BU 231

Business Law Notes

Section 3: The Law of Contracts II

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Contents

These are my compiled notes for **BU 231 - Business Law, Spring 2024** with Keith Masterman. These notes represent mostly material from lecture slides and lectures themselves, and content from the textbook. Some internet sources were used to complement certain content.

To the above, the usefulness of each note may vary - I have tried my best to highlight important bits with bold or italic font, but ultimately please use your own discretion. Another important thing to note is that **no case-specific information** is included here unless the case is super important.

I absolve myself from being liable for any negligent misrepresentation or omissions that may occur from using these notes. If something is wrong, or if you feel something is missing, please tell me and I will update it whenever I get around to it.

These notes were written up in Typst.

1. The Law of Contracts II

1.1. Interpretation

As stated by the doctrine of Contra Proferendum, in the case of ambiguous statements in contracts, the courts prefer the interpretation against the drafter. But, how do they resolve the ambiguity?

A cynic might say, "Why don't we always throw out all ambiguities?". Although easy, the Courts would not be performing their role of encouraging reliance on seriously made agreements. Agreements and Contracts will not have weight if the Court just brushes it aside. Thus, **the Court will make every effort to enforce the contract**.

1.1.1. Approach to Interpretation

- **Plain Meaning**: This approach is the true dictionary purist approach, using the dictionary meaning of the word to make interpretations, recursively referencing the dictionary until a deduction is made. While this seems rigorous due to going "by the book", there is potential danger from different brands of dictionaries giving different results.
- **Liberal Approach**: Looks to the intent of the party, as well as cirumstances - notes shared between the parties, context, and existing definitions in any relevant legislature. It minimizes, but does not fully ignore, the importance of the words actually used. It can be dangerous as it allows endless speculation and bias to seep into arguments.
- **Hybridding**: The case of *Sattva Capital Corp. v. Creston Moly Corp.* has set out a new precedent in how contracts are interpreted, seemingly blending the two - using "mixed fact and law". The Courts start with the dictionary definitions (Plain Meaning), then examine their meaning in the context of the contract and parties (Liberal Approach). They may also consider "trade usages" and local customs on words, as well as the "factual matrix" and surrounding circumstances.

Third parties can also be pulled in to provide credibility to one side or confirm certain word use.

1.1.2. The Parol Evidence Rule

This rule says that if the 2 parties had a written copy of the contract that both agree is complete and accurate, then any Parol Evidence (evidence from outside the written agreement - like past negotiations and explanations) cannot be used to add, subtract or modify the final written contract. A final written contract is final, save for mistakes, rectification, and some exceptions. However, with the advent of the *Sattva* case, this rule is essentially non-existent.

1.1.3. Implied Terms

An **implied term** is a term not expressly included in the contract, but would have included it if they thought about it (as reasonable people). Think of these as terms that you would not hesitate to put in if asked. For instance, common terms in industry or statute may be implied. A **duty of good faith** is always implied in every contract in Canada, first established in *Bhasin v Hrynew*. Terms that are reasonably necessary to make a contract effective are also applied, as otherwise the fair expectations of a party would be defeated. (Ex. *Nickel Developments v. Safeway* - leasing space to open a supermarket, then keeping it vacant and not terminating to block out competitors). **Implied terms can be breached!**

1.2. Privity

1.2.1. Privity of Contract

Privity of Contract is a special term that refers to the relationship that exists between parties to a contract. 2 parties with privity impose their own rules on each other, so the Courts generally say those rights or obligations should not apply to anyone outside of the contract.

This essentially means that if A and B have a contract, **only A and B can sue each other** - no external party can sue or be sued. Without Privity of Contract, you do not have a legal right to obtain a legal remedy through Contract Law (though you can still sue in Tort Law (and apparently Tort Law was developed as an exception to this rule)).

While this may seem reasonable, there are cases where this rule leads to harsh results. Though a third party may not be signing a contract, they can still be affected by it - and can suffer immensely due to a contract breach. Thus, we have exceptions!

1.2.2. Exceptions to Privity of Contract

1.2.2.1. Novation

Novation terminates the first contract and replaces it with a new contract with similar terms but with the 3rd party to the contract instead of the original, releasing them from the contract. This requires the consent of all parties and the 7 elements of contract formation to be met. Once novation occurs the third party has entered a contract, thus gaining privity and the ability to sue.

1.2.2.2. Vicarious Performance

Vicarious Performance occurs when a 3rd party performs on behalf of a promisor, who **remains responsible for proper performance**. Think of a subcontractor, or employees to a corporation - it is the employee who performs the work on behalf of the corporation, but it is the corporation who is still liable for performance within the realm of Contract law.

So long as the contract doesn't have a "personal performance" clause, the party who needed to perform does not require consent from the other party to subcontract as it "would make no difference" with proper performance. The third party taking over does not face contractual liability wrt the **original** contract, but may still face tort liability, leading to the promising party being liable through vicarious liability. I think the subcontractor can still be sued by the party to perform if they had a contract too.

1.2.2.3. Constructive Trusts

Trusts are arrangements that transfer assets from an owner (called the **settlor**) to an administrator (called the **trustee**) who looks after them for the benefit of another (called the **beneficiary**). For example, if A is a parent to B, they may enlist C as a trustee to look after their wealth while B is still a child. Trusts split equitable and legal ownership - while the legal owner is the trustee, the equitable owner is the beneficiary. The trustee acts as a fiduciary and the equitable owner (**beneficial owner**) can compel the trustee to provide benefits to them/carry out their duties under the **trust agreement**. Here, only the original trust writer and the trustee have a contract, but the beneficiary can still compel performance even though they are a third party.

In the case where there was not an "express" trust written or described in a contract, but a clear notional trustee and notional beneficiary exist, a **constructive trust** (aka resulting trust) can be built as an equitable remedy to force the notional trustee to perform (usually to transfer the assets). However, this requires the original contract to have been irrevocable - the trust must be permanent with no option for the settlor of the trust property to later change their mind.

1.2.2.4. Insurance-Related Contracts

Each province has statutes that allow beneficiaries of an insurance contract to force the insurance company to perform and pay out the contract.

1.2.2.5. Undisclosed Principal

If an agent enters a contract on behalf of a 3rd party (called the undisclosed principal), unknown to the other signing party, the undisclosed principal may sue and be sued. See Agency Law for more info.

1.2.2.6. Contracts Concerning Land

The new owners of land must respect previous rights and obligations outlined in earlier contracts in the public record, even if they aren't a party to it. For instance, a tenant leasing land has a duty to pay rent and maintain the property. The owner of the land can swap and the tenant's duties and lease continue with respect to the new owner.

1.2.3. Exemption Clauses (Principled Exception)

Clauses in a contract that exempt liability can also extend protection to third parties such as agents, employees, and directors of companies. The third party can rely on this if the parties **intended to extend protection** to the third party, and the activities of the third party were **within scope** of the contract generally and the exemption clause in particular.

For instance, as a company, you are allowed to protect your employees, officers, agents, etc, who are vicariously performing for you. You could exclude all liability in Tort and in Contract, or limit liability to some fixed amount. The vicarious performers are technically third parties but still **gain protection** from the contract.

1.2.4. Enurement Clauses

An **enurement clause** extends the rights and benefits to those inheriting from a party, succeeding the party, or taking an assignment from a party. Basically, any "replacements" to a given party get a privity exemption so they can still enforce their inherited rights under the contract; as well as be sued to perform their inherited duties. The usual clause will say the contract "is binding on and for the benefit of parties and their respective heirs, administrators, successors, and assigns" or something like that.

1.3. Assignment

1.3.1. What is Assignment?

Contractual Rights are valuable! They are commercial commodities that can be bought and sold. **Assignment** is one party transferring its **rights** under a contract to a third party. Note that **only rights or benefits can be assigned** - liabilities and obligations are stuck and cannot be transferred.

1.3.2. Parties in Assignment

The **Promisor** is Party 1, who promises to do something. The **Assignor** is Party 2, who assigns their rights under a contract. **Assignee**, Party 3, receives the rights from Party 2. Parties 1 and 2 have a contract, and the assignor's rights are assigned to the assignee.

1.3.3. Choses in Action and Choses in Possesion

- **Choses in Possession** are rights to tangible property that can be possessed physically.
- **Choses in Action** are rights to *intangible* property, like patents, stocks and other contracts. Their value is derived from the fact they can be enforced by action in the courts. For example, the right to enforce a (separate?) contract can be assigned and is a chose in action.

1.3.4. Equitable Assignment

Equitable Assignments are any assignments that do not fully meet the statutory requirements to be legal. Usually, this is when the assignor doesn't give up ALL of their rights, as that is required for it to be a Common Law assignment. Another way for it to be an equitable assignment is if it falls under the *Conveyancing and Law of Property Act* and is not in writing (the act requires it to be in writing).

If Equitable Assignment applies, the assignee may receive the benefit of the contract from the promisor, and a contract breach would impact them. Practically, the original assignor is left as a party to the contract, and thus to enforce the contract **all 3 parties must be included in any legal action**.

1.3.5. Notice to the Promisor

Assignments **require notice** to the promisor, however **consent is not required**. The promisor ignores a notice of assignment at their peril. If they *ignore the notice* and perform for the assignor instead of the assignee, the promisor will be in breach of contract and will **need to perform again**.

1.3.6. Assignee's Title

The assignee can never acquire a better right to sue the promisor than the assignor - in legal terms, their claim is "subject to the equities", and the assignor can only assign what they have. The assignment is also subject to any rights that the promisor had against the assignor *before* they received notice. For example, the equitable right of **set-off** allows a promisor to deduct any debt owed to them by the assignor at the time of assignment. They also have a **right of recission** - apparently the right to cancel/terminate the contract?

1.3.7. Assignments by Operation of Law

In some cases, assignment is statutory and involuntary. When you **die**, any contractual rights to you are assigned to the executor of your will. In **bankruptcy**, all assets, including contractual rights are assigned to a court-appointed trustee in bankruptcy.

1.4. 4 Ways to Discharge Contracts

Contracts are **discharged** when they end - no parties have any further obligations, and notably no party can sue each other anymore.

1.4.1. Discharge by Performance

This is the good ending. Both parties finish performing their obligations (including all implied terms) satisfactorily and the contract is discharged. Yay!

Some contractual terms can survive the completion of a contract, like indemnification provisions, limitation of liability clauses, NDAs, customer privacy, and non-competes. These terms can be extended even after discharge through **survival clauses**.

The notion of **tender of performance** also exists - this is when 1 party attempts to perform. One party may attempt (tend) performance, but the other party refuses to accept it. In this case, the one tending can sue for contract breach. Debtors who tend payment but are unsuccessful are free from liability on interest; but if the payment is refused, the debt isn't extinguished. The legal principle is that the onus is on the debtor to find and pay their creditor.

1.4.2. Discharge by Agreement

This occurs when both parties agree to stop the contract and not perform, in one of a few ways.

1.4.2.1. Waiver

A **waiver** is an agreement not to proceed with the performance of an existing contract, and is also a contract, requiring the 7 elements and so on. As a waiver is a contract, both parties need consideration - thus this can only occur when **neither party has fully performed**. A waiver must be agreed to - you cannot impose a waiver on the other party and proceed to not perform.

1.4.2.2. Substituted Agreements

This occurs when the parties substitute their old agreement with a new one, where the burden to one party is lessened:

- **Material Alteration**: One party may offer money or some other substitute for performance, creating a new arrangement. The discharge of the previous contract is incidental.
- **Accord and Satisfaction**: Similar to Material Alteration but the parties seek to end their existing arrangement and the new arrangement is a means to this end. It is usually seen in out-of-court settlements with some sum of money exchanged.
- **Novation** - The parties agree to terminate the previous contract and replace it with a new one, with either a material change in terms or a change in parties.

1.4.2.3. Contracts that Provide for its Own Dissolution

- **Condition Precedents**: These clauses stipulate that a given uncertain event must occur before the obligation to perform arises (ex. insurance). It can be written in the contract or an oral understanding. The parties are discharged only when the condition precedent becomes impossible to fulfill.

- **Condition Subsequent**: These clauses are the reverse of a condition precedent - these bring a promisor's liability to an end if an uncertain event happens. The termination of liability is a discharge by agreement.
- **Option to Terminate**: These clauses allow a contract to be terminated on condition that the party provides notice to the other party. (ex. employment contracts often give the right to terminate).

1.4.3. Discharge by Operations of Law

1.4.3.1. The Bankruptcy and Insolvency Act

Bankrupt debtors are discharged from all contractual liabilities after the bankruptcy process finishes, but only if they qualify for a certificate stating that the bankruptcy was due to misfortune and not misconduct.

1.4.3.2. Provincial-level Limitations Acts

Debts that are ignored by a creditor for a long time become **statute barred** - the creditor loses the right to sue as the suit was delayed beyond the limitation period in the relevant statute. This bars a right of action, but does not fully discharge it - the claim can be rehabilitated and made enforceable through certain conduct of the promisor…? The textbook was not fully clear on this.

1.4.4. Discharge by Frustration

One party can be discharged for failure to perform if external causes have made performance impossible, pointless, or radically different from what was contemplated by the parties - essentially unpredictable events changing the context enough that performance is impossible or frivolous.

1.4.4.1. History of Frustration

Back in ye olden days, the terms of a contract were absolute - even if it were impossible to perform! This led to many hardships, especially for renters, who were required to keep the property in good repair, making them liable for fire damage, war, etc. One particular case where this happened, *Paradine v. Jane* dates back to 1647!

The courts have now begun to recognize how external actions can cause radically different situations, such as in *Taylor v Caldwell*, which seems to be one of the first cases forming the doctrine of frustration. Paraphrased, they state that "where a contract requires the existence of a person or thing becomes impossible to perform since it ceases to exist, the contract ends."

1.4.4.2. Requirements for Frustration

1. The Frustrating event must have been **unforeseen** when the contract was created
2. The Frustrating event must have been **outside the control of both parties**
3. The Frustrating event must have occurred **after** the contract was made
4. The Frustrating event makes performance **impossible, purposeless, or "radically different"** from what was originally intended by the parties

Note: Impossibility and Purposeless are confusable. According to Wikipedia, "the distinction is that impossibility concerns the **duties** specified in the contract, but frustration of purpose concerns the **reason a party entered** into the contract".

1.4.4.3. Other Caveats to Frustration

1.4.4.3.1. Self-Induced Frustration is Not a Frustrating Event

Self-Induced Frustration is where one party wilfully disables itself from performing a contract, claiming that the contract has been frustrated. Clearly shooting yourself in the foot is not a frustrating event. It is Breach of Contract. Don't footgun yourself.

1.4.4.3.2. It must be IMPOSSIBLE

It is not enough if circumstances change and performance will be more challenging than originally thought - it must be physically impossible to perform the duties outlined in the contract.

1.4.4.4. The Effect of Frustration

When a contract is frustrated, it is **discharged at the moment of the frustrating event**. The courts enforce the contract up to the moment of discharge and **let the loss fall where it lies** - obligations due before the frustrating event remain, and any obligations arising after the event are discharged.

This obviously can have some consequences. If neither party has performed, frustration completely discharges both parties cleanly. However, if either side partially performs, one party could receive a windfall for the completed performance of another party - for example, if they were to be paid after the frustrating event. This is quite unfair and harsh at times.

1.4.4.5. Fixing Unfairness in Frustration

1.4.4.5.1. The Frustrated Contracts Act

This act fixes some of the unfairness in allocating losses.

- For either party, any amount [due/paid] may be [retained/recovered], but no more than the amount [paid/due].
- Save for in BC, Yukon, or SK, if one party performs, yet no money was paid or due, and the other party hasn't received any benefit, the **performing party bears the loss**. Some extra splitting of loss occurs in those 3 jurisdictions.
- For example, say I am to perform work for Prof. Masterman, and our contract gets frustrated. If I had previously collected a deposit from him, I am entitled to an amount corresponding to the cost of my work. If, however, I had not collected any deposit, the 2nd point applies and I bear the loss.

1.4.4.5.2. The Sale of Goods Act

Under Section 8, Where:

- There is an agreement to sell **specific goods** (they must be identified & agreed on at the time of sale)
- The risk has **not been transferred to the buyer** (the seller is still responsible for goods safety)
- The goods have **perished** without any fault from the buyer or seller (this is the frustrating event)

Then the agreement is avoided, or equivalently frustrated.

1.5. Breach of Contract: The 5th Way

The last way for a contract to end is if one of the 2 parties screws up. This allows you to sue*.

1.5.1. Conditions and Warranties - Major and Minor Breaches

Some breaches of contract do not immediately discharge a contract. We need to separate the different types of terms in a contract. A **condition** is an essential term to the contract, while a **warranty** is a non-essential term.

Major Breaches are breaches of the whole contract or an essential term (condition), so that the purpose of the entire contract is defeated. If this happens, the non-breaching party can either discharge the contract (freeing them from liability), then sue for damages; or continue on despite the breach, remaining "ready willing and able to perform", forcing the other side to perform as well. If the latter happens, the non-breaching party is still liable to perform its side of the contract.

Minor Breaches are breaches of non-essential terms of the contract, or breaching an essential term of the contract in a minor way. If this happens, both parties are still bound to the contract, however, the non-breaching party can sue for damages where it has incurred losses due to the breach.

In summary, major breaches may discharge the non-breaching party from performing the contract, but not always. They get to choose whether to discharge or continue. Minor breaches do not discharge.

1.5.2. Ways to Breach Your Contract

1.5.2.1. Express Repudiation

Express Repudiation occurs when 1 party declares to the other that it does not intend to perform as promised, for whatever reason. The promisee can either:

- Terminate the contract immediately, reserving the right to sue for damages.
- Continue to insist on performance and wait for the eventual non-performance (all the while remaining ready and willing to perform). They can still sue if they don't perform by stated time.

Anticipatory Breaches are express repudiations that occur **before the time agreed for performance**. In this case, the non-breaching party either accepts it or insists on performance.

Also note that this breach can only occur after the contract has been formed, which the slides mention.

1.5.2.2. Rendering Performance Impossible

This is self-induced frustration that was mentioned earlier. This can occur either **before** or **when** performance is due.

1.5.2.3. Failing to Perform

Failure to perform can only occur at the time of performance - otherwise, the infringing party can always choose to perform later and still meet their obligations under the contract. Failure to perform also only usually becomes apparent at the time set for performance.

The degree of failure also varies - it could be a partial failure, total failure, or simply grossly inadequate performance. The extent of a failure impacts the types of remedies available to the injured party.

1.5.3. The Doctrine of Substantial Performance

This is not to be confused with "Part Performance", which only applies to contracts for land and in cases where the Statute of Fraud applies.

Substantial Performance is performance that does not comply with the contract's requirements in some minor way. If this happens, the non-breaching party **cannot avoid performance** under the contract (i.e. cannot discharge the contract). They have to perform, but can sue for damages from the inadequate performance. Essentially, trivial performance failures cannot allow obligation avoidance.

1.5.4. Exemption Clauses

As mentioned before, **exemption clauses** exempt a party from liability for failing to perform some or all of its contractual obligations. These are helpful in business to keep legal costs low. Costs are further reduced as contracts can require one party to obtain insurance, for instance in shipping contracts - then the risk assumed as part of an exemption clause gets covered by said insurance.

However, in Standard Form Contracts, the inequality of bargaining power can put risks onto parties who are unwilling or unable to accept the risk. How can they escape the effects of an exemption clause?

1.5.4.1. The Ways the Slides have

As mentioned before, the defences of **Inadequate Notice**, **Contra Proferendum**, **Misrepresentation** and **Non-Est Factum** can help make these clauses not enforecable.

1.5.4.2. The Way the Textbook has

A 3 step approach where:

1. The Court decides whether the clause covers the circumstances in question - an interpretation question, notes to ambiguity, and Contra Proferendum.
2. The Court decides if the clause is an **unconscionable term** - if it is unfair and gives one party an unfair advantage. These terms have inequality in the process of creating the clause, and also an unfair outcome.
3. Any Public Policy and Public Interest considerations. Is there greater harm to the public interest if the offending conduct is protected?

1.6. Remedies to Contract Breach

When a Contract Breach occurs, the Courts will first try to throw money at you; and if that isn't enough, they will use equitable remedy. Also, this is separate from the notion of damages in Tort Law?

1.6.1. Damages

As the *sole* Common Law remedy, damages is an award of money compensating the injured party for the loss caused by the other party's breach of contract - thus it is compensatory, rather than punitive, in nature. The purpose of damages is to place the injured party in the position they would have been in **had the contract been performed**.

1.6.1.1. Cost of Performance VS Economic Loss

What number is used for damages? The plaintiff and defendant could argue that the figure should be based on "cost of performance" - remedial costs required to restore the plaintiff to the required position. The other could argue that the figure should be based on "economic loss" - simply the difference in market value that was caused by the breach. These two estimates can give vastly different figures, especially in *Peevyhouse v. Garland Coal Mining Co.*

In *Peevyhouse* specifically, the courts ruled that they will usually give remedial costs, unless it is "unreasonably/unwarrantly expensive", in which the difference in economic profit is given.

In addition, there is a relatively new case precedent - it aims to ensure higher sums of damages actually get put into restoration work rather than being used for vacation trips to Florida. So, the higher sum of money for restoration work may be awarded if one of the following happens:

1. The Remedial Work was actually performed
2. There is sufficient intention to perform the remedial work, if you were to be compensated
3. You **undertake** in court (pinky promise or go to jail) to do the remedial work

1.6.1.2. Mitigation and Betterment

In addition for the losses to have "flowed from" the breach, damages are only awarded if you show *reasonable* **mitigation** - there was action by the aggravated party to reduce the extent of its loss caused by the breach from the other party. The injured party cannot sit around and do nothing - you must actively take steps and show **reasonable effort to reduce your losses**, or else you will get nothing! (For instance, reselling goods at the best possible price, finding alternative suppliers, or searching for alternative employment in the case of wrongful dismissal)

On a different note, **betterment** caps the amount of damages the plaintiff can receive, stating that the plaintiff **should not be put in a better position** than they were before the breach of contract. For example, depreciation must be considered when assets are damaged or destroyed as part of a breach - they should award damages equal to the fresh sale price minus X years of depreciation expense.

1.6.1.3. Measures of Damages

In most cases, the injured parties are entitled to expectation damages, consequential losses, and general damages. I guess the other damages (reliance, liquidated, nominal, punitive) are more specific or something.

1.6.1.3.1. Expectation Damages

Expectation Damages are amounts awarded based on the **expected profits** or benefits of the contract **at the time of formation** VS their current actual position. This is the usual remedy for a breach of contract. Expectation damages can also be based on **lost opportunity cost** - you lost your chance to make a similar contract with a different promisor and so should be entitled to your profits.

1.6.1.3.2. Consequential Loss

Consequential Losses are secondary losses incurred by the non-breaching party that were **reasonably foreseeable** at contract formation that flowed from the breach. For instance, if the injured party had to shut down business operations, or were unable to fulfill other contractual obligations due to this breach.

1.6.1.3.3. General Damages

Similar to Tort Law, these are damages awarded for non-quantifiable or intangible damages, such as in lost reputation. The courts will decide what award is fair to compensate for these types of damages.

1.6.1.3.4. Reliance Damages

As an alternative to Expectation Damages, **Reliance Damages** are costs of expenditures and wasted effort reasonably made in preparation for performance, essentially returning the party to a pre-contract position. Examples include preparatory research or material for a specific client who breaches that cannot be reused anywhere else.

1.6.1.3.5. Liquidated Damages

Liquidated Damages are amounts agreed on to be paid in damages by a party to a contract if it commits a breach. These are pre-estimated damages that are put in as the breach may not be worth going to court for. These are enforceable if they are accepted and are a **genuine pre-estimation** of the other party’s damages.

In contrast, **penalty clauses** are terms specifying an exorbitant amount for breach of contract, aimed to frighten parties into performance. These are not genuine estimations of damages and thus are *not enforceable* in Court. They are quite effective in scaring the party into performance though.

1.6.1.3.6. Nominal Damages

Sometimes, the damages suffered by one party are negligible. However, the Courts still wish to acknowledge the “moral victory” by the plaintiff, so they will give a token sum - dollars or even pennies. They still have to pay the litigation fees though.

1.6.1.3.7. Punitive Damages

Damages aren’t supposed to be punishing, but in exceptional circumstances, plaintiffs have been awarded for malicious or bad faith behaviour from the breaching party. So, yeah.

1.6.1.4. Problems in Measuring Damages

It can be hard to measure damages for certain things, such as Mental Anguish, Wrongful Dismissal, and Lost Enjoyment - damages could be awarded if it was reasonably foreseeable at formation. There is also the Cost of Performance v. Economic Loss Evaluation difference causing issues from earlier too.

1.6.2. Equitable Remedies

In some cases, pure monetary damages are not sufficient. This is where the Courts of Equity step in, providing Court orders other than money settlements, for instance being able to order a party to perform the contract!

1.6.2.1. Requirements for an Equitable Remedy

1. Not really a prerequisite, but the Courts are **discretionary** - the court decides if an equitable remedy is required as damages will not fully compensate the loss.
2. The plaintiff must come to court with **clean hands** - they cannot be partially responsible for the damages, or have acted unethically in some way.
3. The plaintiff must take action in a reasonable amount of time - the defendant cannot be misled into thinking no court action will happen against them.
4. No innocent third party can be affected by the equitable intervention.
5. The plaintiff's consideration must also be commensurate with the defendant's promise. (The price of the promise must be fair)

1.6.2.2. Specific Performance

Specific Performance is an order requiring a defendant to do a specific act, usually to complete a transaction or finish their contract. You have to show that **the damage award won't help you** - that for some reason the specific action to take is incomparable monetarily. Apparently, it is almost never granted in employment or personal service contracts - personal skill does not lend itself to an order of specific performance, and the Courts don't want to "supervise" the defendant to make sure they do it.

1.6.2.3. Injunctions

Injunctions are a court order restraining a party from acting in a particular - specifically prohibiting them from committing a contract breach or similar. For this to be an available option, the contract must have a **negative covenant** - a promise not to do something, expressly written or implied logically. This also avoids the "need to supervise" as mentioned in Specific Performance.

1.6.2.3.1. Tests for if you need an Injunction

1. There exists a **serious issue**
2. That will cause **irreparable harm**
3. And the **Balance of Convenience** favours the Moving Party (it is probably better and more convenient to just put the injunction in)

1.6.2.3.2. Types of Injunctions

1.6.2.3.2.1. General Injunctions

This is your default category of injunction. An instant classic!

1.6.2.3.2.2. Interm / Interlocutory Injunctions

Interm Injunctions are temporary injunctions preventing immediate harm from being done, before the full trial of the issue at a later court date.

To be able to get this, you must undertake (pinky promise or jail) that if you don't win the case you will receive damages. You also need to show irreparable harm will be caused without an injunction, and you have to argue your case 100% neutrally as the other party you're injuncting against isn't present when you present your case to the judge.

1.6.2.3.2.3. Mareva Injunctions

Mareva Injunctions, or freezing orders, prevent a defendant from moving any assets they own or control (regardless of where they are and whose name they are under). This is to safeguard a plaintiff's "clear and apparent" legal claims and stop the defendant from loopholing their way out of skimping on the damages they need to pay.

1.6.2.3.2.4. Anton Piller Orders

These court orders provide the right to search premises and seize evidence without prior warning. They are essentially search warrants, but from the Court! The original Anton Piller Order was used to search the premises of an agent stealing trade secrets from Anton Piller, seize the confidential information, and gather evidence of the stealing.

1.6.2.3.3. Quantum Meruit

Quantum Meruit is the amount a person deserves/merits to be paid for goods and services provided to the person requesting them. This claim can arise when "a valuable benefit is conferred at the request of a promisee." It can also be claimed when the non-breaching party has partially performed when the other party breaches the contract. Essentially, it's payment for performance already done when the contract is terminated that has not been compensated for?

This seems to be an exception to the general rule that expectation damages are to apply, and occurs when there is a wrongful termination of the contract, supposedly.

1.6.3. Enforcing Judgments

Judgments are any court order requiring one side to pay the other damages, or perform as part of an equitable remedy. Here, the plaintiff will become the **Judgment Creditor** and the defendant the **Judgment Debtor**. The JD owes money to the JC.

If the JD doesn't willingly comply, the Courts can choose the seize the assets of the JD. The judgment must first be registered with the court, and a writ filed with the Sheriff's office. Then the **execution order** can be made to the Sheriff, who gains authority to **levy execution** and seize and sell assets. (Save for some assets like pensions and annuities).

After the Sheriff acquires assets from the JD, they first take a % for Sheriff's fees, then pay out all secured creditors. After that, the remaining sum is distributed pro rata (proportionally) amongst all the execution creditors.

1.6.3.1. Garnishment Orders

This order to collect forces the JD's employer to retain a portion of JD's wages to give to the JC instead. It can also be collected from your bank account or Accounts Receivable. They are also filed with the Sheriff's office, and the sheriff gets paid before the funds get distributed to execution creditors.

1.7. Odds and Ends

1.7.1. References Exist

A **reference** is simply asking the Courts to make a decision, rather than a full-blown lawsuit. For example, *Ontario Mushroom Growers v. Learie* was a reference to ask the Courts to interpret if mushrooms were a vegetable (and thus if minimum wage law exemptions to vegetable farmers apply).

1.7.2. "Time is of the Essence" Clauses

These clauses emphasize that performance must be completed on time (for example, delivering highly perishable goods on time). The timing becomes material to the terms of the contract - could be a major breach if it wasn't delivered on time!

1.7.3. Failure to Perform and Installments

Inadequate Performance leads the non-breaching party to ask, "Do I end this now, or insist on performance"? This is troubling with installments - partial delivery for the installment now could be annoying, but in the future, they could make up for this deficit!

In this case, the innocent party could terminate and sue, but then see the courts absolve it as a minor breach. Thus the party should consider if:

1. Is there good reason to believe the other performances will be inadequate?
2. Is the expected/actual deficiency to date important relative to the whole performance promised?

If they say yes to both, they may consider themselves freed from liability.

1.7.4. Other Trivia Related to Enforcing Judgements

- Writs filed with the Sheriff do need to be renewed regularly every few years or so to stay current.
- Judgements remain in effect for 21 years.
- The notice of judgment can also be placed at various credit rating bureaus to affect the JD's credit rating and notify others of the outstanding debt.
- An **Examination in Aid of Execution** is basically an examination under oath (appear and don't lie or contempt of court) to figure out where a JD's income and assets are so they can be yoinked. As Prof Masterman says, this is perhaps the worst part of being a lawyer. Apparently, they are allowed annually.