Certainty and Completeness

<table>
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<th>Issue 1</th>
<th>Whether the contract is uncertain or incomplete at all</th>
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- A slight distinction between certainty and completeness

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<tr>
<th>CERTAINTY</th>
<th>COMPLETENESS</th>
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<tr>
<td>Commercial vagueness. There is a term in the contract but it is too vague, fuzzy or ambiguous. The contract impliedly anticipates the need for further agreement by being so vague. e.g. <em>Scammell v Ouston</em> – the words ‘on hire purchase terms’ were too vague, because they covered too broad a range of transactions for a court to say which transaction applies. e.g. <em>Walford v Miles</em> – “lock out” agreement (whereby W had the exclusive opportunity to negotiate with Y) unenforceable because no timeframe was set.</td>
<td>An essential term is missing. The contract expressly anticipates the need for further agreement (the ‘one more step’ problem) or impliedly does so by being silent on material points (the ‘gap’ problem). e.g. <em>agreement to agree</em> – <em>Fletcher Challenge</em> – heads of agreement document with provisions marked “to be agreed” and “not agreed”; agreement deferred to a later point in time. e.g. <em>agreement to agree</em> – <em>Barker Bros</em> – terms of renewal of lease of airstrip “shall be as agreed upon by the parties at the time”.</td>
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- The starting point can be derived from Blanchard J’s judgment in *Fletcher Challenge v ECNZ*.
  - Is the term alleged by one party to be uncertain (ambiguous) or incomplete (missing) an ESSENTIAL term or rather a NONESSENTIAL, peripheral term?
  - If essential, an uncertainty or incompleteness argument can be run. If nonessential, we can effectively ignore it, because it will not cause the contract to fail for want of certainty or completeness.

- What types of terms are essential? There are two broad types of essential terms.

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<tr>
<th>‘LEGAL INCOMPLETENESS’</th>
<th>Terms the law considers to be essential</th>
<th>‘PARTY INCOMPLETENESS’</th>
<th>Terms the parties consider to be essential</th>
</tr>
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| □ Blanchard J in *Fletcher Challenge* did not state what essential terms the law requires. □ So on the facts of each case we have to ask: to have a basic workable legal contract, are the essentials present here? □ Some elements are obviously essential, e.g. the basic nature of the transaction (a sale, a pledge or a hire purchase?), the price, the subject matter of the transaction and the consideration for it, who the parties are, the conduct required amounting to performance, a timeframe for performance. | □ How do we find that the parties considered some term to be essential? □ According to Blanchard J in *Fletcher Challenge*, it is enough that there is some form of objective manifestation that the term was important to one party, i.e. the party has made that clear to the other party.
**Issue 2**

Despite the existence of uncertainty or incompleteness in relation to an essential matter, does the contract nevertheless contain an **objective machinery or formula** that can be used to “add flesh” to the otherwise uncertain contract?

- General attitude of the courts in these cases = In dealing with certainty and completeness the courts do not take a neutral stance like they do in dealing with contract formation. Once having ascertained an intention to be legally bound, the courts will go to great lengths to help the parties out **but** to be able to do so there needs to be **some kind of machinery provided for in the contract**. This is essentially a presumption of enforceability.

  - **Authority**: Scammell v Oueston, Fletcher Challenge v ECNZ, Barker Bros

- **Cases studied:**
  - Barker Bros, Sudbrook: machinery but no formula: if machinery fails go to test on page 3
  - Money: formula but no machinery: need a machinery so would usually fail (see third arrow under formula heading below), unless the court can imply machinery

- **FORMULA**
  - A formula will enable the court to apply an objective **standard** to find an uncertain term.
  - e.g. contract states unagreed price must be the “fair value”.
  - Without a machinery a formula might be too subjective, e.g. where the formula for the price ‘to be agreed upon’ is “export value” or “market value” (note: “market valuation” is more certain).

- **MACHINERY**
  - e.g. Sudbrook: clause states that a valuer is to determine the price
    The House of Lords in Sudbrook held this machinery to be **inoperable**. The clause would only work if the terms were followed. There was nothing in the clause to deal with the situation where one party fails to abide by the clause. [Test on page 3 was laid down and applied]
  - e.g. Barker Bros: arbitration clause
    "18 In the case of **ANY DIFFERENCE OR DISPUTE** arising as to **ANY CLAUSE** matter or thing herein contained or implied, or arising in any way in respect of this deed such difference or dispute shall be decided by a **single arbitrator** if the parties can agree upon the appointment of one person and if otherwise then by the arbitration of two independent persons one to be appointed by each party to this deed and by an umpire who shall be appointed by the arbitrators before proceeding with the reference and shall sit with them during the consideration of such difference or dispute and **if in any difference or dispute arising hereunder either party shall fail to appoint an arbitrator or shall appoint an arbitrator who shall refuse to act then the arbitrator appointed by the other party shall act as sole arbitrator in the reference** and every such arbitration shall be subject to the provisions in that behalf contained in the Arbitration Act 1908 or any then subsisting statutory modification or re-enactment thereof”.
    - A detailed arbitration clause, stating who the arbitrators were and where arbitration was to take place.
    - Nevertheless a broad arbitration clause, applying to the whole contract and “any difference or dispute”.
    - In Barker Bros the Crown had an option to renew its lease of an airstrip on the Chatham Islands, the details of which were to be ‘fleshed out’ by arbitration.
    - In Barker Bros there was no formula. But Richmond P held the machinery was sufficient to be **workable**. A specific formula was not necessary because arbitrators could be assumed to be reasonable people who would determine a fair and reasonable result. Will only fail if there is evidence that the lack of a formula will impede the arbitrators.

- Where there is **no machinery**
  - **Is it possible to IMPLY the requisite machinery?**
    - In Money v Ven-Lu-Reg the Court of Appeal were prepared to imply the requisite machinery – an arbitration clause – when there was only a formula = UNUSUAL given the courts are very happy to strike down an arbitration clause. It is unclear whether this decision will be followed again. On appeal to the Privy Council Lord Goff was more equivocal about implying machinery. Why is it bad?
      - It equates to the courts writing the contract for the parties.
      - The standard for implying terms is set at NECESSITY, not reasonableness as Denning suggested in Liverpool City Council v Irwin. Was it necessary to imply an arbitration clause? Arguably not, Richardson J didn’t think so (Richardson J was in the majority with Cooke P and Bisson J but thought a formula alone was sufficient).

- Where there is **neither a machinery nor a formula**
  - **If there is no machinery or formula then what there is is an agreement to agree, and the contract fails.**
  - **But** as a fallback position Blanchard J in Fletcher Challenge said there may be the possibility of IMPLYING TERMS. But the standard for implying terms is set at NECESSITY, not reasonableness: Irwin.
Focus on: Obligations to “NEGOTIATE IN GOOD FAITH” or “USE BEST ENDEAVOURS”

Obligations to negotiate in good faith

- *Walford v Miles* = an attempt to IMPLY an obligation to NEGOTIATE “in good faith” – “lock in” undertaking
- cf *Wgtn City Council v Body Corp 51702* = an EXPRESS obligation to NEGOTIATE “in good faith” – “Council officers will negotiate, in good faith, sales of Council’s leasehold interest to existing lessees at not less than the current market value of those interests.” = an obligation to negotiate a contract
- *Walford v Miles* per Lord Ackner: An obligation to NEGOTIATE “in good faith” is too subjective or nebulous a standard to be enforced by the courts. It is more or less the same as an agreement to agree. If the law will not enforce an agreement to agree, then a fortiori the court will not enforce an agreement to negotiate.
- Tipping J in *Wgtn City Council v Body Corp 51702* agreed with Lord Ackner: “Good faith in this context is essentially a subjective concept, as the House of Lords pointed out in Walford. There is thus no sufficiently certain objective criterion by means of which the Court can decide whether each party is in breach of the good faith obligation.”
- Tipping J indicated HOWEVER that the position might be DIFFERENT if the parties are not required to negotiate the whole terms of an agreement, but rather a SPECIFIC MATTER assisting an already concluded contract, e.g. a “good faith negotiation” of the rent payable when a lease is renewed.
- The reason why the good faith obligation in *Wgtn City Council v Body Corp 51702* was not enforceable was because it was an obligation to negotiate a contract in good faith BUT WITH NO MORE DEFINITION THAN THAT of what the obligations of the parties were.
- So LOOK OUT for whether the obligation to negotiate in good faith HAS SOME CLEAR AND DEFINED AIM.
- Tipping J: “It is implicit in what we have just said that there will be some circumstances in which a process contract (to negotiate in good faith) is enforceable… In such cases a specific procedure is in issue, and the Court can reasonable determine what the parties are required to do and whether they have done it. If a contract specifies the way in which the negotiations are to be conducted with enough precision for the Court to be able to determine what the parties are obliged to do, it will be enforceable.”
- Tipping J made mention that a promise to negotiate in good faith given in return for a money sum, if wholly unperformed, could well give rise to an equitable obligation to repay (the Court could order repayment on restitutionary principles), but that this was an issue best “left for another day”.

Obligations to use best endeavours

- *Walford v Miles* per Lord Ackner: Unlike an obligation to NEGOTIATE in good faith, an obligation to USE BEST ENDEAVOURS might be enforceable, because of the greater degree of objectivity.
- *Wgtn City Council v Body Corp 51702* per Tipping J: NOT ALL obligations to “use best endeavours” will be sufficiently certain. If the contract says the parties will “use best endeavours” to agree, because “best endeavours” are being used to reach an undefined goal, that obligation will be too uncertain. BUT if the contract says the parties will use “best endeavours” to do x (e.g. to obtain planning possession), the contract has A CLEAR AND DEFINED AIM and so will be sufficiently certain.
Frustration

The theoretical underpinnings of frustration

The preferred theory is the ‘construction’ theory: preferred by the House of Lords in Panalpina and accepted in New Zealand in Power Co v Gore DC, in Australia in Codelfa and in England in The Great Peace. You construe the contract in order to work out what the parties’ obligations are. You then compare those obligations to what they are now, after the frustrating event. Comparing the obligations before and after they event, are they radically different? The test is one of radical difference in New Zealand. In England the threshold is set much higher, one of impossibility.

Starting point: doctrine of absolute obligation

Doctrine contained in Paradine v Jane (1647): a party who has voluntarily assumed an absolute and unconditional contractual obligation is strictly bound to perform that obligation and may be liable in damages for failing to perform. Your obligations were fixed no matter what happened later.

Frustration = exception to the doctrine of absolute obligation

Lord Reid, Davis Contractors [1956]:
“Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.”

Frustration emerged from the case Taylor v Caldwell to mitigate the harshness/injustice of the doctrine of absolute obligation from Paradine v Jane = RATIONALE for frustration.

Criteria of frustration: if satisfied, the contract is discharged forthwith and automatically.

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<tr>
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<th>A frustrating event which occurs AFTER contract formation</th>
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<tr>
<td>• There must be an event or new situation.</td>
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<td>• Injunction ≠ event. In Codelfa Brennan J in his dissent correctly held there was no event. The P was unable to carry out excavation work because local residents had obtained an injunction stopping the P from working during the night and on Sunday. This injunction was not an event; it was merely an order to do that which the P was already bound to do, i.e. clarified the law. It disclosed the mistake that had existed all along: go to the CMA for a mistake argument.</td>
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<th>2</th>
<th>The frustrating event must render the contract radically different</th>
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<td>• ‘Construction’ theory: Need to first identify that X was bound to perform and then determine whether performance in the changed situation after the frustrating event is within the contractual promise. If not, there is a frustration. Otherwise no frustration. Brennan J dissenting in Codelfa.</td>
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<td>• The doctrine is not to be “lightly invoked”: Bingham LJ in The “Super Servant Two”. Its purpose is not to relieve contracting parties of the normal consequences of hard or imprudent bargains (“bad bargains”). Thus a number of things will be insufficient:</td>
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<td>⇒ Mere hardship or inconvenience.</td>
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<td>⇒ An increase in costs: Power Co v Gore DC. Costs increased because of inflation. Performance not rendered radically different. Ps should have thought of inflation when drafting.</td>
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<td>⇒ Mere delay: National Carriers v Panalpina. Road closure for 1 year.</td>
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<td>• Example – Gamerco. The D band Guns N’ Roses contracted to play at a stadium in Madrid. Prior to the concert Spanish authorities found that the stadium was unsafe, the stadium was closed and the permit to play was revoked. Impossible for the band to play the concert = frustration.</td>
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3 Without the fault of either party
   • i.e. it must truly be an external event – refer notes on self-induced frustration

4 Neither party bears responsibility to assume the risk of the frustrating event
   • Have to ask, is there a force majeure or catastrophe clause, or other provision which deals with the alleged frustrating event that has occurred, stating who should shoulder the risk in such an event? If so, that is likely to an allocation of risk.
   • Garland J in Gamerco: “The Ps did not either expressly, or as a matter of construction, accept the risk of a concert not taking place due to events outside their control and not contemplated by either party…there was no force majeure or catastrophe clause, nor any provisions similar to those in some engineering contracts allocating the risks should the work become physically or legally impossible of performance.”

Effect of frustration in New Zealand under the Frustrated Contracts Act 1944

This Act applies where a contract governed by New Zealand law is frustrated.

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<tr>
<th>Section 3(2)</th>
<th>Section 3(3)</th>
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<td>• You use s3(2) when you are trying to recover money already paid. s3(2) also releases any obligation to pay money already owing.</td>
<td>• You use s3(3) when you are trying to recover the value of goods or services rendered, i.e. part performance of the frustrated contract.</td>
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<tr>
<td>• “All sums paid or payable” = gets rid of the requirement in Fibrosa that there needs to be a total failure of consideration, now allowing for partial consideration.</td>
<td>• The court’s discretion is limited to awarding an amount that is less than or equal to (not more than) the benefit conferred.</td>
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<td>• The proviso in s3(2) deals with the expenses situation. If X pays money and Y, the person X is seeking recovery from, has incurred expenses under the contract, Y can offset those expenses against the amount X is seeking to recover (but cannot recover expenses over and above the amount X is seeking).</td>
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<tr>
<td>• How do we deal with this proviso?</td>
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<td>• Three approaches to the proviso discussed by Garland J in Gamerco:</td>
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<tr>
<td>1. TOTAL RETENTION: if D has incurred any expenditure he can keep the full amount paid to him by the P.</td>
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<td>2. EQUAL DIVISION: split losses equally.</td>
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<td>3. BROAD DISCRETION: gives courts a broad remedial discretion. The courts must have regard to all the circumstances of the case and decide whether to allow recovery.</td>
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<td>• Garland J: adopts broad discretion approach.</td>
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<td>• Argument that total retention is preferable. Goff J in BP v Hunt said s3(2) was a statutory eg of unjust enrichment, and the proviso was a statutory eg of a change of position defence. If X receives money under a contract which is later frustrated and X has in the meantime incurred expenditure under that contract, that is a change in position and X is only required to give back the leftover amount yet to be spent. A far more principled approach from a ‘to be’ Lord.</td>
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Misleading and Deceptive Conduct: Contents

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Exceptions (continued)

- Example – *Spice Girls Ltd v Aprilia*: Various conduct of SGL from 4 March 1998 onwards, e.g. supplying promo material featuring all five members in the band, was a representation that the band consisted of five members. This was true at the time, but was rendered untrue when on 9 March 1998 Ginger Spice declared her intention to leave the band.

**Actions or conduct**, just like a statement, can amount to a misrepresentation under these exceptions. In *Spice Girls Ltd v Aprilia* the Spice Girls’ active participation in the filming of a commercial was a representation that SGL did not know and had no reasonable grounds to believe that any of existing members had at that time declared an intention to leave – this was untrue because SGL knew Ginger Spice had already declared her intention to leave. *Spice Girls Ltd v Aprilia* was a silence or non-disclosure case, but fitted into both the exceptions.

Lord Wright MR’s formulations of supervening falsification in *With v O’Flanagan*: views

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<th>‘Continuing representation’ formulation</th>
<th>‘Duty of disclosure’ formulation</th>
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<td>- A representation made as a matter of inducement to enter into a contract is to be treated as a continuing representation.</td>
<td>- The representor comes under a responsibility to disclose the changed circumstances in relation to the subject matter once learned of them.</td>
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<td>- You make a statement, but the time at which the accuracy of that statement is judged is the time at which the contract is entered into, not the time at which the statement is made.</td>
<td>- “…If a statement has been made which is true at the time, but which during the course of negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances.”</td>
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<tr>
<td>- If there is a gap between the making of the statement and the entering into the contract, and events during that period falsify the statement, you will be liable for misrepresentation.</td>
<td>- This formulation will only be triggered if the representor has KNOWLEDGE of the supervening falsification.</td>
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= wider, misrep even if unaware of the SF. = much narrower, misrep only if aware of the SF.

Which formulation is preferable?

**Arguments for ‘continuing representation’ formulation and against ‘duty of disclosure’ formulation**

- The ‘duty of disclosure’ formulation can be criticised for its requirement of knowledge. To require knowledge amounts to imposing liability only for fraud. This conflicts with the general position that a misrepresentation is defined by its accuracy regardless of the representor’s knowledge of it.

**Arguments for ‘duty of disclosure’ formulation and against ‘continuing representation’ formulation**

Two major arguments propounded by Rick Bigwood in his article [2005] CLJ 94.

- 1. The ‘continuing representation’ formulation converts the representation into a contractual warranty, i.e. you are effectively promising x will be the case entirely into the future. A statement of fact is essentially being converted into a kind of promissory statement.
  ⇒ *Counter argument*: Bigwood overemphasises the importance of the distinction between promissory statements (i.e. terms) and statements of fact (i.e. representations), at least in New Zealand. This distinction is one which has been rendered less important by the Contractual Remedies Act 1979 which gives the same remedies for breach of contract and misrepresentation.

- 2. The ‘duty of disclosure’ formulation only captures those in deliberate misrepresentation. The ‘continuing representation’ formulation captures not only those in deliberate misrepresentation, but also those in innocent misrepresentation. So the duty formulation allows for notions of fairness. [This view accords especially with that of Potter J in *Ladstone Holdings v Leonora Holdings*]
  ⇒ *Counter argument*: The intention of Parliament evident in the CRA has been to do away with the distinction between deliberate, negligent and innocent misrepresentations. Specific wording of s6(1): “If a party…has been induced to enter… by a misrepresentation, whether innocent or fraudulent…”