context can cause trouble, its absence may cause just as much difficulty in another context as, for example, in *Decorby v. Decorby*[57] decided in the Manitoba Court of

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[54] e.g. Waddams, *The Law of Contracts* (2nd ed. 1984) p. 224.

[55] *Supra*, note 40 at p. 9.

[56] (March 10/89) 467/87 (Man. C.A.).

[57] *Ibid.*

Appeal and varying the decision of Oliphant, J.[58] The plaintiff sued the estate of his deceased father, claiming specific performance of an alleged contract whereby the deceased was to have left his farm to the plaintiff. The deceased's will (executed in 1971) had, instead, left the farm to all of his seven children equally. The defence was the *Statute of Frauds*[59] since the alleged contract concerned an interest in land and was entirely oral; there was no signature by the father, let alone any writing that could operate as a sufficient memorandum under that statute.

Of course the *Statute of Frauds* has been repealed in Manitoba,[60] making this province unique in Canada. The repealing act came into effect on October 1, 1983, but we may expect litigation under the *Statute of Frauds* for some time to come, although the incidence of it should diminish as the years go by. Section 2 of the repealing act states that the *Statute of Frauds* still governs contracts of certain types made before October 1, 1983, such as the one posited in *Decorby*.

Decorby is a typical fact situation. A child is claiming the family farm from a deceased parent's estate on the basis of an alleged contract whereby the child was to be willed the land if he (the claimant is usually a son) assisted his parent to operate and maintain the farm until the parent's death or decision to retire from farming. Nothing is ever put into writing; the contribution of the child is variable over time and never clearly defined. The child may or may not receive some form of compensation for his efforts; the real pay-off is expected to be the testamentary donation of the land. These arrangements are mutually beneficial. The parent retains the security of ownership of the farm and obtains for free valuable physical assistance in the task of farming. The child has the security of expectation, the confidence that his unpaid work is really an investment in a future, very worthwhile, asset. As *Decorby* demonstrates, however, these arrangements are fraught with legal problems and

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[58] *DeCorby v. DeCorby* (1987) 49 Man. R. (2d) 136 (Q.B.). Note the different spelling of the name. I use 'Decorby' as did the Court of Appeal. Note also that the headnote of this report incorrectly states that, "The Saskatchewan Court of Queen's Bench allowed the son's action ..." [!].

[59] 29 Car. 2, c.3.

[60] *An Act to Repeal the Statute of Frauds*, S.M. 1982-83-84 c.34 (F158). Note that the Manitoba Law Reform Commission had recommended retention of the *Statute of Frauds*, albeit with extensive modification. MLRC Report on the Statute of Frauds, 1980, no. 41.

may end in a failure of expectation with resultant litigation, costly in financial and familial terms. The *Statute of Frauds* is but one of the several legal barriers to the establishment and enforcement of such agreements and its repeal may make very little difference to the rate at which they find their way to court.

The *Statute of Frauds*, almost from its inception in 1677, was recognized as a two-edged sword. It might prevent injustice by stopping the unscrupulous from claiming contracts where none existed, but it was also capable of causing injustice by rendering valid contracts unenforceable for lack of a technical or formal requirement. Equity came to the partial rescue by developing the doctrine of part performance.[61] The claimant may give evidence of acts done in performance of the contract which, if sufficiently strong, will remove the matter from the purview of the *Statute of Frauds* and allow for its specific performance. There has long been uncertainty over the justification or theoretical basis for this intervention,[62] with one view being that part performance represents a different kind of evidence of the contract, equivalent to a signed memorandum, and the other that it prevents injustice to one who has relied on the contract to the extent of benefitting the other party who (or whose estate) now denies any obligation to compensate. Decorby, Junior argued that his several years of work on Decorby, Senior's farm amounted to acts of part performance sufficient to oust the *Statute of Frauds* requirement of a signed writing.

The Decorbys, Senior raised their seven children on three quarters of a section of farm land near McAuley, Manitoba. In 1971, Mrs. Decorby died. Five of the children had already left the farm and a sixth did so on her mother's death. Only the plaintiff, the second born, was still resident on the farm and he was the only one who wished to make a living as a farmer. The others had all been attracted to different livelihoods. He was then aged 29, having left school permanently at the age of 17. His father was 80 and, increasingly, the plaintiff did the work of the farm in both its grain and cattle components. He did carpentry on run-down farm buildings and repaired the farm machinery. He installed water and septic systems for the farm house at his own expense, although he was at the same time installing

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[61] *Butcher v. Stapley* (1685), 23 E.R. 524.

[62] See e.g. Bridge, "The Statute of Frauds and Sale of Land Contracts" (1986), 64 Can. Bar Rev. 58.

the plumbing in his own mobile home parked close to the farm house. In 1973, the plaintiff purchased a half section for himself and paid for it within the year. By 1976 he had bought a further section of land, but he continued also to work on his father's farm. The plaintiff received no wages for his work but he had spending money from his father as needed. There was a crop-sharing agreement between the two which resulted in a modest income for the plaintiff who re-invested most of it in the farm. He acquired $150,000 worth of machinery from and for his own operations. In 1970 he had been given twelve cattle by his father as a wedding gift and he soon established a fairly large-scale cattle operation of his own. By about 1974 the father's cattle business had "petered out." From 1971 Decorby, Senior's health steadily failed and he died in 1979.

At trial, Oliphant J. found an oral contract whereby the plaintiff was to have the farm by his father's will if he stayed and helped his father run the operation. This was despite the fact that they never once had a discussion about a will; the plaintiff had just assumed that was what his father meant when he said the farm would be the plaintiff's one day because the plaintiff "had stuck by him on the farm." The plaintiff's older brother, Jacques, supported this testimony by reference to casual remarks made to him by their father which gave the impression of an "arrangement" between the plaintiff and the deceased concerning disposition of the land. One of their sisters, Edith, however, gave evidence that the father spoke always of an equal sharing, but Oliphant J. found Jacques' testimony more persuasive given that it was against his own interests. In the Court of Appeal O'Sullivan J.A., speaking for himself and Lyon J.A., merely said that there was ample evidence to support at least an implied contract as alleged and offered no discussion on the point.

With respect, the judgment of Huband J.A. on this threshold question seems more compelling. He found that there was certainly no explicit contract, nor was there a contract by implication. The evidence of formation of the alleged contract was remarkable for its vagueness. The plaintiff himself said that Decorby, Senior wanted him to have the farm because "I stuck by him when the times were hard and the kids were young."[63] There was no evidence of mutual promises, one by the plaintiff to provide services in the future and one by the deceased to make a new will. In fact, it seems that the word "will" never passed their lips in this context. Huband J.A. then considered whether the

[63] This sounds like simple gratitude or past consideration.

parties' conduct could indicate the alleged agreement and concluded in the negative. Jacques' testimony did not support the alleged contract of a testamentary gift in return for services. At best it suggested an unspoken notion that the plaintiff would have the farm someday. He said it was "more an understood thing" than any obviously settled arrangement. Huband J.A. was unprepared to find, on this flimsy basis, a contractual duty which would denude the father of his right to will his property as he saw fit.

Huband J.A. also pointed out, although it was not argued, the difficulty presented when a contract is alleged between family members. In such cases the plaintiff is faced with a rebuttable presumption that no legal consequences are intended for domestic arrangements. He cited *Balfour v. Balfour*[64] for the basic proposition and *Jones v. Padavatton*[65] to show its application to parent/child arrangements. These are based on mutual trust and affection and not intended to create legal rights. *Lazarenko v. Borowsky*,[66] he noted, applied this reasoning to an arrangement giving rise to an expectation of inheriting land. Finally, he used *Cross v. Cleary*[67] to caution against the danger of a court's concluding "out of thin air" that a contract exists where one of the parties is now dead and cannot give evidence and where there is a probated will to the contrary. In such a case the court should be very slow to find a contract unless the evidence is very strong.

Huband J.A., nonetheless, went on to assess the argument of part performance on the assumption that a parol contract existed. Oliphant J. had found part performance with emphasis on the provision of valuable service by the plaintiff for twenty years with no wages and only a "pittance" for an allowance, the re-investment of his crop share proceeds in the father's farm, the repairs done to the farm buildings and, most particularly, the installation of sewer and water systems in the farm house at his own expense. All three Court of Appeal judges found no part performance, with Huband J.A., again, providing the much more in-depth analysis of the doctrine itself and the facts of this particular case.

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[64] [1919] 2 K.B. 571 (C.A.).

[65] [1969] 2 All E.R. 616 (C.A.).

[66] [1966] S.C.R. 556.

[67] (1898), 29 O.R. 542 (Div. Ct.).

There is a difference of opinion among the judges about the test to be met in the doctrine of part performance. All agree that the starting point is *Maddison v. Alderson*[68] from which two formulations have emerged. The more formidable test is that the acts of part performance must unequivocally point to the very contract alleged and to no other. The gentler test is that they must unequivocally and in their own nature refer to some such contract as that alleged; in other words, the acts must indicate a contract of the class alleged and be consistent with it, whereupon parol evidence will be let in to explain the exact contract involved. In *Steadman v. Steadman*[69] the test was broadened when the House of Lords said that the payment of money (usually an equivocal act, absent parol explanation) could amount to part performance. The test might then be reformulated: the acts must be referable on a balance of probabilities to some contract (any contract) and be consistent with the one alleged.[70]

In Canada the position is somewhat unclear. In *Deglman v. The Guaranty Trust Co. of Canada*[71] the Supreme Court of Canada took a restrictive view and determined that the acts must be referable only to a contract concerning the very lands in question and of the type alleged. It has been debated whether subsequent cases have relaxed this position,[72] but the Supreme Court of Canada has not itself reviewed the matter since *Steadman* and in its light.

In *Decorby*, Oliphant J. used the narrow test:

> I therefore find that not only has the plaintiff proved the parol agreement but he has satisfied me, as well, that his actions, over the years, were in part performance of that agreement and clearly and unequivocally referable to the agreement.[73]

In the Court of Appeal, Huband J.A. canvassed the authorities, noting the narrow Canadian view and the liberal United Kingdom approach,

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[68] (1882-3) 8 A.C. 467 (H.L.).

[69] [1976] A.C. 536 (H.L.).

[70] See Waddams, *The Law of Contracts* (2nd ed. 1984) p. 175.

[71] [1954] S.C.R. 725.

[72] e.g. Fridman, *The Law of Contract* (2nd ed. 1986) p. 216-217.

[73] *Supra*, note 58 at p. 145.

and concluded that there had been no relaxation of the narrow *Deglman* standard. He said that however the test might be stated, the plaintiff had failed to establish part performance sufficient to overcome the *Statute of Frauds*.

O'Sullivan and Lyon, JJ.A., simply disagreed with their brother's conclusion that Canadian and United Kingdom law diverge on the test. O'Sullivan J.A. for himself and Lyon J.A. said, "... I see no difference in the law of Canada from the law of England in so far as concerns the 'doctrine' of part performance."[74] He quoted from *Anson's Law of Contract*, "The view that the acts of performance must be referable 'to no other title' than the alleged contract has long been exploded,"[75] a remark made in reference to *Steadman*. O'Sullivan J.A. then said "I agree that the acts of the plaintiff are consistent with a contract being in existence but, unfortunately for the plaintiff, they are also consistent with there having been no contract."[76] No analysis of the facts was made against the test selected. This is regrettable in view of the trial judge's finding that the plaintiff's acts had met the most stringent test. It would have been enlightening to know in what respect the acts fell so far short as not even to meet the most relaxed test. It is more regrettable that the apparent adoption in Manitoba of the more liberal standard was not accompanied by some explanation beyond the terse statement "I see no difference..." Commentators have argued in favour of this test but doubted its adoption in Canada.[77] It would have been helpful to know the reasons of the majority for taking this direction.

Interestingly, a Manitoba case, *Clubb v. Clubb*,[78] some twenty years before *Steadman* used the flexible test, but this case does not appear to have been cited in *Decorby*. Tritschler J. in 1954 stated the test as follows: that "the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the

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[74] *Supra*, note 56 at p. 3-4.

[75] (25th ed. 1979) p. 82 n.6.

[76] *Supra*, note 56 at p. 4.

[77] See Fridman and Waddams in their works cited, *supra*.

[78] [1955] 4 D.L.R. 654 (Man. Q.B.).

contract alleged."[79] *Deglman* was also decided in 1954 but is not referred to in *Clubb*. *Clubb* is a good example of how the soft test would operate. In a simplified version of the facts, the plaintiff son was to be left a quarter section of farm land near Morris, Manitoba by his mother's will, if he provided a house for her twilight years in Winnipeg. He purchased a house in the city in which she lived for twelve years, expense-free. He lived there too but only for three years whereupon he moved to Ottawa to establish his career and family. The mother later moved into an apartment where her expenses were paid by another son. The plaintiff sold the Winnipeg house and kept the proceeds. The mother made no complaint about this changed plan, nor did the other son who all along had worked the mother's quarter section of land along with his own. Four years later the mother died but her last will had changed the recipient of the quarter section from the plaintiff to her grandson, the plaintiff's nephew.

Tritschler J. found part performance of the oral agreement. The purchase of a house for use by his mother, expense-free, by a young man whose means were then far more slender than his parents' was an act beyond filial duty, was consistent with, and could only be explained by, the existence of some sort of contract. Parol evidence could then be admitted to explain the exact contract. This case would have failed on the *Deglman* test. The plaintiff's action had nothing to do with the land in question, the quarter section of farm land owned by his mother and worked by his brother. It did not unequivocally and in its own nature point to a contract to leave the land by will to the plaintiff son.

Huband J.A. in *Decorby* hewed to the traditional test requiring a high degree of connection between the acts and the alleged contract. In his analysis of the acts in question, they fell short of the standard. They certainly did not indicate a contract to will the land in return for services rendered but neither did they by necessary implication show any contract at all in regard to these specific lands. They were equally consistent with the acts of a grateful son who had had rent-free accommodation from his emancipation and an excellent training ground to hone the skills he needed to be a farmer, his desired career, and who was thus enabled to establish his own thriving farm. He stayed behind while all his siblings left, but, then, he had wanted to stay. His activities did not change one whit after the alleged contract

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[79] *Ibid.* at 659. He was quoting from Fry, *Specific Performance* (6th ed.) p. 278. Note that the headnote in *Clubb* inaccurately reflects Tritschler J.'s finding.

was made. His duty to his father (whether contractual or merely filial) in no way impinged on his own upward progress in the agriculture business. He gave up nothing in order to help his father realize a wish to stay on the farm as long as possible and, indeed, was himself highly benefitted. With respect, this conclusion seems preferable to that of Oliphant J.

Huband J.A. clarified that the acts to be considered were not those done in the twenty years before the father's death; that is, since the plaintiff was 17. Whatever may be thought of Oliphant J.'s perception of the appropriate test or its application to the facts, it is obvious that he ought not to have referred to twenty years' worth of the plaintiff's acts. Since the doctrine of part performance, by definition, attaches to acts done pursuant to an alleged contract, only those acts done after formation of the contract can be relevant. In *Decorby* evidence of contract formation was sketchy at best but no one ever suggested that the contract was made when the plaintiff was 17. The most likely timing of it was 1971, the date of the mother's death. Only then did the last of the siblings leave the farm, only then did the father's health begin to falter, and only then did the children, or some of them, begin to ask after their father's situation and intentions. Such evidence as there was to indicate a contract occurred about this time. Thus, eight or nine years of the plaintiff's conduct should have been scrutinized, not twenty. It is unclear whether the majority appreciated this point, or simply did not think it mattered, given their finding of no part performance.

The Court of Appeal, thus, unanimously reversed the trial judge's decision to order specific performance by a transfer of the land to the plaintiff. They, however, agreed with Oliphant J.'s alternative finding that the plaintiff was entitled to a payment on a *quantum meruit* basis for services rendered, although they varied the amount from $50,000 to $30,000. This remedy is a lesser one in that it does not allow for specific performance of the contract but only for compensation at a reasonable rate for services rendered, where it can be shown that they were not meant to be gratuitous and were requested or freely accepted by the defendant. In such a case fairness requires the one who has had the full benefit of such service to pay for it lest there be unjust enrichment.[80] The valuation is of the benefit conferred, not of the expectation lost, and so a *quantum meruit* recovery will most likely be at some lower level than that contemplated in the contract.

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[80] *Deglman v. The Guaranty Trust Co. of Canada*, *supra*, note 71.

None of the judges gave any basis for the figures reached here. Such valuations are often very difficult given the informality of the situation, lack of records, and ill-defined services expected. It was observed by Oliphant J. that the plaintiff had received, over the years, much less than a hired hand would have for all his work, and so perhaps that was the benchmark, but this is speculation.

Given the clear willingness of Canadian courts to look to the law of restitution for a remedy to contracts unenforceable by reason of the *Statute of Frauds*, perhaps it is no wonder that they have not developed a wider test of part performance on their own, or adopted *Steadman*. On the other hand, this approach seems wishy-washy. If injustice is looming why not be more forthright and award the robust remedy of contract enforcement through use of a wider test of part performance?

If the majority truly is endorsing the wider test for part performance in *Decorby*, that is a development to be applauded. The people of Manitoba have demonstrated their view that the *Statute of Frauds* is not useful, by repealing it. Although it continues to touch contracts made before October 1, 1983, surely the courts of Manitoba should apply the *Statute of Frauds* in as flexible a way as possible to cut down its interference in the contractual affairs of Manitobans.

VI. CERTAINTY: *MEGILL-STEPHENSON CO. LTD. V. WOO*[81]

Contract formation can be a tricky business indeed, as evidenced by *Megill-Stephenson Co. Ltd. v. Woo*.[82]

The defendant Woo owned a parcel of land on Pembina Highway in Winnipeg, where he carried on a service station business. He was interested in selling it preparatory to retirement and listed it with a real estate company through the agent, Kulik. Kulik introduced the plaintiff, but initial negotiations proved abortive as of the end of January, 1987, and the listing agreement expired.

Then, in May, 1987, the plaintiff's interest in buying revived and it contacted Kulik to carry a new offer to Woo. Some considerable "backing and forthing" ensued until the crucial date of May 27, 1987. The plaintiff prepared a fresh written offer open until 6:00 p.m. that day and conveyed it to Woo *via* Kulik. Woo, unfortunately, had

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[81] (1989), 59 D.L.R. (4th) 146 (Man. C.A.) aff'g. 55 Man. R. (2d) 81 (Q.B.).

[82] *Ibid.*

suffered a stroke earlier in the year and did not conduct these negotiations himself. Instead, his spokesperson was his brother-in-law, Allen. Thus it was that on the evening of May 27, 1987, Kulik and Allen were in telephone communication with each other.

When Allen first came on the telephone to speak to Kulik, he made it clear that he was not acting as Woo's lawyer and that any agreement would have to be approved by Woo's lawyer, Mercier. Allen informed Kulik that there would be a meeting with Mercier on May 28 to consider any arrangement. Various changes to the offer were required by Allen and Kulik agreed after making some calls to the plaintiff. When all questions and suggestions from Allen had been dealt with, Kulik then said, "Do we have a deal?" and Allen replied, "It would appear that way." Kulik conveyed all of this to the plaintiff, which, if it had not authorized all of Kulik's positions beforehand, ratified them at that stage, the morning of May 28.

Meanwhile, unknown to Kulik, a competitor of the plaintiff's had come upon the scene later on the evening of May 27, made an offer higher by $60,000 than the plaintiff's, and been accepted. The defendant cancelled the meeting with Mercier.

The plaintiff sued for specific performance or damages, claiming a prior concluded contract for the sale of the land, as of May 27, 1987, when Allen said to Kulik that it would appear they had a deal.[83]

It should first be noted that the time limit of 6:00 p.m. May 27, 1987, on the plaintiff's offer, was regarded by both courts as irrelevant. The contract, if any, may have been concluded by that time but, if not, both parties had continued to negotiate past the deadline thus showing it was inconsequential to them. As well, the question of Kulik's agency was ultimately not a point of decision.

At the trial, Barkman J. dismissed the action for he determined that the plaintiff and defendant had never reached a concluded contract. In his view, Woo's *alter ego*, Allen, had not accepted at all and Woo was free to sell to the plaintiff's rival. Barkman J. referred to only one authority, *Block Bros. Realty Ltd. v. Occidental Hotel Ltd.*.[84] In that case a sale of land was expressedly to be carried through by a "mortgage back to vendor and or Agreement for Sale..." The Court held that there was insufficient certainty of terms. Clearly,

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[83] The defendant's counterclaim drawing in Kulik and his real estate firm need not concern us.

[84] (1971), 3 W.W.R. 51 (B.C.C.A.).

further decisions were contemplated and the court could not impose its own view of what the parties might have meant. The vagueness of this important term rendered it, in essence, non-existent.

In *Megill-Stephenson* Kulik and Allen had spoken about and agreed upon the way the balance of the purchase price should be paid. The plaintiff had wanted to give a promissory note, but Woo preferred a mortgage back. The plaintiff informed Woo that it would be seeking a mortgage for development costs but Woo agreed to a postponement of "his" mortgage if he could be assured that proceeds of the first mortgage would indeed go to improvement of the property. Barkman J. characterized the mortgage postponement terms as missing provisions of a nature essential to the contract. The agreement was incomplete without them and Allen had made it clear that Mercier would play a role in finalizing this aspect. This role was not a mere formality in an otherwise concluded contract; rather, Mercier was to help in the actual negotiation of the postponement terms. Once Barkman J. decided that crucial terms were missing, that ended the case. If some matter of moment to the parties and to the viability of their contract remains open, the parties are still in negotiation and not in contract. Insufficient certainty as to terms exists.

The *Block Bros.* case is really rather peculiar in that the point of reference used by Bull J.A. to reach his decision, involved a quite different aspect of certainty. The reference is to *Calvan Consolidated Oil & Gas Co. Ltd. v. Manning*[85] which approved *Von Hatzfeldt-Wildenburg v. Alexander*.[86] These cases dealt with situations where the parties had reached clear and full agreement on all essential terms but had indicated that the deal was to be subject to some future event or contingency. In such cases the court may be in a quandary. Do the parties intend that a binding contract should be formed at once which will then terminate without fault of either if the event fails to materialize, or do they mean that there is no contract *until* the event transpires? The consequences are evident. In the former case the parties are not free to withdraw or deal elsewhere, but have a duty to await the event and make good faith efforts to bring it about. In the latter case, since there is no contract, either party is free to ignore the "deal."

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[85] [1959] S.C.R. 253.

[86] [1912] 1 Ch. 284.

There is an infinite variety of events to which parties may make agreements subject; for example, financing, zoning, approval by a third party, formal documentation, and so on. Unless they spell out what they mean to happen in the interval before the event, the court faces the difficult task of deciding their intentions. Both *Calvan* and *Von Hatzfeldt-Wildenburg* declare the matter to be one of construction. The court must divine the intention of the parties from statements and actions at the time of "contracting". The contingency in those cases was formal documentation.

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract ... In the latter case there is a binding contract and the reference to the more formal document may be ignored.[87]

The construction approach is not confined to formal documentation but could as well be applied to some other sort of contingency such as a lawyer's approval.

Ultimately, in his decision, Barkman J. appears to confuse these two aspects of certainty, forgiveably, because *Block Bros.*, as decided, does not appear to appreciate the difference either. Barkman J. said there was no contract because: 1) Woo did not intend to enter into a binding agreement until it had been discussed with Mercier (a contingency problem) and 2) the terms relating to the mortgage postponement were still to be negotiated with the assistance of Mercier (an incompleteness problem).[88]

Does this matter? Missing or vague terms do not depend as much on the parties' intentions. This is a technical matter for the court to decide; either there is enough material for a viable contract of the sort envisaged by the parties, or there is not. In this respect the courts have a variety of mechanisms to use to fill in the gaps: prior dealings between the parties, trade custom, applying "formulae" the parties may have included in their agreement, severance of meaningless terms, and even reference to subsequent conduct of the parties. In this context, the court is sure that the parties intended to be bound, but

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[87] *Von Hatzfeldt-Wildenburg v. Alexander*, *supra*, note 86 at p. 288-89 per Parker J.

[88] 55 Man. R. (2d) 81 at p. 85.

struggles to find meaning in what they have expressed or to supply overlooked but necessary terms.[89] The contingency issue is much more difficult, being at the threshold. Do *these* parties even intend a contract even though what has already been agreed would be perfectly clear and enforceable?

In the Court of Appeal, the decision point was the second certainty issue, the contingency question. Huband J.A. for the court, in one sentence, discounted the incompleteness issue: "... I have serious doubts that the areas of uncertainty were of sufficient significance to prevent a binding contract from coming into being at the time of the telephone conversation."[90] This is an illustration of one of the ways around incompleteness: characterizing the missing terms as inessential to a valid contract. Huband J.A. then went on to decide the matter briefly and solely on the basis that:

> ...The entire transaction was made subject to the approval of Mr. Woo's solicitor ... Allen made it clear that there would be no agreement *until* it was reviewed by the lawyer Mercier. Solicitor's approval meant more than a review of the wording to ensure that all things were properly in place. It meant that there could be no deal without the concurrence of the lawyer, and consequently Woo was free to accept an intervening offer before the intended meeting at Mercier's office.[91]

In matters of construction, other cases are of small use as each depends upon its own particular circumstances. As well, the cases on contingencies are multitudinous and inconsistent; nevertheless, the clear tendency of the courts has been to find an intention to make immediately binding contracts.[92] This is so, apparently, because to do otherwise might upset reasonable expectations or lead to uncompensated reliance. In *Megill-Stephenson* there was no reliance by the plaintiff in the interim and so the conclusion that there was no contract is palatable. Also, in general, when the contingency is the addition of another party's approval, the court may well be justified in concluding that the original party has not yet fully committed his or her mind to the transaction; a discretion to say "no" has been

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[89] See the discussion in Waddams, *The Law of Contracts* (2nd ed., 1984) Chapter 2(c) and in Fridman, *The Law of Contract* (2nd ed., 1986) Chapter 2.

[90] *Supra*, note 81 at p. 150.

[91] *Ibid.*

[92] *Supra*, note 89.

retained.[93] This would be especially true where the outside party is not a truly independent body but is the party's own solicitor, and, to that extent, merely an extension of the party's own conscience.

There is another aspect of Huband J.A.'s judgment that cries out for commentary. Fortunately, it is *obiter*.

As we know, the *Statute of Frauds* was repealed in Manitoba as of October 1, 1983.[94] Obviously, then, that piece of legislation should never have been mentioned in this case, and yet, Huband J.A. referred to it. He said that despite its repeal, the basic idea behind it remains valid. This he took to be the fostering of caution against too quickly finding contracts on the basis of conversations which may involve contradictory evidence. With respect, this ought to be the approach by any court to any alleged contract, not just to the categories of contract which were covered by the *Statute of Frauds*, and writing is but one sort of evidence that might be useful. Unfortunately, Huband J.A. did not stop there. He said, bolstering his conclusion that the contingency of Mercier's approval precluded an immediate contract, that this judicial caution was needed,

> ... particularly where the usual practice has been to reduce such contracts into writing. In spite of the repeal of the *Statute of Frauds*, the practice in dealing with the purchase and sale of land is to have the contracts in written form, and that was the obvious expectation between the parties in this dispute. Indeed, the expectation of Woo was that the contract would be reduced into writing and would have no binding legal impact until signed by him. And the signing, of course, would take place only after the contract was reviewed and approved by his solicitor.[95]

This "obvious expectation" is not based upon anything the parties indicated. Barkman J. found that the parties had not completed their negotiations and in the Court of Appeal, the contract hung on the contingency of Mercier's approval. No one ever said the contingency was to have been a signature.

Huband J.A. said that it was the expectation of Woo that the contract would not be binding until signed. With respect, what Woo thought is a matter of absolutely no account, unless it was conveyed to the plaintiff. In fact, Barkman J. said it was Woo's spokesperson,

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[93] See the discussion in Waddams, *supra*, note 89 at p. 37 ff.

[94] *An Act to Repeal the Statute of Frauds*, S.M. 1982-83-84 c.34.

[95] *Supra*, note 81 at p. 151.

Allen, who thought that a contract about land would not be binding "until it was made in writing signed by both parties."[96] The judge imputed this understanding to Woo, but then went on to characterize it as an "error in the mind of ... Allen."[97] Barkman J. appears to labour under the same misapprehension that what Woo or Allen had in mind was relevant. A meeting of minds, or consensus, in our contract law comes, or not, from overt signs, not from the parties' inner wishes.

This "expectation" of a written contract appears to emanate from the court's perception of "practice," and not from the parties themselves. It may well be the case that the "practice" grew up because of the *Statute of Frauds* but now that it is gone, is there any reason to perpetuate the practice through judicial assumptions?

About ten years ago, the Manitoba Court of Appeal, differently constituted,[98] was faced with a similar case in *Jen-Den Invt. v. Northwest Farms Ltd.*[99] There, a written offer to sell land was accepted by telephone on a Saturday. On Sunday, the offer was revoked and, knowing this, the plaintiff purchaser, nonetheless, signed a form of acceptance on Monday. The issue was whether there could be an oral acceptance of an offer in writing for the sale of land. O'Sullivan J.A., for the court, did not say this was impossible but found, for six reasons, that the parties "intended" that the only binding form of acceptance would be by signature, although they did not say so. One of the reasons was that, "The subject-matter of the offer was land and it was known to both parties that without a memorandum in writing, signed by the party to be charged, a contract would be unenforceable."[100] This is a clear reference to the *Statute of Frauds*. Nowadays, it could find no place among the six reasons. I will not repeat all the other reasons; I find only one of them compelling and that is that the vendor's agent and the officers of the plaintiff all assumed that something in writing would be necessary to signify

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[96] *Supra*, note 88 at p. 84.

[97] *Ibid.*

[98] O'Sullivan, Monnin and Matas JJ.A.

[99] [1978] 1 W.W.R. 290 (Man. C.A.).

[100] *Ibid.* at p. 294.

acceptance of the offer.[101] This is quite different from either a one-party assumption or an assumption by the court. O'Sullivan J.A. then went on to say:

> Without suggesting that every offer to purchase land in writing must be accepted only in writing, I think it is true to say that in Manitoba the understanding of conveyancers and lawyers generally is that in the case of an offer in writing made through a real estate broker or salesman, the normal and usual mode of acceptance is in writing.
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> I would, therefore, hold that in the case before us, the [offer was] not accepted by the plaintiff so as to bring into existence a complete contract on Saturday ...[102]

Although *Jen-Den* was not referred to in *Megill-Stephenson* it reverberated through Huband J.A.'s decision. In Manitoba a written offer for the sale of land apparently requires to be accepted in writing and no other way, because this is the "expected" form. The parties have an onus to indicate that oral acceptance may occur as, otherwise, the "practice" will supply their "intention."

The result of this thinking would be that in Manitoba, for the most part, contracts concerning interests in land could not be *made* orally. This is even more heavy-handed than the *Statute of Frauds* ever was. That legislation only ever required that such contracts be *evidenced* in writing, to be enforceable. The contract may have been unenforceable against the non-signing party but that does not mean it did not exist. If a signed memorandum came into being at a later stage the problem would be cured and the contract fully enforceable. In the meantime, it could be used as a defence to an action. In some cases, reliance on the contract would open up the possibility of enforcement through the equitable invention of the doctrine of part performance.[103]

What Huband J.A. suggested in *Megill-Stephenson* is that the "contract" would not exist prior to signature and there could be no defensive use of it, nor any enforceability, despite reliance. There would be complete freedom to withdraw and no obligation to make good faith efforts to clear any contingencies. Thus, "assumption" or

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[101] *Ibid.* at p. 295.

[102] *Ibid.*

[103] See e.g. Fridman, *supra*, note 89, Chapter 6.

"expectation" seems to signal a regrettable veneration for a discredited formalism.

VII. Restrictive Covenant: *Chicago Blower Corp. v. 141209 Canada Ltd.*[104]

CHICAGO BLOWER CORP. V. 141209 CANADA LTD.[105] deserves comment because it is about an uncommon aspect of contract law in the context of an unusual subject-matter. The area is restraint of trade through use of a restrictive covenant in a contract for the licensing of "know-how." The larger matter is, of course, illegality of a sort developed through the common law as opposed to statute. Here the value of freedom of contract comes into conflict with the value of freedom of competition in the marketplace. Freedom of contract which could result in freedom *from* competition in the marketplace for some contractors must bow to the greater public interest in reasonable access to goods and services, lest there be social and economic hardship or disadvantage. Monopolies must be discouraged and individuals must be able to ply their trades to make a living according to their talents and training.

In *Chicago Blower* the plaintiff was an American company involved in the fan business from design through to sales. It also licensed the rights to manufacture and sell its fans which were unpatented. Technical information relative to design and manufacturing processes was provided to licensees. In March, 1959, the defendant's predecessor negotiated a licence for the exclusive Canadian rights to manufacture and sell the plaintiff's fans and to receive the technical information. In return, royalties were to be paid of a percentage of the factory invoice price on the fans. The license was to endure for thirty years but could be terminated earlier for breach or default. This licence was assigned one month later to the defendant with the plaintiff's consent. For the next twenty-three years the agreement operated well and the defendant paid about two million dollars in total royalties. For some undisclosed reason, the relationship then soured; the defendant refused to pay the royalties for 1981-82 and the plaintiff terminated as of December 21, 1982, on this account. After the cancellation, the defendant continued to manufacture and sell the plaintiff's fan lines.

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[104] (Aug. 17/89) 83-01-00878 (Man. Q.B.).

[105] *Ibid.*

Further such activity was enjoined in May of 1983 by the Manitoba Queen's Bench and in December of 1988, the defendant was found in contempt of court for non-compliance with the injunction.

The basis for the injunction and the source of this preliminary issue in the trial was clause 11 of the licence agreement, the crucial part of which said:

> 11. The Licensee agrees ... if, for any reason, this Contract is cancelled, to give up completely for a period of five (5) years the working by any procedure of fan lines on which information was provided.

The defendant argued that this clause was void as being in restraint of trade.

The classic statement of the law is Lord Macnaghten's in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd.*:

> All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions ... It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[106]

The cases have generally divided into two groups: the sale of a business in which the vendor covenants not to compete with the purchaser, and the termination of an employment contract in which the employee had covenanted not to compete with the employer on termination. The restrictive covenants in the former category have been much more often upheld as valid exceptions to the policy than have the ones involving employees.[107] The most compelling reason for this difference is that the parties are more likely to be on an equal bargaining footing and equally well supplied with legal advice in the sale of a business. An employee may be at a disadvantage in bargaining with a prospective employer. Additionally, the courts have been unsympathetic to such clauses because the employee would be forbidden to earn a livelihood for some time in the best way he or she knows how. Finally, in the sale of a business, the vendor receives

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[106] [1894] A.C. 535 at p. 565 (H.L.).

[107] See *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (H.L.).

compensation through a component of the purchase price ear-marked for goodwill, whereas it is difficult to see how an employee may be compensated for forgoing the ability to earn a living in a certain accustomed way. At any rate, there is unlikely to be a specified compensation for this.

Chicago Blower is a case involving neither of these scenarios and that makes it unusual. It is a case where a licensee has agreed not to continue with the licensed line of unpatented products or processes for a period of time after termination. Probably the only other Canadian case of this sort is *Tank Lining Corp. v. Dunlop Industrial Ltd.*[108] in which the Ontario Court of Appeal remarked on the novelty of this subject-matter. Nonetheless, in both *Tank Lining* and *Chicago Blower* the courts had no real doubt that such cases were to be covered by the doctrine as stated by Lord Macnaghten. As Lord Wilberforce said in *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, "... the classification must remain fluid and the categories can never be closed."[109] There must be constant vigilance to ensure that undue restraints on trade are eliminated no matter what their provenance.

Jewers, J. found the covenant to be in restraint of trade, although the plaintiff did not seriously contend otherwise. He made reference to a number of definitions found in cases, perhaps the simplest of which is Lord Reid's in the *Esso Petroleum* case, "... a man contracts to give up some freedom which otherwise he would have had."[110] Indeed, all the definitions involve the idea of renouncing a liberty to trade in whatever fashion one sees fit. In light of this definitional direction, we can see that the fact the fans were unpatented in *Chicago Blower* was crucial.[111] If there had been a patent or patents in place, then the defendant would not have been at liberty to use the information and only the licence contract would have enabled this. Covenanting not to use the information *post* termination, therefore, would in no way have involved a loss of liberty. Similarly, if such an arrangement concerned use of the licensor's trade marks, industrial designs or copyrights there would be no liberty apart from the

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[108] (1982), 140 D.L.R. (3d) 659 (Ont. C.A.).

[109] [1968] A.C. 269 at p. 337 (H.L.).

[110] *Ibid.* at p. 298.

[111] In *Tank Lining*, *supra*, note 108, the licensed process for lining the interior of railway tank cars was unpatented.

contract, and, therefore, no restraint of trade upon termination with a restrictive covenant. It is interesting to note that in this case the licence included the right to use "the trade name 'Chicago Blower'", and this aspect of the licence was dealt with in another action.[112]

Jewers, J. thought that the defendant would surely be restrained by the covenant in question because, otherwise, the defendant could have made use of the unprotected technology as indeed could anyone else. If the clause were to be upheld, the defendant would have to cease trading in a long-time product and develop other lines not employing the plaintiff's techniques, causing a lull in its business and probably a considerable loss of customers and contacts.

Given that the clause was in restraint of trade, it was *prima facie* void. The onus was on the plaintiff to prove it justifiable as an exception. The cases have interpreted this to mean that the covenantee has some legitimate proprietary interest to protect and has asked for no more protection than is reasonably necessary.[113] Legitimate proprietary interests have included purchased goodwill, trade secrets, confidential information, "know-how" and so on. The usual bone of contention, though, is whether the covenant is reasonable between the parties and goes not a step farther than is necessary. Of importance are the time, if any, attached to the restraint, the geographic area it covers and the scope of the prohibition. All must be reasonable or the clause will fail. In *Chicago Blower* the scope was impeccable for the clause merely precluded the defendant from dealing in certain lines of the plaintiff's fans, not from dealing in fans at all. Similarly, there seemed to be no problem with the time limit of five years; at least, the defendant did not raise this question. The problem was with the geographic ambit of the clause; because it was silent on the subject, the restraint was world-wide.

It is true that clause 11 made no reference to geographical limitations. Interestingly, in the only other analogous Canadian case, *Tank Lining*,[114] the clause in question, clause 7, was silent on this point too. In that case, clause 5 had defined the geographical scope of the licensing agreement as the "Dominion of Canada." Blair, J.A.,

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[112] *Chicago Blower Corp. v. 141209 Canada Ltd.* (1990), 30 C.P.R. (3d) 18 (Man. Q.B.).

[113] See e.g. *Vancouver Malt & Sake Brewing Co. v. Vancouver Breweries Ltd.*, [1934] A.C. 181 (P.C.).

[114] *Supra*, note 108.

simply said that the combined effect of these two clauses meant that the restrictive covenant applied to Canada and then the question was whether Canada was too large an area to be justifiable. The court in *Tank Lining* was obviously willing to read a limitation into clause 7 because of the geographic scope of the whole licence as found in clause 5. In *Chicago Blower* the court noted that the first "salient point" of the agreement was that "the licensor grants to the licensee the right to manufacture and sell the licensor's fan lines *in Canada*."[115] The licensor agreed not to grant a similar licence to anyone else "in Canada" nor to manufacture its lines itself "in Canada" during the term of the contract. There is nothing in the judgment to suggest that the plaintiff even raised the argument of implication; if it was raised, Jewers, J. ignored it. Since the ambit of the licence agreement *per se* was clearly Canada, it seems unfortunate that the issue of implication was not considered in *Chicago Blower*.

In *J.G. Collins Ins. Agencies Ltd. v. Elsley*, Dickson J., for the court, said:

> It is important, I think, to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny. The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.[116]

He was speaking of an employment contract, but surely the statement should apply with even more force to non-employment agreements as those are held to a less exacting standard. The failure to imply the words "in Canada" into the *Chicago Blower* clause, if conscious, indicates that restrictive covenants in Manitoba courts face a high degree of judicial hostility.

The court went on to judge the clause exactly as it was written and found it unjustifiable. The plaintiff overreached what was necessary by imposing a world-wide prohibition. The case law is clear that the time at which the reasonableness of the restraint is to be determined is the time when the agreement is made and not the time when it is terminated.[117] In *Chicago Blower* that meant 1959. The court had to

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[115] *Supra*, note 104 at p. 2 (my emphasis).

[116] [1978] 2 S.C.R. 916 at p. 923-24.

[117] See e.g. *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865.

consider whether, in 1959, it was reasonable for the plaintiff to have required world-wide protection from the defendant Canadian licensee. The plaintiff at that time had six licensees in countries other than the United States but they represented only one or two per cent of its business. As Jewers J. remarked, the company clearly was not global then. On the other hand, authority provides that the reasonableness is to be tested against the circumstances of the contract formation and these must surely include future expectations.[118] If, at formation, the company is in an expansion mode and it is reasonable to expect the expansion to continue, then perhaps global protection would be no more than adequate. In fact, the plaintiff had continued to grow and had twenty-six licensees at the time of this trial in countries around the world. Nevertheless, the plaintiff failed to demonstrate that in 1959 it had a world-wide network of licensees in contemplation and certainly not that one was planned. The plaintiff apparently led no evidence at all of what its plans were in 1959. The fact that it had expanded to twenty-six licensees was, therefore, irrelevant.[119] As of 1959, such expansion was only hypothetical. It would seem, then, that a generous area of geographical coverage would only be possible upon proof of planned expansion, not upon a simple hope. Global protection may be no more than necessary in some cases where the plaintiff's business is widely international as in the *Nordenfelt*[120] case itself, but the onus of proving this is a heavy one. In *Vancouver Malt* the court characterized the imposition of a worldwide embargo as "out of all reason."[121] Jewers, J. concluded that "the worldwide nature of the covenant can only be justified if it is essential to make the covenant reasonably effectual."[122]

Finally, Jewers J. observed that the plaintiff had also sought to justify the covenant on the ground that it related to trade secrets or confidential information. These things are not subject to any geo-

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[118] See e.g. *Tank Lining*, *supra*, note 108.

[119] The fact that a company does *not* expand is equally irrelevant; if it was reasonable at formation to expect expansion then what actually happens is of no account. See *eg. Tank Lining*, *supra*, note 108.

[120] *Supra*, note 106.

[121] *Supra*, note 113 at p. 191 per Lord Macmillan.

[122] *Supra*, note 104 at p. 11.

graphical limitations for once a secret is "out" it is no longer controllable anywhere. Again, the court took a hard-line approach. Whereas the licence in clause 3 required the defendant to keep secret and confidential "processes and technical information, including but not limited to the construction of said fans and the methods of manufacture ...,"[123] this "gag order" was only for the currency of the agreement. Clause 11 made no reference to trade secrets or confidential information. The court found that it prohibited manufacturing the plaintiff's fans but not divulging information to third parties. The court did not read the subject-matter of clause 3 into clause 11, nor the prohibition of clause 11 into clause 3.

Restrictive covenants, therefore, are subject to restrictive interpretation. They mean what they say and only that. In some instances, courts have been persuaded to excise the unjustifiable aspects of a restrictive covenant through the doctrine of severance.[124] This is sometimes referred to as the "blue pencil rule" but it requires that the clause could survive a partial striking out and, of course, that there be something that could be struck out. In *Chicago Blower* there was nothing to erase. These sorts of clauses will not be rewritten by the courts; they are initially void and so the onus is on their proponents to word them precisely between saying too little and saying too much. This is truly a case of death by drafting.

Licensing agreements having been found to be within the purview of the law on restrictive covenants in restraint of trade, it might be interesting to speculate where they will eventually be placed on the spectrum between sales of businesses and employer/employee contracts. *Chicago Blower* suggests that they will be examined against the harsher standard, while *Tank Lining* appears to have taken a softer line. It is unlikely that in negotiating a licence, either party would be perceived as at a disadvantage. Unlike the prospective employee, a would-be licensee will probably be a corporate entity interested in a business opportunity and well supplied with legal and financial advice. On the other hand, like employment contracts, licences are meant to create long-term relationships; they are not "one-shot deals" like sales of businesses. They do not contain an identifiable financial pay-off for agreement not to compete on

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[123] *Ibid.* at p. 15.

[124] See the discussion of severance in Fridman, *The Law of Contract* (2nd ed. 1986) at p. 399 ff.

termination and the breach of the covenant will likely occur only years after the contract is made, when it will be difficult to contemplate retraining a party who now has years of "investment" in the particular field. The marketplace is also more likely to suffer detriment because a well-established, experienced and familiar operator would be suspended from plying a business or trade for some amount of time. In the sale of a business, the business itself likely continues to function in the marketplace and all that is withheld from the public is the establishment, for some amount of time, of a second, competing, business. The *Tank Lining* case may not really be a strong precedent for the less stringent approach because of its own peculiar facts. The restrictive covenant, unusually, forbade *either* party to operate in Canada for two years after termination. Clearly such a pact would not create freedom from competition for either party and is not as offensive to the basic public policy. As well, the cancellation occurred in *Tank Lining* only two years after the agreement was made; the defendant was not, therefore, as entrenched in the market as it might have been after several years.

Because Jewers J. found clause 11 to be unjustifiable between the parties, it was not necessary for him to go on to the second part of the justification process: the investigation of public interest. Only if a restrictive covenant is found to be reasonable between the parties, will the other branch of the doctrine have to be examined. In such a case, the onus is on the defendant to prove that, although the clause is supportable as nothing more than adequate protection for the plaintiff's legitimate proprietary interests, it ought, nonetheless, to be struck down as unreasonably harming the public's interest. This aspect of the law has often been ignored or simply assumed to be governed by the same considerations as the first inquiry; that is, if the clause is justifiable between the parties, there is an assumption that the public interest has been served as well. As *Tank Lining* makes clear, however, the second branch is a quite separate matter and deserving of serious treatment.[125] Blair J.A. devoted much of the judgment to this matter, and considered the public policy which triggers the whole problem with restrictive covenants in restraint of trade to be different from the public interest which inhabits the second arena of reasonableness. The public policy is the very wide concept of fostering competition in the marketplace but the public interest requires a narrower or more detailed investigation, on the

[125] See also *Doerner v. Bliss & Laughlin Industries Inc.*, *supra*, note 117.

footing that the clause will operate. In such cases it may be that the particular community theretofore served by the now prohibited entity will suffer unduly because of loss of such things as an essential industry, numerous jobs, vital technology or adequate choice of operators. In *Tank Lining*, none of these factors was found. The result of clause enforcement was neutral in the Canadian market, simply returning matters to where they had been before the agreement and, obviously, leaving the door open to others capable of filling any void caused by the reciprocal embargo.

The question of public interest, however fascinating and important, did not arise in *Chicago Blower* and our interest in this case must be in the factors of its unusual subject-matter and the judicial attitude demonstrated towards restrictive covenants in restraint of trade. Clearly, great attention must be paid to the drafting of such clauses if they are to overcome their initial disability.

VIII. Rescission for Innocent Misrepresentation: *Ennis v. Klassen*[126]

Finally, there is *Ennis v. Klassen*,[127] a decision of the Manitoba Court of Appeal which is of considerable importance. It dealt with some basic questions of contract law and caused a sharp difference of opinion between Twaddle J.A. on the one hand and Huband, J.A. and Monnin C.J.M. on the other, although all agreed in allowing the appeal. The subject was misrepresentation and, more particularly, whether the remedy of rescission was available where the contract had been executed, was for the sale of a chattel, and had been induced by an innocent misrepresentation.

The story began with X who illegally imported into Canada a BMW 728 model automobile. X changed the numbers on the back of the car from 728 to 733. In fact the model appropriate for the North American market was the 733i with the "i" standing for fuel injection, whereas the 728 had a carburetor. There were other differences between the models: the 728 had a smaller capacity engine and was less luxurious in its appointments. X sold this vehicle to the defendant who shortly thereafter took it to a BMW dealership where he was informed that the car was a 728. The trial judge, Lockwood, J., giving the benefit of

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[126] (1990), 66 Man. R. (2d) 117 (C.A.).

[127] *Ibid.*

the doubt on unclear evidence as to what was said, found that the defendant was told that the car was referred to as a 728 in Europe but that it might be a 733 in Canada. The dealer declined to buy it from the defendant who then advertised it for sale in the "Auto Trader" magazine as a "1980 BMW 733i."

The plaintiff went to see the car on August 18, 1987. He noticed the absence of the "i" designator and the defendant said that that stood for fuel injection and showed the plaintiff that this "European model" did not have fuel injection. The plaintiff test drove the car. He then gave the defendant a cheque for $9,000, the agreed purchase price, and received a bill of sale signed by the defendant which described the car as a "BMW 733." The plaintiff took possession on August 19, paid the sales tax and registered the vehicle in his name on the 21st and on the 22nd went to a BMW dealership to obtain a service manual. He was told by the dealer that the car was not a 733i or 733 model. Immediately, the plaintiff's wife telephoned the defendant to seek rescission but the defendant refused to accept return of the car or to repay the purchase price, even when he was later supplied with documentary proof that the car was a 728. The plaintiff, upon ascertaining that the vehicle was a 728, parked it in his driveway and left it there.

Evidence from two BMW dealers was to the effect that the car either had no dealership market at all as a trade-in or that it had a dealership value of $1,000 to $1,500 for parts only. It was admitted that the car might have a highway value (to someone who wanted to drive it, not trade it in or resell it) but there was no evidence of what that might be, and a general consensus that it would not be anything like $9,000.

The Statement of Claim was issued January 8, 1988. The sole claim was for rescission of the contract on the basis of fraudulent misrepresentation. At trial, Lockwood J. found that a misrepresentation had occurred but that it was not fraudulent. Lockwood J. said in oral judgment that the plaintiff "got what he bargained for"[128] and dismissed the action. The allegation of fraud was not repeated in the appeal.

In the Court of Appeal the parties, apparently, were invited to make written submissions on the question of whether an amendment of the pleadings should be allowed at this stage, to introduce an action for breach of contract and, if so, what the remedy should be. As it was,

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[128] *Ibid.* at p. 7.

the majority, Huband, J.A. and Monnin C.J.M., decided the case solely on the misrepresentation basis, whereas Twaddle J.A. would have allowed the amendment and the award of damages.

At the outset of his judgment, Huband J.A. (Monnin C.J.M. merely concurred) swiftly and unsurprisingly dispensed with any notion that there had been no misrepresentation. In the advertisement, the car was clearly said to be a BMW 733i. It is true that this was modified by the defendant's explanation about the lack of fuel injection, but "733" was also a misrepresentation. The model was actually a 728, did not comply with some Canadian safety standards, had a smaller engine capacity, faced a six-week delay in obtaining parts unavailable in North America, and had a very limited trade-in or resale value, especially to a BMW dealer. The defendant argued that the plaintiff could see for himself what he was buying. Once an inducing misrepresentation has been made, however, it is not open to the defendant to say that the plaintiff ought to have known better or ought to have made personal enquiries into the matter. As was said in *Redgrave v. Hurd*,[129] once a representation calculated to cause reliance has been made, the court will presume it had the intended effect. Nothing short of proof of actual (not constructive) knowledge of the truth on the part of the representee, or clear proof that there was no reliance on the representation, will excuse the representor. There is no fault in a representee who believes the representor's plausible statements.

Huband J.A.'s next point is, however, remarkable. He asserted that for an innocent misrepresentation to admit of rescission, it "must be fundamental, or substantial in nature."[130] He referred only to *Leggett v. Taylor*.[131] That was a case where the plaintiff argued that a sale to him of a power cruiser was a sale by description and that, since the engine turned out to be a converted automotive engine and not a marine engine as he had been told, he could reject the boat. The court's main discussion was of a definition of a sale by description and the conclusion was that this had been a sale by inspection. The power cruiser was as bargained for; the engine was but part of it. Neither fraud nor mistake had been pleaded. The court found that the innocent misrepresentation had no effect since it did not go to the

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[129] (1881), 20 Ch. D. 1 (C.A.).

[130] *Supra*, note 126 at p. 121.

[131] (1965), 50 D.L.R. (2d) 516 (B.C.S.C.).

whole root of the contract. Ruttan J. cited *Bell v. Lever Bros.*[132] and *Kennedy v. Panama, N.Z. and Australian Royal Mail Co.*[133] for the proposition that an innocent misrepresentation, to upset a contract, must cause a complete difference in substance between what was and what was supposed to be obtained; it must be fundamental and not just material.

These, however, were cases of mistake at common law. As Waddams explains in his book *The Law of Contracts*,[134] early common law courts made no distinction between rescission for mistake and rescission for misrepresentation, demanding that in either case the blunder be fundamental. The result would be that the contract was void *ab initio*. Equity, however, made no such demand, requiring only that a misrepresentation be material, but stating that the contract would be voidable, not void, at the representee's option. Huband J.A. appears to have adopted the former position, despite fusion of the courts of law and equity.

Materiality merely necessitates that the misrepresentation be an inducing factor, even just one of many, in the representee's mind in deciding to contract. As well, the statement must have been objectively inducing.

> Once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that the representee was so influenced; this presumption is not rebutted by showing that there were other contributory causes which played a substantial part, perhaps even a more notable part, in the formation of his intention. The court allows no *post mortem* examination into the relative importance of the contributory causes.[135]

This is a lower standard than something which is fundamental and seems only fair where, after all, the contract has been caused, at least partly, by an untruth told by the other party, albeit innocently. The very consent to the contract is at stake when one has been misled. If the matter is one which would reasonably induce consent from a person in the particular circumstances of the contract formation, it

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[132] [1932] A.C. 161 (H.L.).

[133] (1867), L.R. 2 Q.B. 580.

[134] (2nd ed. 1984) p. 308 ff.

[135] Cheshire and Fifoot's *Law of Contract* (9th ed. 1976) p. 255. The same idea is expressed, but not as succinctly, in the 11th (and latest) edition of this work at p. 264.

seems *de trop* also to demand that it touch the very essence of the contract. Nonetheless, there seems to be a confusion of these standards in some Canadian cases. In *George v. Dominick Corp. of Canada*[136] the Supreme Court of Canada spoke only of a misrepresentation having to be "material." Two Manitoba cases which use this standard are *Comeller v. Billinkoff*[137] and *McKinnon v. Brockinton*[138] but two others, *Rasch v. Horne*[139] and *Fleischhaker v. Fort Garry Agencies Ltd.*[140] require the misrepresentation to go to the root of the contract. In any event, Huband J.A. found the misrepresentation in *Ennis* to be fundamental.

The major question of this case, however, is whether rescission is still available as a remedy when the contract has been executed. With a fraudulent misrepresentation, there is no doubt,[141] but as Huband J.A. pointed out, with respect to the sale of land, "a settled rule developed that rescission for innocent misrepresentation would not be possible after execution of the contract."[142] *Redican v. Nesbitt*[143] stands for this proposition in Canadian law. There was doubt about whether this impediment also handicapped executed contracts for the sale of chattels or choses in action. In England, *Seddon v. North Eastern Salt Co. Ltd.*[144] indicated that it did, in a contract for the sale of company shares. Although this development was castigated, especially by Lord Denning in *Solle v. Butcher*[145] and *Leaf v. Inter-*

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[136] [1973] S.C.R. 97.

[137] (1953), 11 W.W.R. 279 (Man. Q.B.).

[138] [1921] 2 W.W.R. 437 (Man. C.A.).

[139] [1930] 3 D.L.R. 647 (Man. C.A.).

[140] (1957), 65 Man. R. 339 (C.A.).

[141] See *McKinnon v. Brockinton*, *supra*, note 138.

[142] *Supra*, note 126 at p. 122.

[143] [1924] S.C.R. 135.

[144] [1905] 1 Ch. 326.

[145] [1950] 1 K.B. 671 (C.A.).

national Galleries[146] it took the *Misrepresentation Act*, 1967[147] to clarify that rescission was yet available after execution even for innocent misrepresentation and no matter what the subject of the contract.

The issue is of importance because in the case of innocent misrepresentation which has not become a term of the contract, there is only the remedy of rescission.[148] *Heilbut Symons & Co. v. Buckleton*[149] made it evident that damages are not awarded for innocent misrepresentation.

Huband J.A. did not refer directly to the *Seddon* case[150] in his decision but spoke principally of *Leaf v. International Galleries*[151] and especially of Lord Denning's judgment therein. In that case the plaintiff had purchased an oil painting from the defendant on the representation that it was by Constable. Five years later, the plaintiff discovered the truth and sued to recover his money. No claim was made for damages for breach of contract and the plaintiff was not later allowed to amend his pleadings. The Court of Appeal was in agreement that the contract was not void for mistake; the plaintiff had received exactly the object he had bargained for, the particular oil painting. The difference between an oil painting by Constable and one by some lesser artist was thought to be a difference only in quality and not in essence. The Court, however, regarded the test for misrepresentation to be that the statement be material, which this was. Lord Denning M.R. stated the proposition that rescission was available for innocent misrepresentation even after execution of a sale of a chattel despite *Seddon*, but refused to grant the remedy because of the excessive lapse of time from the date of sale. In his view, rescission could be had but only within a reasonable time after the

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[146] [1950] 1 All E.R. 693 (C.A.).

[147] *Misrepresentation Act, 1967* (U.K. 1967 c.7).

[148] There is the possibility of an action in tort for damages for negligent misstatement, but that is a subject beyond the scope of a commentary on contract law.

[149] [1913] A.C. 30 (H.L.).

[150] *Supra*, note 144.

[151] *Supra*, note 146.

sale, allowing for the purchaser to inspect the chattel and verify representations.

The *Sale of Goods Act* speaks of "acceptance" of goods and declares when this shall be deemed to have occurred. From this well, Lord Denning M.R. drew his unique proposition that innocent misrepresentation, being a much less potent thing than breach of a contractual condition, should not produce a stronger remedy. Under the *Sale of Goods Act*, the purchaser in *Leaf* would long ago have lost his right to reject the goods and have the price returned, and so, innocent misrepresentation should not be allowed to give a different result. This makes sense in some cases, but in others the *Sale of Goods Act* deems acceptance to occur instantly the contract of sale is formed in which case the right to reject (and to rescind) would be lost instantly. In a case of innocent misrepresentation concerning a sale of goods, there would then be no remedy whatsoever. Lord Denning himself had pointed out this difficulty in *Solle v. Butcher*.[152] The better view would be that even in the sale of specific goods, there should be a reasonable time to allow for inspection of the goods before rescission is barred.

Lord Denning's cohorts in *Leaf* agreed that rescission was out of the question. Because of the elapse of five years, it was just too late to unravel the transaction, for practical reasons. They neither agreed nor disagreed with Lord Denning on the basic proposition that rescission was still possible after execution of a sale of goods for innocent misrepresentation, but made their decisions assuming it to be so.

Ennis thus raised the question squarely. There was an executed sale of a chattel, an innocent misrepresentation and a timely attempt at rescission. Only a few days had passed between the sale and discovery of the awful truth and the plaintiff's indication of a desire to return the car for his money. Huband J.A. referred to the varying results of Canadian cases on point but preferred *Bevan v. Anderson & Peace River Sand & Gravel Co.*[153] where Riley J. commented that there seemed to be no logical reason for denying the remedy in such a case purely because the contract had been executed. Huband J.A. said that the absence of the remedy would produce an unfair result and hedged his conclusion with the requirement that rescission would have to be sought within a reasonable time of the sale or would be

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[152] *Supra*, note 145.

[153] (1957), 12 D.L.R. (2d) 69 (Alta. S.C.).

lost. There would, thus, be no fear of dismantling contracts long after their formation and performance, a nod in the direction of certainty.

Huband J.A. then spent some time in commenting upon the doctrine of *error in substantialibus*, that "uniquely Canadian"[154] concept which appears to have been developed to circumvent the bar of execution where the representation was non-fraudulent. It was mentioned in *Redican v. Nesbitt*[155] by Duff J. in reference to the *Kennedy v. Panama*[156] case and would seem to be a recognition that mistake might undo a contract where misrepresentation could not. At common law, mistake makes a contract void *ab initio* but is to be found only in cases of total failure of consideration, cases of fundamental or essential difference between what was and what was supposed to have been received.[157] In *Hyrsky v. Smith*[158] the idea of *error in substantialibus* was elaborated. An executed contract for the sale of land, based on an innocent misrepresentation that the parcel was much larger than it was in fact, was set aside because there was a virtual failure of consideration, though not a total failure. At common law the 'mistake' would not have been fundamental; the land bargained for was the very land received. The doctrine has also been applied to the executed sale of a chattel, a haystacker, in *Adams v. Canadian Co-Operative Implements Ltd.*.[159]

Huband J.A., while acknowledging this line of cases, did not care to use it as the basis of his decision. He thought it merely grew from a blurring of the supposed requirement that any misrepresentation, to be operative, must be substantial or fundamental in nature. From that threshold question, the leap was taken to remedy, without consideration for the intervention of execution. With respect, the definition Huband J.A. used for misrepresentation is controversial; materiality may well be all that is required and the doctrine of *error in substantialibus* is, therefore, really a venture into mistake law, with

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[154] *Supra*, note 126 at p. 124.

[155] *Supra*, note 143.

[156] *Supra*, note 133.

[157] *Bell v. Lever Bros.*, *supra*, note 132.

[158] [1969] 2 O.R. 360 (H.C.).

[159] (1980), 20 A.R. 533 (Q.B.).

a lower standard of "fundamentalness" but with a more flexible result; that is, discretionary rescission.

I do agree, however, that *error in substantialibus* seems an inappropriate ground for decision in such cases as *Ennis*. It is a strange doctrine, hard to anticipate in application and involving tortured analysis. It is only in existence because of the development of the bar of execution in cases of innocent misrepresentation. Much more forthright is the approach Huband J.A. has taken in declaring that bar not to exist. Execution must still be a factor to be taken into account, but the court at least has the discretion to award rescission in an appropriate case.

The difficulty with Huband J.A.'s position is his insistence that the innocent misrepresentation be fundamental or substantial, instead of merely material. "Even where the contract has not yet been executed, an innocent misrepresentation gives rise to the remedy of rescission only where the misrepresentation is fundamental or substantial in nature."[160] This requirement could prove just as much a fetter to rescission as execution ever was. It is not always very easy to determine whether a matter goes to the root or substance of a contract. In *Ennis*, the trial judge said that the plaintiff got what he bargained for but two justices of appeal thought he had not. In *Leaf* the Appeal Court thought that a different artist only made the oil painting different in quality, not in identity or essence.[161] It is, of course, unclear whether Huband J.A. would use this definition also for fraudulent misrepresentations, for he spoke only of the innocent variety. Surely the definitions should be the same. The effect upon the representee's decision-making is the same - no matter what the motive of the representor. In any event, with regard to innocent misrepresentations, Huband J.A. may well be giving with one hand, in discarding the execution bar and taking away with the other, in requiring the misrepresentation to be fundamental.

Twaddle J.A. concurred in allowing the appeal but on a very different basis with a consequently different remedy. He would have allowed the plaintiff to amend his pleadings to argue breach of a term of the contract. He would not have allowed repudiation of that

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[160] *Supra*, note 126 at p. 125.

[161] See also the startling conclusion in *Diamond v. B.C. Thoroughbred Breeders' Society*, *infra*, note 163, in which a race-horse was sold as "X" when it was in fact "Y," a horse with different blood-lines. This was held insufficiently fundamental.

contract but would have awarded damages. He was not in a position, on the paucity of evidence, to determine what the amount should be.

To Twaddle J.A. the clear basis of action in cases such as *Ennis* should be breach of contract with possible repudiation and always damages. It does seem obvious that the statement that the vehicle was a 1980 BMW 733i (or 733) would be a term of the contract and, indeed, it was the description written into the bill of sale. Huband J.A. would not have denied that, had it been argued, but he was willing to let the plaintiff, at his option, frame his case as involving only a misrepresentation and to take his chances on remedy. Twaddle J.A. was aggrieved that the plaintiff should have such an option. He said that it was "unfortunate" that the plaintiff chose to sue for fraudulent misrepresentation instead of breach, "a much more straightforward basis of advancing the claim."[162]

Twaddle J.A. said that the plaintiff could obtain the same remedies for breach of condition as for fraudulent misrepresentation. With respect, this is not evident. Fraudulent misrepresentation would clearly have allowed rescission (absent bars) plus damages (for the tort of deceit), whereas breach of condition might result in damages only, as in Twaddle J.A.'s own analysis of *Ennis*. If the plaintiff wanted to return the car and have his money back, fraudulent misrepresentation must have seemed the best, if not only, avenue of approach.

To Twaddle J.A. rescission would be quite inappropriate as a remedy in such cases as *Ennis*. The superior (perhaps only) remedy would be damages. He said that it was pointless for the court to have to determine the rescission question in the context of innocent misrepresentation because all it led to was the problem Lord Denning M.R. alluded to in *Leaf*: that if a certain remedy would no longer be available for a breach of contract it should certainly also be barred for an innocent misrepresentation. (This is sometimes referred to as Lord Denning's "potency test"). The real question then just becomes the usual one under the *Sale of Goods Act* of whether the goods have been accepted. With respect, it is not clear that this "test" has become the operative one. Lord Denning himself seemed to offer it only as a buttress to his real point of decision, the lapse of time, and it ought to be read in that light; his colleagues in *Leaf* did not speak of it. It was

[162] *Supra*, note 126 at p. 126.

applied in *Diamond v. B.C. Thoroughbred Breeders' Society*[163] but that is a far cry from its being the accepted standard. Supposing it were the standard, Twaddle J.A. indicated that under the *Sale of Goods Act* of Manitoba by sections 13(3) and 37, the plaintiff would have forfeited any right to reject the goods.

At the beginning of his judgment Twaddle J.A. stated that, in his opinion, the plaintiff had not repudiated, anyway, because he did not make it clear that the vehicle was at the defendant's risk until the statement of claim was issued three months after the sale. It is of note that Huband J.A., without discussion, clearly thought the plaintiff had done an adequate job of rescinding in a timely fashion as far as the action based on innocent misrepresentation was concerned. Repudiation would, thus, seem to call for more on the part of the disgruntled purchaser, but what more we are not told.

In the event, once the "acceptance" of the goods occurs by the *Sale of Goods Act*, breach can result only in damages. That innocent misrepresentation might, on the same facts, still result in rescission may indeed seem anomalous but that is a quirk of the law that ought to be dealt with otherwise than by omitting any remedy at all for innocent misrepresentation. Twaddle J.A. was not unsympathetic to this point of view. He said he shared the concern voiced by Lord Denning in *Solle v. Butcher* that "... innocent people would be deprived of their right of rescission before they had any opportunity of knowing they had it."[164] He addressed this problem by calling for the Manitoba Law Reform Commission to review innocent misrepresentation as a cause of action. Clearly his preference would be for an enactment along the lines of the U.K. *Misrepresentation Act*, 1967[165] in which damages were extended to such actions. Rescission, he said, was an undesirable remedy but damages would be ideal.

Twaddle J.A.'s main problem with the idea of allowing rescission of an executed contract for innocent misrepresentation appears to be that it would "cause much uncertainty as to ownership."[166] If the buyer tried to return the goods but the seller refused to take them back, at whose risk would they then be? Who would bear a loss through

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[163] (1965), 52 W.W.R. 385 (B.C.S.C.).

[164] *Supra*, note 145 at p. 696.

[165] *Supra*, note 147.

[166] *Supra*, note 162 at p. 7.

destruction or injury? Who should insure? If much time goes by before the question is resolved by a court decision, will the item be capable of restoration? What if it has seriously deteriorated in the interval? These are problems inherent in the remedy of rescission. They would be present even if the misrepresentation had been fraudulent. The factor of innocence of the representor has no effect on the nature of rescission. Taking apart any completed contract for any reason could raise these issues. The courts have not been indifferent to them and have developed fairly flexible requirements for restoration. The remedy is and always has been discretionary and there is little evidence that courts have been cavalier in their use of it. Twaddle J.A. said he feared that allowing the possibility of rescission in such cases as *Ennis* would encourage judges to award it in inappropriate cases. This seems paternalistic and inflexible. The problem is that, absent rescission, there would be no other remedy available in many cases. It is all very well to demand that executed sales be argued always on the ground of breach so that the courts will be spared the invitation to order rescission, but that places enormous emphasis on the principle of *caveat emptor*. Where the subject of the sale could be inspected before contracting, the possibility of relief for judgment-distorting pre-contractual assertions by the vendor would be nil, once delivery had occurred.

Huband and Monnin, JJ.A., through analysis of existing case law arrived at a remedy for the plaintiff in *Ennis v. Klassen*, the only one he requested. Were it not for the chance of allowing an amendment of the pleadings so late in the case, an amendment apparently not especially sought by the plaintiff, Twaddle J.A. would not have been able to offer a remedy at all. Maybe in clarifying the law for Manitoba on this point the majority has rendered possible a remedy that seems too strong in the circumstances, or productive of some uncertainty, but they have boldly opted for greater remedial flexibility. Not all aggrieved purchasers would be content with damages; now, in Manitoba, thanks to *Ennis v. Klassen* they have a clearer option to seek rescission as a remedy of choice where the contract has been induced by innocent misrepresentation, does not concern an interest in land, and has been executed.