

## MAXIMS OF EQUITY:

- Equity aids the vigilant, not the indolent (*Blundon v Storm*; delay/laches/acquiescence)
- He who seeks equity must come with clean hands (unclean hands cases- *Polai, Tinsley*)
- He who seeks equity must do equity // equity will not act in vain (unclean hands cases- *Polai, Tinsley*; undertaking as to damages, ex parte full and frank disclosure, relief from forfeiture in *Shiloh Spinners*)
- Equity acts in personam- so does not conflict w/ law (*Penn v Baltimore, West v Dick*, contempt orders)
  - Only exception = writ of sequestration (rare, strictly tied to contempt order)- acts in rem
- Equity follows the law- respects and recognizes legal ownership, but steps in where necessary (*Re Macdonald, Pro Swing, Canson*)
- Equity will not suffer a wrong w/o a remedy (i.e. irreparable harm- injunctions)
- Equity regards as done that which ought to be done- can create eq interests in property before remedies are actually granted (*Re Macdonald, Walsh v Lonsdale*- SP)
- Where equities are equal, the law prevails (*Re Macdonald*, balance of convenience- injunctions)
- Where equities are equal, the first in time prevails
- Equity looks to the intent, not the form- court will look at wording, intent of parties prevails (i.e. penalty and forfeiture clauses)
- Equity does not allow a statute to be made an instrument of fraud- court will not allow statute to effect an unjust result (*Re Macdonald*)
- Delay defeats equities (defences- limitation periods, delay/laches/acquiescence)
- Equality = equity- prefers equal division rather than winner take all (balance of convenience, tracing)
- Equity imputes an intention to fulfill an obligation (SP cases)

## CHAPTER 1

***Re Macdonald (1972)***: (bankrupt lawyer, undated \$1 cheque = undischarged bankruptcy, life policy payable to his estate) Equity can override statute; life policy to dependents instead of creditors.

- “It would be inconsistent with natural justice and fair dealing to deprive the bankrupt’s family of \$37,768 in insurance, paid for by the bankrupt out of his earnings, by reason of his failure to pay \$1.”
- “injustice to the dependents of the deceased outweighs injustice to creditors”
- trustee not at fault; “handled a difficult and unusual situation in a thorough and careful manner”

## CHAPTER 2

**L&E Act, ss.1, 2**: rules apply to all courts in BC

**4-7**: court must grant relief as would have been given in Equity; must recognize and take notice of all equitable estates/titles/rights/duties/liabilities

**s.8**: causes/proceedings must not be restrained, but stays of proceedings can be granted

**s.9**: judges must recognize and give effect to all legal claims/demands/estates/titles/duties/liabilities

**s.10**: court must grant all remedies that parties are entitled to, multiplicity of proceedings to be avoided

**s.31**: stipulations in Ks are not deemed to be the essence of Ks, must be interpreted

**s.44**: if rules of law and equity are in conflict, equity prevails

***United Scientific Holdings Ltd v Burnley Borough Council (1977)***:

- Quoting Ashburner, Principles of Equity (1902): “the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters”
- Lord Diplock: “the waters of the confluent streams of law and equity have surely mingled now.”
- Lord Simon: “since 1875 there has been one fused system administered in one Supreme Court of Judicature”
  - **Judicature Act 1873, 1875** → fused law and equity

***Canson Enterprises Ltd v Boughton & Co (1991)***: (Solicitor breached fiduciary duty in failing to disclose secret profit of 3<sup>rd</sup> party in P’s purchase of land; solicitor also liable for loss suffered due to negligence of architects and

engineers) Principles governing the award of CL damages in tort and contract (i.e. mitigation, foreseeability, remoteness, contributory negligence) apply to equitable compensation.

- La Forest: “the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice.”
- **Dissent** (McLachlin): equitable compensation and legal damages serve different purposes, should remain distinct. Losses considered should only be those caused by the breach. Duty to mitigate = duty only to take “the most obvious steps”.

***Cadbury Schweppes Inc v FBI Foods Ltd (1999)***: (breach of confidence in commercial context; misuse of confidential info to manufacture rival Clamato drink) Misused info was “nothing very special” and provided no more than a 12-month head start; financial/equitable compensation to restore what respondents lost as a result of the appellants’ breach of confidence.

- Injunction inappropriate due to delay of respondents coupled with ongoing investment and commercial activity of the appellants
- \*Equitable compensation is a distinct remedy that has nothing to do with CL principles (distinguished from *Canson*)

**CHAPTER 3** - Equity acts “in personam” (against people), CL acts in rem (against things)

***Penn v Lord Baltimore (1750)***: (dispute over boundaries of Maryland and Pennsylvania, lawsuit in England for specific performance of survey agreement) Injunction granted; equitable decision to enforce agreement across jurisdictions, since equity acts in personam.

- Note: sequestration = CL in rem remedy, indirect enforcement against property (if D leaves assets behind, court can sequester the assets and coerce D into obeying the injunction).

***West & Partners (Inverness) Ltd v Dick (1969)***: (Contract in England to purchase land in Scotland, lawsuit for specific performance of K) Equity, acting in personam, is able to grant specific performance of a contract to buy or sell foreign land, provided that D is domiciled within its jurisdiction.

**L&E Act, ss.37, 38**: court may order conveyance of land/vest property in a person

**Enforcement of Canadian Judgments and Decrees Act**: Canadian judgments can be registered and enforced in BC → SP and injunctions, subject to equitable defences (delay, laches, acquiescence)

- **6(4)(b)**: An ex parte injunction requires application for instructions before it can be enforced

***Pro Swing v Elta Golf Inc (2006)***: (Trademark infringement of golf club technology, US co seeking recognition and enforcement of consent injunction and contempt order in Canada) Canadian courts can recognize and enforce equitable decrees granted by foreign courts, in appropriate cases. Not appropriate in this case:

- Injunction entered by consent of parties, terms lacked clarity (intended territorial scope uncertain)
- Contempt order = quasi-criminal in nature, too drastic and penal
- \*Emphasis on the discretionary nature of equitable relief
- Dissent (McLachlin): contempt order restitutionary, not penal; injunction sufficiently clear and enforceable, no ambiguities about extraterritorial application.

## **CHAPTER 8**

**EQUITABLE DEFENCES** = **discretionary factors** (laches/delay/acquiescence, estoppel, unclean hands)

### **LACHES**

***Lindsay Petroleum Co v Hurd (1874)***: Laches = P’s unreasonable delay + either substantial prejudice to D (loss of evidence, economic harm) or D’s reasonable belief that P had waived enforcement (acquiescence of the conduct)

- Must consider a) length of delay; b) nature of acts done during the interval
- General rule: **laches is discretionary**, effect of delay more important than duration

***Erlanger v New Sombrero Phosphate Co (1878)***: Always a question of whether the balance of justice or injustice is in favor of granting the remedy or withholding it

***Canada Trust v Lloyd (1968)***: (Breach of fid duty, misappropriation of money from co; 43 years btwn cause of action and action itself) Directors clearly profited and did not suffer prejudice; ordered to return money + interest to shareholders. Defence of laches does not apply.

- Length of delay irrelevant. More imp factors = conduct of the parties, effect of delay on the parties, public interest, knowledge of the parties

***M(K) v M(H) (1992)***: (Father-daughter sexual assault, claim for breach of fid duty) No prejudice to D, nothing rendering further prosecution unreasonable, nothing to suggest that P acquiesced to the conduct.

- Defence of laches does not apply
- CL discoverability doctrine and acquiescence doctrine → both require knowledge on the part of P
  - In CL, knowledge = discoverability; start of limitation period
  - In equity, knowledge = start of delay period. Must ask: in light of P's knowledge, can it reasonably be inferred that P acquiesced to D's conduct?

**Limitation Act, ss. 2, 3, 5**

- Applies to CL and equity; **claims must be brought within 2 years of discoverability**
- Note: does not apply to sexual misconduct (s.3)

**S.8: discoverability** = when P first knew or reasonably ought to have known:

- 1) Of the injury, loss or damage;
- 2) That the injury, loss or damage was caused by an act or omission of D; and
- 3) That a court proceeding would be an appropriate means to seek a remedy

**“Equity aids the vigilant not the indolent”**

***Blundon v Storm (1970)***: (Partnership to find sunken treasure ship, 1 partner defected and found treasure on his own) Partnership subsisted, excluded partners never acquiesced to separate search or abandoned their rights. 75% of treasure to Storm, 25% split btwn other partners.

- Defence of laches does not entirely apply- although CA thought it should (partnership was never actively enforced, partners only came forward to claim a share once treasure was discovered)
- There can be degrees of laches

***A-G Nova Scotia v City of Halifax (1969)***: (AG sued city for debt imposed by statute, delay in transferring patient to local hospital) Defence of laches is only available for a claim in equity, not available for a legal claim; laches does not operate against the Crown.

***Cadbury Schweppes Inc v FBI Foods Ltd***: Laches was a factor; Cadbury delayed and FBI Foods suffered economic harm. Delay + detriment do not bar the action completely, equitable compensation still applies.

- There can be degrees of laches

**ESTOPPEL**- Test: would it be unconscionable to continue to enforce the right?

- 1) **D acted unconscionably** (misleading words, actions or inaction = knowing encouragement)
- 2) **P reasonably relied on the encouragement and suffered prejudice**

***Trethewey-Edge Dyking District v Coniagas Ranch (2003)***: (incorporated district to protect lands from flooding, ranch wanted to claim lands back) Proprietary estoppel established- reliance on property agreement, money/work expended in maintaining dykes, unconscionable to deny permanent access.

- Creation of an equitable easement = registrable, all purchasers subject to it
- Proprietary estoppel/acquiescence- can found a cause of action in itself, can defend against both legal and equitable claims

**UNCLEAN HANDS** = defence only applies in equity

“He who seeks equity must come with clean hands” // “He who seeks equity must do equity”

- P’s improper conduct must have occurred in the claim before the court, or in the context of litigation

*City of Toronto v Polai (1969)*: (D running a boarding house, contrary to bylaw/fines) Persistent flouting of the law, injunction granted; fact that city was not restraining other violators did not amount to unclean hands.

- Public interest (enforcement of bylaw) must prevail over D’s private interest
- Even where an equitable remedy is denied, legal remedy can apply
- Note that injunction was delayed for 1 year in this case- to prevent hardship to tenants (\*see delayed injunctions, enforcement of legislation)

*Tinsley v Milligan (1994)*: (House registered in T’s name, M fraudulently claiming welfare; both parties contributing funds to run lodging house) No need to defend source of funds, M had a beneficial interest in the property. Unclean hands defence does not apply.

- A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title w/o relying on his own illegality
- Court is neither bound nor entitled to reject claim unless the illegality necessarily forms part of P’s case

## CHAPTER 9

**INJUNCTIONS** = discretionary, temporary relief

- P must agree to undertaking damages (liable if it turns out the injunction should not have been granted; P bears risk of getting an order that they should not have gotten) → “he who seeks equity must do equity”

**L&E Act, s. 39**: injunction may be granted by interlocutory order, where it appears “just or convenient”

**SC Civil Rules, s.44(5)**: service or delivery of interlocutory application

**45: injunctions-** applications before proceedings, w/o notice, by court order, after judgment; undertaking as to damages (6)

**52:** chambers rules- applications to be heard in chambers, orders w/o notice (urgency requirement)

**Ex Parte Interim:** w/o **notice**, trying to prevent harm (quia timet requirement) → P must show urgency, full and frank disclosure

*Gulf Islands Navigation Ltd v Seafarers International Union (1959)*: (ex parte injunction granted, then challenged) Breach of company’s promise to conduct some tests, injunction set aside due to **unclean hands**.

- Injunction never should have been granted- Gulf Island could be liable for undertaking as to damages

**Pre-Trial (Interlocutory or Interim):** w/ **notice**, civil claim must be in progress

*American Cyanamid Co v Ethicon Ltd (1975)*: (potential patent infringement of surgical sutures) Injunction granted; emphasis on preserving the status quo and preventing market competition until patent resolved at trial.

Applicant for an interlocutory injunction (P) must show:

1) **Serious question to be tried**

- not necessary to consider merits/potential outcome of the case

2) **Irreparable harm to P**

- inadequacy of legal remedy, damages won’t restore P to original position

3) **Balance of convenience**

- comparative harm to P if refused, harm to D if granted, harm to 3<sup>rd</sup> parties; risk of doing an injustice (**RJR**)

**Other discretionary factors** = public interest (**RJR, Metropolitan Stores, Harper, Kent District**)

\***Fundamental question:** whether the granting of an injunction is just and equitable in all the circumstances (**BC (AG) v Wale**)

**MacMillan Bloedel Ltd v Michael Mullin (1985):** (logging on Meares Island, dispute btwn logging co and FNs/envmtalists) 2 injunctions granted- restraining logging and restraining protesting, pending further trial for Ab title/rights claim.

- Position of FNs is far stronger than that of MB → no irreparable harm to MB, timber will still be there if injunction is granted; irreparable harm to FNs, subject matter of the trial will be destroyed if injunction is refused.
- Need to preserve evidence while claim is being actively pursued
- Early trial date- to be resolved within a reasonable time
- American Cyanamid approach applies to Ab title cases

**Haida Nation v BC (2004):** Note that the court criticized interlocutory injunctions as only partial, imperfect relief; suggested that the Crown's duty to consult and accommodate is more appropriate for settlement of claims, consideration of Ab interests.

**BC (AG) v Wale (1987):** (Indian bands passed bylaws to regulate fisheries on their reservations, BC argued that fisheries were under gov't jurisdiction) Injunction granted to preserve status quo and prohibit enforcement of bylaws, pending trial.

- Irreparable harm may be reviewed as part of balance of convenience, is not required to be a sep element
- American Cyanamid approach applies to Ab rights cases
- Undertaking as to damages does not apply to Crown

**BMWE v Canadian Pacific Ltd (1996):** (change in union workers' schedules, to be settled in arbitration) Interlocutory injunction granted and upheld.

- Where no adequate alt remedy exists, the courts retain a residual discretionary power to grant interlocutory relief
- Courts have jurisdiction to grant an injunction where there is no cause of action; courts may grant interim relief where final relief will be granted in another forum

**Negative Covenants** = generally enforceable in equity (Rule in *Doherty v Allman*), unless there is doubt as to validity/enforceability

**Cascade Imperial Mills Ltd v Lindsay (1985):** (non-compete clause in employment K, Lindsay quit to work at rival co and P sought injunction) Where there is doubt about validity of clause, must apply American Cyanamid test. Injunction not granted, since balance of convenience favored Lindsay- he would lose job and suffer irreparable harm while co would not lose much.

**Mandatory Injunction** = order to do a positive act, generally unenforceable

- Factors to consider: ambiguity, constant supervision, balance of convenience

**Kennard v Cory Brothers and Co Ltd (1922):** (Ds' mine tailings slid down mtn onto P's land, P sought mandatory injunction to "clear the drains" and "execute such works as might be necessary" to protect buildings) Only the narrower/specific injunction was granted; latter request **too broad/requiring constant supervision = unenforceable.**

**Hedstrom v Manufacturers Life Insurance (2002):** (H electrocuted while talking on cell phone on wet floor, sought mandatory interim injunction to continue insurance benefits until trial) Injunction denied, American Cyanamid test not satisfied- H did not demonstrate irreparable harm/inadequacy of damages.

**Contracts of Personal Service**- note that equity will not grant a positive injunction for SP of a personal service, b/c equity will not enforce slavery. Can enforce a neg covenant by injunction, so long as it does not amt to a decree that the person must perform the personal services or remain idle/starve (*Warner Bros*).

**Warner Bros v Nelson (1937):** (Bette Davis breached non-compete clause in employment K by working for another co, P applied for perm injunction to restrain breach and claim damages) Injunction granted for 3 years to restrain her from working for other producers; court is not forcing her to perform work or be idle, since she can do other things besides acting.

**Hill v CA Parsons & Co (1971):** (Hill refused to join union, was fired at age 63; sought injunction to restrain co from termination and compel reinstatement until age 65) Injunction granted b/c damages inadequate- wrongful dismissal, employer did not give proper notice.

- Interlocutory injunction is possible to prevent employer's breach of employment K (to prevent wrongful dismissal or to order reinstatement of a wrongfully dismissed employee)
- Mandatory injunction = SP

**Constit Cases** = emphasis on public interest, American Cyanamid test applies

**Manitoba (AG) v Metropolitan Stores Ltd (1987):** (store challenged constit of Labour Code, sought stay of proceedings) American Cyanamid approach applies to constit cases. Stay of proceedings refused- since balance of convenience favours public interest.

- Interlocutory relief not approp in constit cases, too disruptive of gov't
- Distinction btwn suspension and exemption- easier to grant stay/injunction in an exemption case, as opposed to suspending legislation as inoperable to everyone

**RJR Macdonald v Canada (AG) (1994):** (ban on tobacco advertising, possible violation of Charter rights; application for a stay of execution/proceedings, pending constitutionality decision) Application for stay dismissed, due to the importance of public interest in health.

- Same principles apply whether remedy = injunction or stay
- Irreparable harm test: focus on the nature of harm rather than magnitude
- Balance of convenience: focus on the public interest in constit cases; applicant must demonstrate that the suspension of the legislation would itself provide a public benefit
  - In this case- balance strongly in favour of gov't/public health, not offset by economic harm to tobacco cos
- Suspension case- more detrimental to public interest than an exemption case

American Cyanamid approach applies to: Charter cases, applications for stays of proceedings, temp suspensions of legal process

**Libel and Slander** = injunction v unlikely; according to *Church of Scientology* case, court must find:

- 1) wrongful act (clearly libelous)
- 2) no defence (i.e. justification, fair comment, privilege)
- 3) probable repetition

**Church of Scientology of BC v Radio NW Ltd (1974):** (radio broadcast show played exposés of Church and interviews, Church sought interlocutory injunction) Clear case of libel + repetition = injunction granted.

**Mareva Injunction** = freezing order, ex parte (or interlocutory?) injunction restraining D from removing assets from particular jurisdiction

- In personam- as long as D is in jurisdiction, assets can be restrained anywhere in world
- Can be combined w/ Anton Piller order, disclosure order, order appointing a receiver
- American Cyanamid does not apply

Test from Aetna (more stringent than American Cyanamid):

- 1) P has cause of action justiciable in BC
- 2) strong prima facie case (>50% likelihood of success)



- 3) D has some assets in BC (if outside BC- worldwide Mareva)
- 4) genuine risk of D removing assets before judgment (quia timet requirement)
- 5) balance of convenience

***Aetna Financial Services Ltd v Feigelman (1985)***: (Co failed to give SH proper notice of co's default, F got ex parte Mareva injunction preventing transfer of assets out of province) Mareva set aside b/c improperly granted, F ordered to pay damages for undertaking.

- Balance of convenience- Aetna = fed incorp co, entitled to enjoy mobility of assets; was acting in ordinary course of business

**Anton Piller Order** = ex parte interim injunction allowing search and seizure of premises, for the preservation of property/evidence; American Cyanamid does not apply

Elements from *Celanese* (more stringent than American Cyanamid):

- 1) strong *prima facie* case
- 2) serious actual or potential damage to P
- 3) convincing evidence that D has possession of incriminating docs or things
- 4) real possibility that D may destroy material

\*Also: full and frank disclosure of material facts, undertaking as to damages, indep supervising solicitor to execute order

***Celanese Canada Inc v Murray Demolition Corp (2006)***: (MD trying to steal trade secrets, C obtained Anton Piller Order to search/seize confidential material) Access to privileged docs should have been anticipated and avoided, C's lawyers removed from case. Established elements of APO, heavy responsibility on P to stay within bounds of order.

- Protections for D:
  - 1) carefully drawn order that ids material to be seized and sets out safeguards for privileged docs
  - 2) vigilant court-appointed indep supervising solicitor to conduct Anton Piller search
  - 3) responsible self-restraint on those executing order; focus on **limited purpose of preserving evidence**
- if order is exceeded, lawyer for breaching party will be removed and damages awarded for trespass
- Anton Piller is difficult to execute, test is very stringent

***BC (AG) v Malik***: (gov't funded defence of Malik in Air India bombing trial, sought APO authorizing search of Malik's business/residence for evidence of concealed assets- in order to get repayment) Requirements for APO are met, Anton Piller Order + Mareva Injunction granted = financial records identified and preserved from imminent destruction.

***Vinod Chopra Films Ltd v John Doe***: (concern that someone was planning to copy and distribute film illegally, co sought Rolling APO) Order denied, P should have id'ed specific known defendants.

- Problems: No full/frank disclosure, no evidence of real damage/possibility of destruction
- Other factors to consider- inspection would do no harm to D, would not bring interests of justice into disrepute
- Difficult to get a Rolling Anton Piller Order against anonymous D

**Norwich Pharmacal Order** = interlocutory order compelling 3<sup>rd</sup> party to disclose identity of parties (so that P can identify wrongdoer)

Test from *BMG Canada*:

- 1) bona fide claim against unknown wrongdoer = belief that wrong was done and intention to bring action, no improper purpose for seeking identity
- 2) 3<sup>rd</sup> party is more than a mere bystander- somehow involved in matter, knowledgeable and benefitting from the wrongdoer either innocently or knowingly

- 3) 3<sup>rd</sup> party is **only practical source of info**
- 4) 3<sup>rd</sup> party is **indemnified by P** = reasonably compensated for compliance/legal costs
- 5) **public interest in disclosure outweighs legitimate privacy concerns**

**BMG Canada Inc v John Doe (2005):** (BMG wanted to sue file-sharers, sought Norwich Pharmacal Order to compel ISPs to provide identities) Order denied due to **privacy concerns/public interest**, court not convinced that P's commercial interest outweighs privacy interests of file-sharers in this case.

**Anti-Suit Injunction** = restraining litigation in a foreign jurisdiction, directed against parties in personam

- Foreign proceedings must be in progress/pending

**Amchem Products Inc v BC (WCB) (1993):** (class action against asbestos manufacturers in Texas for exposure that occurred in BC, Ds sought anti-suit injunction to restrain Ps from bringing action in Texas) Injunction refused, litigation could continue. General principle of **int comity**- court should respect foreign jurisdictions.

- Remedies to control choice of forum = stay of proceedings or anti-suit injunction
- Choice of approp forum should ensure that (1) action is tried in jurisdiction w/ closest connection to action and parties, and (2) judicial advantages are not secured to one litigant at the expense of others in a jurisdiction that is otherwise inappropriate
- 1) **Is BC the natural forum for the trial?** (Does it have the most **real and substantial connection** w/ parties and dispute?)
  - If no → then refuse anti-suit injunction
  - If yes → look at question 2
- 2) **Does foreign jurisdiction offer either party legitimate advantage of which it would be unjust to deprive them of?**
  - Possibility of higher damages in Texas = legitimate advantage
  - Not a serious injustice to try this case in foreign court

\*note that Amchem effectively killed the anti-suit injunction as an effective way to control forum-shopping

- Injunction appears to be making a comeback in arbitration cases (preventing court action?)

**IP/Breach of Confidence** = strictly equitable wrong

Elements from *Cadbury Schweppes*:

- 1) **confidential info**
- 2) **received in confidence**
- 3) **unauthorized use (wrongful misuse)**
- 4) **to the owner's detriment**

**Remedies:** interlocutory or perm injunction (to restrain continued misuse), equitable compensation (where injunction would be too harsh)

**Cadbury Schweppes Inc v FBI Foods Ltd (1999):** injunction too harsh, equitable comp awarded instead.

- Cadbury did not suffer irreparable harm, formula was “nothing very special” (only provided a 1-year headstart); Cadbury guilty of partial laches → no jurisdiction for court to award injunction
- Distinction btwn equitable comp and equitable damages under **Lord Cairns Act**- cannot attach a legal remedy to an equitable claim:
  - If no jurisdiction to decree injunction or SP → then no eq damages (eq comp may be possible)
  - If refusal to decree injunction or SP on discretionary grounds → can decree eq damages

**Expropriation Doctrine** = eq damages in addition to or in substitution for an injunction

**Lord Cairns Act, s.2 / L&E Act, s.2:** where P is entitled to injunction, court may provide eq damages instead (b/c of **balance of convenience**, consequences of injunction may be unfair)

- If awarded **in addition to injunction**- damages compensate for injury done



- If awarded **in substitution for injunction**- must cover the injury already sustained and injury that would be inflicted in future by the commission of the act not enjoined (*Rombough*- past and future wrongs)
- Precondition to getting eq damages- must be entitled to receive injunction (*Cadbury Schweppes*)

***Rombough v Crestbrook Timber Ltd (1966)***: (C's sawmill caused damage to R's land from smoke and ashes, R was awarded a limited injunction and \$ for expected future damages) Damages can be awarded in substitution for injunction; balance of convenience favoured rest of community/jobs over harm to P in this case.

#### Encroachment

**Property Law Act s.36**: if a building/fence improperly encroaches on adjoining land, the court may:

- Order compensation to be paid and declare that owner has an easement
- Order compensation to be paid and vest title to the land (move property line)
- Order owner to remove the encroachment

**Quia Timet/Anticipatory Injunction** = party fears/anticipates that harm will occur, seeks a neg injunction to prevent harm

Test from *Redland Bricks*:

- 1) **strong probability that grave damage will occur** (cannot be subj fear)
- 2) **monetary damages will be inadequate if such damage does occur**
- 3) **balance of convenience**- cost to D of doing the work or preventing/lessening the likelihood of the future wrong vs. P's legitimate concerns

***Redland Bricks Ltd v Morris (1969)***: (R's excavations caused subsidence of M's farm, M sought damages + anticipatory injunction restraining further quarrying + mandatory injunction to restore support to land)

Anticipatory injunction granted, mandatory injunction refused. R was acting reasonably, not a willful or deliberate wrongdoing; cost of restoration disprop high compared w/ any real benefit to M.

- note that some harm had already occurred in this case- quia timet injunction is usually sought prior to harm occurring

**Delayed Injunction**- equity may delay order if it will cause hardship to D

***Woollerton and Wilson Ltd v Richard Costain Ltd***: (invasion of airspace by D's crane during construction project, P refused to grant licence and sought injunction) American Cyanamid applies- trespass vs. nuisance is a serious question to be tried, irreparable harm (trespass) to P is established, balance of convenience favors granting the injunction; however, injunction suspended for 1 year. Court has discretion to delay order.

***Charrington v Simons & Co Ltd (1971)***: (mandatory injunction was granted to remove a raised roadway in breach of covenant, delayed for 3 years) CA decided that delay was unnecessary, injunction was ordered to take immediate effect. Delay of an injunction not approp where it will cause unnecessary hardship to the applicant.

- Possible to delay for short period (i.e. *Polai, Woollerton*) but not likely for 3 years
- In this case, P had already suffered breach of covenant and had won his case, TJ went beyond bounds within which discretion may judicially be exercised

***Harper v Canada (AG) (2000)***: (H sought injunction to prevent fed gov't from restricting 3<sup>rd</sup> party spending under the Canada Elections Act, gov't applied for stay of injunction pending decision on constit of Act)

Injunction was stayed pending outcome of appeal- legislation valid for now.

- an injunction against the enforcement of legislation raises special considerations: depriving public of a statute which has been duly enacted, depriving applicant of constit rights
- public interest in keeping the legislation in place pending constit review outweighs detriment to free expression → support for delaying injunction
- \*similar policy argument/balance of convenience in *Metropolitan Stores, RJR*

**Enforcement of Legislation**- i.e. injunction restraining crim activity to supplement crim law

Likely scenarios:

- **1) D is a “flouter”:** *Polai* case- injunction to restrain her from operating illegal suites, b/c legal remedy/fines were inadequate to deter activity
- **2) Public nuisance:** *Kent District*- injunction granted to prevent prosecutors from creating public nuisance or emergency situation; *Couillard*- prostitution in West End
- **3) Activity amounts to contempt of court/interference w/ admin of justice:** *BCGEU*- ex parte injunction to prevent picketing at court

***Kent District v Storgoff and AG BC (1962):*** (emergency bylaw passed to prevent a protest outside Agassiz prison, injunction sought to restrain Ds from violating bylaw until constit validity of bylaw was decided) American Cyanamid test satisfied, injunction granted to maintain status quo/expedite trial.

- Imp for court to consider 3<sup>rd</sup> party and public interests

***AG BC v Couillard and Alexander (1984):*** (AG sought injunction to restrain prostitution in West End, argued that it was a public nuisance) American Cyanamid test satisfied, perm injunction granted. Example of equity filling a gap in crim law- prostitution not yet a crime.

***Provincial Rental Housing Corp v Hall (2005):*** (squatters protesting housing policies violated certain bylaws, building owners got ex parte injunction to end squat) Injunction overturned- not suff urgency to justify ex parte order, notice should have been given. Court must ensure fundamental procedural safeguards, must not prohibit freedom of expression.

- Ex parte only approp in extremely urgent situations

***Lakehead Region Conservation v DeMichele:*** (injunction granted to stop development of land w/o permit) Perm injunction upheld; public interest in protecting wetland env and ensuring compliance w/ Conservation Authorities Act.

***BCGEU v BC (AG) (1988):*** (injunction issued by judge to stop picketing at courthouse) Injunction upheld; picketing = crim contempt, interference w/ **admin of justice**. Court may act ex parte on its own motion whenever there is an interference with the courts of justice that will entail irreparable loss of rights.

**Undertaking as to Damages**- applicant can be required to pay damages if injunction should never have been granted; judicial discretion to dispense w/ P's undertaking (*Delta*)

- “one who seeks equity must do equity”
- only applies to interlocutory/interim injunctions (not perm injunctions)
- includes all reasonably foreseeable damages at the time of the undertaking (*Fletton*)
- Survives discontinuance of a claim (*Bird Construction*)

**L&E Act, s.39(2):** court can impose “terms and conditions” on granting an injunction order

**BCSC Rule 45(6):** unless court otherwise orders, an order shall contain the applicant's undertaking to abide by any order which the court may make as to damages

***Vieweger Construction Co Ltd v Rush and Thompkins Const (1964):*** (P obtained injunction against removal of construction equipment, D later won main action for damages) D has right to claim undertaking damages, P punishable by contempt if he does not comply. Court will only deprive D of damages in special circumstances (i.e. D guilty of unethical conduct)- does not apply here.

***Manitoba Dental Association v Hyman and Halstead:*** (injunction against dentists practicing w/o a licence) Dental Association required to undertake damages b/c they sought the injunction.

***Delta v Nationwide Auctions Inc and Nationwide Realty Service Ltd (1979)***: Rule 45(6) confirms that there is judicial discretion to dispense w/ P's undertaking, "unless the court otherwise orders". Special circumstances- impecuniosity of P (no money), so no undertaking required.

***Bird Construction Co v Paterson (1960)***: (B obtained injunction against picketers, then voluntarily discontinued action) B still liable to pay undertaking damages. Undertaking survives discontinuance- is a promise to the courts, rather than a promise btwn parties.

- By discontinuing action, P is admitting that injunction was improperly granted
- Better to apply to have injunction dissolved, then court can decide to relieve undertaking or not

***Fletton Ltd v Peat Marwick Ltd (1986)***: (P obtained injunction for laundry units to be preserved until trial, action was dismissed and D sought damages to cover expenses incurred during storage/preservation of units) D is entitled to reasonably foreseeable damages as part of undertaking; CL principles apply.

**Proper Form of Injunction**- must be **clear enough** so parties know what is expected and who it applies to

***Marengo v Daily Sketch Ltd (1948)***: (injunction granted against corp by "their staff servants and agents") Wording does not restrain 3<sup>rd</sup> parties. Old Rule: 3<sup>rd</sup> parties who were not named could not be held in contempt for violating an injunction → overruled by *MacMillan Bloedel v Simpson*.

***MacMillan Bloedel Ltd v Simpson (1996)***: (MB obtained injunction against Simpson and "John Doe, Jane Doe, and other unknown parties" from blocking logging roads) Injunction is enforceable against 3<sup>rd</sup> persons.

- Knowingly disobeying an injunction = impeding the admin of justice
- Requires that they are (1) **informed of the order**, and (2) **given an opportunity to comply**
- 3<sup>rd</sup> parties who violate an injunction may be prosecuted for contempt of court

***Sonoco Ltd v Local 433, Vancouver Converters (1970)***: (A charged w/ contempt for blocking logging road, violating an injunction prohibiting "unlawfully persuading or attempting to persuade") Word "unlawful" unclear, injunction unenforceable. An injunction must be worded clearly enough so a defendant knows what behavior is being enjoined.

***Doucet-Boudreau v Nova Scotia (2003)***: (Francophone parents applied for mandatory injunction to provide French-language education under Charter rights, court ordered province to use "best efforts") Order upheld, wording considered clear enough to be enforceable.

- Note political/civil rights issue that would likely never occur again (in general, legislation prohibits courts from issuing injunctions against Crown)

**Permanent/Final Injunction**: (9-49) awarded after judgment

- 1) **Has the party established its legal rights?**
- 2) **Is an injunction the appropriate remedy?**
  - Irreparable harm/balance of convenience = discretionary considerations on the question of appropriateness
  - \*no undertaking as to damages for a perm injunction
  - \*see *Cadbury Schweppes, Polai*

## CONTEMPT

**CC s 9**: court may impose punishment for contempt at CL

**s.127**: disobedience of court order- indictable or summary conviction

- Crim contempt requires MR + AR, BRD; A knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt (*United Nurses*)

**SC Civil Rule 22-8**: court may impose punishment (fine/committal/sequestration) for civil contempt

- D had actual notice/knowledge of the order and disobeyed it (proof BRD)
- Corp can be held in contempt = “piercing of the corp veil”
- Element of public interest in upholding any court order
- Due diligence can be a defence (*Alberta v MB*)

***United Nurses of Alberta v Alberta (AG) (1992)***: (contempt proceedings against individ nurses + union)

- Simple breach of court order = civil contempt
- Element of public defiance of the court’s process, calculated to lessen societal respect for the court + breach = crim contempt
- Respect for rule of law, admin of justice- must be enforced

***Videotron v Industries Microlec Produits Electroniques Inc (1992)***: (failure to comply w/ perm injunction, refusal to testify in contempt proceedings) Alleged contemnor cannot be compelled to testify.

- Contempt of court is quasi-penal in nature; would be inconsistent if respondent cited for contempt could be compelled to testify

***Isaacs v Robertson (1984)***: (failure to comply w/ interlocutory injunction on basis that injunction was erroneously issued) Order must be obeyed unless and until it has been set aside by the court; invalidity of order not a defence to contempt- but may be a mitigation factor

***Alberta (Child etc, Director) v MB (2010)***: (failure to immediately return child to foster mom following court order) Child protection officer personally responsible for ensuring compliance w/ order, found guilty of civil contempt.

- Public officers can be held liable for contempt (although imprisonment unlikely)
- Cannot relieve responsibility to comply with court orders by delegating to others; however, may be a reasonable step in the exercise of due diligence

## CHAPTER 4

**SPECIFIC PERFORMANCE** = final remedy only

Elements:

- 1) Existing K btwn P and D
- 2) Breach of K or anticipatory repudiation by D
- 3) Inadequacy of damages as a remedy
  - subject matter must be unique (P must establish uniqueness)
- 4) Discretionary factors
  - “conduct of the party seeking the relief” (*Harris v Robinson*)
  - P’s laches
  - P’s unclean hands
  - Not a K for personal services (*Ryan*)
  - Not a K requiring “constant superintendence” by the court (*Ryan*)
  - Not a K that P cannot perform- **doctrine of mutuality**

***Harris v Robinson (1892)***: Not sufficient to show that a contract existed; much regard is shown to the conduct of the party seeking the relief.

***Semelhago v Paramadevan (1996)***: (sale of land) A party entitled to SP is entitled to elect damages in lieu thereof; date of assessment = date of judgment. SP should not be granted unless there is evidence that the property is unique to the extent that its substitute would not be readily available.

- “While at one time the CL regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case”

**Southcott Estates Inc v Toronto Catholic School District (2012):** (sale of land to real estate developer) \$1 damages awarded for breach of contract, failure of Southcott to mitigate losses. No SP, land not unique.

- **Investment property** = not a “fair, real and substantial justification” for claiming SP, unless it can be shown that the land has a “peculiar and special value” (*Asamera*)
- **For mitigation, must establish:**
  - 1) that an opportunity to mitigate the loss existed
  - 2) that P acted unreasonably in failing to take that opportunity
- **Dissent (McLachlin):** P, acting reasonably, cannot pursue SP and mitigate its loss at the same time; purchasing a substitute property would undermine entire SP argument.

**Ryan v Mutual Tontine Westminster Chambers Association (1893):** (Doorman services included in lease agreement, tenants sued landlord for SP) Refusal of SP, damages awarded for breach of lease.

- Relevant factors:
  - Performance of **personal services**- cannot force someone to perform
  - SP unlikely when **constant superintendence by the court** is required to enforce it
  - Cannot compel SP of **part of a K** (i.e. appointment of doorman not sufficient)

**Walsh v Lonsdale (1882):** (lease agreement but no formal deed, refusal to pay the year’s rent in advance) Equitable lease; both parties admit that relief is capable of being given by SP.

- In this case, agreement to transfer legal title considered good in equity
- “Equity regards as done that which ought to be done”

**Manchester Brewery v Coombs (1901):** (Agreement to buy beer from particular supplier but no formal deed) SP granted = injunction to restrain purchase from other suppliers.

- Until a formal lease is executed in compliance with a decree of SP, there exists an equitable lease only
- Principle in *Walsh v Lonsdale* has limited applicability ?

**Beauchamp v Coastal Corp (1986):** (K for sale of Wayward Princess boat) Damages in lieu of SP; election of remedies must remain at the option of the innocent party.

**Raaber v Coll-in-wood Farms Ltd (1971):** (sale of land, P unable to provide conditional sales agreement but willing to substitute cash) Where a non-essential term of the K cannot be performed literally but can be performed cy-pres, the court may order SP.

- Cy-pres = as near as possible

**Crown Proceeding Act, s.11:** No injunction or SP against Crown; however, court may make an order declaring the rights of the parties

- Recall: no immunity of Crown servants or agents personally

## CHAPTER 6

**TRACING at common law** = id of assets that have changed form

Limitations:

- Change of position
- Dissipation squandering
- Mixture that precludes tracing

**BMP Global Distribution Inc v Bank of Nova Scotia (2009):** (RBC cleared cheque and BNS released funds to BMP, later discovered forgery) RBC entitled to recover money as long as money can be identified, no damages awarded to BMP- cannot profit from fraud, even if they did not commit the fraud.

- Where money has been transferred in circumstances in which it can still be identified, tracing is permitted

- CL rule: claimant must demonstrate that assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them
- **possible at CL to trace funds into bank accounts** if funds can be id'ed
- mixing by recipient- not a bar to recovery
- doctrine of **mistake of fact** applies in this case

***Lipkin Gorman v Karpnale Ltd (1991)***: (law firm partner stole funds and gambled at Playboy club, firm brought action against club to recover the money)

- if appellant can establish a basis on which he is entitled to the money, may be entitled to succeed in claim against 3<sup>rd</sup> party (though not if the 3<sup>rd</sup> party has received the money in good faith and for valuable consideration)
- in this case- gambling chips/chance of winning not valid consideration
- **change of position** defence applies- unjust to ask D to make restitution to the extent that he has changed his position in good faith
- club acted in good faith- still liable to pay enrichment (money earned from partner's gambling overall)

**TRACING in equity** = id of assets that have been mixed/changed form

Possibilities:

- **volunteer kept money in unmixed fund = constructive trust** (proprietary remedy) "order to restore the unmixed sum of money"
- **volunteer mixed money with own funds = declaration of a charge** (proprietary) on the mixed fund, ranking pari passu w/ claim of volunteer
- **3<sup>rd</sup> person mixes trust funds in real estate**- no tracing; P can't identify and claim as trust property, can't sell (b/c there is a bona fide purchaser for value)
- **3<sup>rd</sup> person uses trust funds to discharge or reduce debts**- no tracing; can't identify trust property
- **no tracing if inequitable result**

***In re Diplock (1948)***: (estate distributed to various charities under an invalid will provision, children vs. charities) Tracing exists in equity; however, money cannot be traced in this case, and even if it could, declaration of a charge would not produce an equitable result.

- equity can id money in a mixed fund, more remedies (specific relief) available
- rights of equitable owner = in effect rights of property
- entitled to a charge ranking pari passu w/ the claim of **innocent volunteer**
- however, declaration of charge would be inequitable here- altered and improved assets come from a combination of charity land and estate money
- **money spent by charity to improve its real property or to discharge debt (i.e. mortgage)- cannot be traced**
- **change of position** defence applies (in equity)
- **equitable tracing is discretionary**

***Foskett v McKeown (2001)***: (misappropriated money paid for 2/5 life insurance premiums, children vs. trust beneficiaries) Declaration of a charge, plaintiffs have a beneficial interest in the proceeds and are entitled to 2/5 of the proceeds.

- Children = innocent volunteers
- Essentially- 2 innocent parties, who should benefit from fraud?
- Dissent: only the cost of the premiums should be returned (pro rata based on original contributions)

***Brookfield Bridge Lending Inc v Karl Oil and Gas (2009)***: (commingled funds-express trust created by operating procedure, question of whether trust beneficiaries were entitled to proceeds when oil well was sold on behalf of secured creditor) **No entitlement to sale proceeds**, since trust no longer attached to funds. **No**



**constructive trust**, since 2<sup>nd</sup> and 4<sup>th</sup> elements of *Soulos* not satisfied. Clear breach of trust/fid duty (unauthorized spending of trust funds), but inability to trace funds into specific assets and unfair prioritization of creditors.

- Once trust funds are disbursed to bona fide 3<sup>rd</sup> parties for value w/o notice, funds are released from trust
- Further deposits are not presumed to replenish trust fund

Ranking of claimants:

- 1) Trust beneficiaries = Karl/Choice
- 2) Secured creditors/equitable charge-holders = Brookfield
- 3) Unsecured creditors

\*trust beneficiaries should rank ahead of secured lenders, but only for trust monies

**Lowest Intermediate Balance Rule (LIBR):** pro rata on the basis of tracing

- investor cannot claim an amount in excess of the lowest balance in a fund subsequent to their investment = **\$81,000 traceable to trust money, proportion split pari passu btwn Karl and Choice**

*Soulos v Korkontzilas*: Elements of constructive trust based on wrongful conduct:

- 1) D was under equitable obligation to P in relation to the assets
- 2) assets in the hands of D resulted from breach of equitable obligation
- 3) P has legitimate reason for seeking proprietary remedy
- 4) there are no factors rendering imposition of a constructive trust unjust in all the circumstances (interests of intervening creditors must be protected)

*Boughner v Greyhawk Equity Partners (2012)*: (commingled funds- fraudulent investment scheme) LIBR applies in this case = most just and equitable result.

- **General rule: LIBR = preferable approach to resolving competing claims to mingled trust funds**
- In circumstances where LIBR is not practically possible (i.e. too many claimants, incomplete records), then distributions should proceed on a pro rata ex post facto basis- based on original contributions

**Example fact pattern:**

A invests \$100 in a fund. Value of fund declines to \$50. B invests \$100, bringing balance to \$150. Value of fund then declines to \$120.

- **If LIBR applies:** A cannot claim more than \$50 = lowest balance in the fund prior to B's investment
  - B's investment constitutes 2/3 of the \$150 fund
  - Of the remaining \$120: B claims 2/3 = \$80, A claims 1/3 = \$40
- **If pro rata based on original contributions:** both A and B claim \$60
  - Equal contributions, therefore equal split
- 3<sup>rd</sup> possibility = **last in, first out** (or first in, first out- rule in Clayton's case)
  - B was last in, therefore B is assumed first out = loss borne by B; A claims \$100, B claims \$20
  - A first in, therefore A is assumed first out = loss borne by A; A claims \$20, B claims \$100
  - Rule has been rejected as unfair, arbitrary; only applies to active bank accounts as a last resort

## CHAPTER 7

### RELIEF FROM FORFEITURE AND PENALTIES

\*balance btwn granting relief and preserving freedom to contract

*Nuytten and Bakalaryk v Stein (1954)*: equity can relieve against forfeitures and penalties, even where there is no fraud, accident, surprise or mistake

- **1897 Supreme Court Act:** the court may relieve against all penalties and forfeitures, and in granting such relief may impose such terms as to costs, expenses, damages, compensations, and all other matters as the court thinks fit = **S.24 of Law and Equity Act**
- not a reiteration of the rules, but something new- gives relatively untrammelled scope to the courts to relieve against forfeiture
- **liberal approach to relief**

***Emerald Christmas Tree Co v Revcon Holdings Ltd et al (1978)***: (sale of land, payment by instalments; upon default, acceleration clause demanding remaining payment in full) **Acceleration clause is not a penalty or forfeiture**; defaulting purchaser not entitled to relief.

- General policy: reluctance of courts to interfere w/ freedom of contract
- TJ = **liberal approach**: if person loses right to pay b/c of default = forfeiture of right against which equity may relieve
  - Not a flagrant and contemptuous disregard of obligations in this case, relief should be available
- CA = **strict approach**: *Nuytten* cannot be interpreted too broadly, legislature did not intend something new

***Shiloh Spinners Ltd v Harding (1973)***: (lessees caused damage to property, breached K; disputed right of re-entry and asked for relief from forfeiture) Series of **clear and willful breaches** = not a suitable case for relief.

- Emphasis on policy; equity expects men to carry out their bargains
- Factors to consider: gravity of breach, flagrant and contemptuous disregard of obligations, value of D's property vs. damage to P, whether court can order remediation quickly and effectively
- "Equity will not act in vain", "he who seeks equity must do equity"

**Note**: can the court grant relief under s. 24 against a statutory penalty or forfeiture?

- only the legislature can relieve against harsh laws; judicial power to relieve against statutory penalties would in effect give the court authority to repeal statutes

**L&E Act, s.28**: cannot relieve the same person more than once in respect of the same covenant or condition

**Penalty Clauses** \*current trend is to uphold contracts, avoid expansion of penalties

***Dunlop Pneumatic Tyre Co v New Garage & Motor Co (1915)***: (K to sell tires for agreed sum, "liquidated damages" owed for breach) Damage of an uncertain nature, fixed sum/tire a **genuine pre-estimate = liquidated damages, enforceable**.

- Penalty (unenforceable) = money stipulated in terrorem of the offending (breaching) party; extravagant and unconscionable in amount in comparison w/ the greatest loss that could conceivably be proved to have followed from the breach; sum stipulated is greater than the sum which ought to be paid
  - Single lump sum = presumption of penalty
- Liquidated damages (enforceable) = genuine covenanted pre-estimate of damage
  - where precise pre-estimate is difficult or impossible, amount can still be considered a genuine pre-estimate
- **Expression used in K is not conclusive**- whether a sum is a penalty or liquidated damages = question of construction to be decided upon the terms and inherent circumstances of the K, at the time of making the K

***Doman Forest Products v GMAC Commercial (2007)***: (K to borrow money from GMAC; Doman found diff lender, cancelled K and paid early termination fee) Fee = **reasonable estimate, not a penalty; simply a negotiated sum**.

- When K was made, this was a reasonable estimate of lost profits
- Payable upon termination, not upon breach- therefore cannot be a penalty
  - **Penalty must be the consequence of breach**

***HF Clarke Ltd v Thermidaire Corp Ltd (1974)***: (breach of non-compete sales clause, "liquidated damages" formula) Exaction of gross trading profits over 3-year period is an **excessive and punitive response** to the problem to which it was addressed = **penalty, unenforceable**.

- However, damages awarded for breach of covenant

***Elsley v Collins Insurance Agencies Ltd (1978)***: (breach of non-compete employment clause, "liquidated damages" sum) P entitled to injunction + equitable damages as can be proven up to the fixed sum.

- Not double relief- damages relate to breach, injunction to future breaches
- Agreed sum payable on breach represents max amt recoverable (whether penalty or liquidated damages)

#### Summary:

- **Where sum = liquidated damages:** must decide btwn damages or injunction; may recover entire sum irrespective of actual loss
- **Where sum = penalty:** may only recover such damages as can be proven, amt cannot exceed stipulated sum (penalty clause = ineffective even if less than actual loss)
- If injunction is chosen: may recover equitable damages for actual loss sustained up to the date of the injunction, amt cannot exceed stipulated sum

#### **Forfeiture of Deposits-** in real estate transactions

**True deposit** = payment at time of acceptance or removal of conditions (usually 10% or less)

- Part payment of purchase price- if transaction is completed
- Considered earnest money = good faith payment, guarantee of performance
- Liable to forfeiture- if purchaser breaches and transaction is not completed

**Abusive deposit** = excessive/unreasonable amt, usually >10% of purchase price

- If seller's retention of it would be penal or unconscionable, court may relieve against forfeiture (*Tang*)

**Down payment** = part payment of purchase price

- Not considered earnest money, is refundable

**Expression used in K is not conclusive-** matter of contractual intention (*Tang*)

***Tang v Zhang (2013):*** (5% deposit on property sale, transaction not completed; vendor profited from subsequent sale) **True deposit, forfeited to sellers-** not considered penal or unconscionable

***Hughes v Lukuvka (1970):*** (8% deposit on property sale, forfeiture as “liquidated damages”, vendor suffered no loss) Deposit not regarded as a penalty, retention not unconscionable = **true deposit, valid forfeiture.**

***Fraser v Van Nus (1987):*** (6% deposit “by way of liquidated damages”, purchaser decided not to perform)

Vendors elected to cancel K and claim the deposit; **stipulated sum = limit on damages recoverable.**

- General rule: in the absence of an indication to the contrary, parties will be taken to have intended that the stipulated sum = limit (*Elsley*)

#### **Forfeitures under Agreements for Sale**

***Re BC Development Corp (1986):*** (agreement for sale, 25% deposit; after real estate market crash, purchasers defaulted and did not comply w/ order for SP) Suff abandonment of K to justify rescission w/o restitution; **all payments and property interest forfeited.**

- Practice of ordering cancellation and, at the same time, retention of money paid under the agreement is well established/supported by authority
  - Applies to agreements for sale, and mortgage foreclosure actions
- Relief from forfeiture requires:
  - **1) penalty** (not liquidated damages) at the time of K formation: “sum forfeited is out of all proportion to the loss suffered”
  - **2) unconscionable** to retain money at the time of breach
- In this case- not penal (land prices had plummeted), not unconscionable (BCDC acted w/ proper business judgment)

***Connor v Bulla (2010):*** (agreement for sale, 50% deposit; purchaser/tenant defaulted) **Part-payment, not a deposit** in this case; possible for some relief from forfeiture- “monies paid seem to be considerably more than the quantum of any possible losses incurred by the vendor”.

- Case referred back to BCSC for revision of facts, relief at court's discretion (minus costs, expenses, damages... grow-op/moisture problems)

**L&E Act, s.25:** court may grant relief against acceleration provisions in a mortgage of land or an agreement for sale of land; may impose any terms as to costs, expenses, damages, compensations and all other matters that it considers appropriate.

### Forfeitures and Other Agreements

***Popyk v Western Savings and Loan Association (1969):*** (payment towards sale of investment certificate, default and forfeiture) There was forfeiture under the K and court has power to relieve against it; however, power should not be exercised in this case- not unconscionable for Association to retain the deposit.

- **To justify court interference, must show that forfeiture was unconscionable**

***Sport International Bussum BV v Inter-Footwear Ltd (1984):*** (forfeiture of money, termination of TM licenses after late payment) No jurisdiction for court to grant relief from forfeiture in ordinary commercial Ks; equity's ability to grant **relief against forfeiture is confined to Ks involving the transfer of land interests.**

- No compelling policy reason why jurisdiction should be extended to Ks creating interests in other property
- Deference to commercial entities, certainty of K

**Insurance Act, s.10:** courts may relieve against forfeiture in insurance breaches

- Factors to consider: conduct of applicant (must be reasonable), gravity of the breaches, disparity btwn value of property forfeited and damage caused by breach