

# LOSS OF A CHANCE IN (AND BY) THE SUPREME COURT OF CANADA

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*In Cohnstaedt v. University of Regina, the Supreme Court of Canada held the 'loss of chance' doctrine to be inapplicable to the quantification of the damages for lost future earnings recoverable by a wrongfully dismissed professor. Through a critique of the analysis adopted by the Court, the author explores some sources of conceptual confusion in the remedial treatment of contractual contingency. Particular attention is given to the so-called 'New Zealand Shipping principle' that 'a party shall not take advantage of his own wrong', and to the notion of 'fictional fulfilment'. In the concluding section, a sketch is offered of an approach on which the remedial outcome is determined, not on an a priori basis, but by a context-sensitive assessment of how the parties should be taken to have allocated the risks inherent in the relevant contingency.*

*Dans Cohnstaedt c. University of Regina, la Cour suprême a décidé que la doctrine de la perte d'une chance était inapplicable à l'évaluation des dommages-intérêts pour la perte de revenus futurs d'un professeur congédié sans juste cause. Par une critique de l'analyse adoptée par la Cour, l'auteur explore certaines sources de confusion au niveau des concepts dans le traitement des recours contractuels. Il porte une attention particulière à ce qu'on appelle le principe du New Zealand Shipping selon lequel une partie ne saurait tirer avantage de sa propre faute, ainsi qu'à la notion de fictional fulfilment. Dans sa conclusion, l'auteur offre l'ébauche d'une approche selon laquelle l'issue d'un recours est déterminée; ce n'est pas d'un a priori; il s'agit d'apprécier, de façon sensible à tout le contexte, comment on pense que les parties ont départagé les risques inhérents aux événements qui sont survenus dans l'exécution du contrat.*

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### Introduction

The most positive thing that can be said about the Supreme Court of Canada's reasons for decision in *Cohnstaedt v. University of Regina*<sup>1</sup> is that they at last brought to an end litigation that had been before the courts for no less than fifteen years. Not for the first time in the recent past, an opportunity (infrequently afforded) has been missed to clarify important and disputed aspects of the law of contracts. In this instance the Saskatchewan Court of Appeal<sup>2</sup> had been divided on the approach to the assessment of damages payable to a tenured university professor wrongfully dismissed following breach of an agreement for a fair evaluation of competence. In the view of the majority, while the starting point had to be the salary that the appellant would have received had he maintained his position until normal retirement age (seven years on), that amount was to be reduced to a degree commensurate with the court's estimation of how the troubled career of Dr. Cohnstaedt would have fared absent the breach. Sherstobitoff J.A., in dissent, regarded the 'loss of a chance' line of cases as inapplicable. Several grounds, of varying degrees of cogency but none of self-evident validity, were advanced in support of this conclusion. Surprisingly—and for the future development of coherent remedial principles, unfortunately—the two-sentence judgment of La Forest J. for the Supreme Court explained the allowing of Cohnstaedt's appeal only to the extent that it was "substantially for the reasons of the dissenting judge".<sup>3</sup>

The agreement at issue, made in 1977, superseded one made in 1972 by which the University had dropped dismissal proceedings in return for Cohnstaedt's commitment to take early retirement in mid-1978. Under the terms of the 1977 contract he was in effect put on a year's probation. Working under the joint supervision of two deans, he was to be assessed by them on the quality of the academic work assigned to him. His fate was to turn on their evaluation of whether it was "of a quality such as might reasonably be expected of a full professor with the University". If the assessment were positive, the University agreed to "waive the requirement for early retirement" contained in the 1972 agreement. If negative, Cohnstaedt was to "continue to be bound by his undertaking ... to retire effective June 30, 1978". In the event he was adjudged not to have come up to the requisite standard, and was informed that his retirement would take effect on that date. The action then launched against

<sup>1</sup> [1996] 3 S.C.R. 451.

<sup>2</sup> [1994] 5 W.W.R. 154 (Sask. C.A.).

<sup>3</sup> Cf. *City of Calgary v. Northern Construction Co.*, [1987] 2 S.C.R. 757, a 'mistaken tender' case in which the two substantive judgments in the court below (the Alberta Court of Appeal: [1986] 2 W.W.R. 426), while in agreement that the Supreme Court decision in *Ron Engineering & Construction Eastern Ltd. v. The Queen in right of Ontario*, [1981] 1 S.C.R. 111 precluded relief for the tenderer, differed markedly in their respective analyses of unilateral mistake. The resourceful Kerans J.A., whose hard line on mistake revived the discredited terms/motive distinction, had at the same time accepted in principle that a sufficiently harsh result of *inoperative* mistake would be redressable on the ground of unconscionability. In dismissing the appeal, the Supreme Court did not go beyond the conclusionary statement that the case was "governed by" *Ron Engineering*.

the University, alleging unfairness in the evaluation process and the consequential invalidity of the termination of his employment, was twice to come before the Supreme Court of Canada. On the first occasion, in 1989,<sup>4</sup> the University appealed the determination by the Saskatchewan Court of Appeal<sup>5</sup> that there had been a breach of natural justice in the evaluation process, and the award of a declaration that the purported termination of his employment was null and void. The Court found it unnecessary to pursue this line of public law analysis. Rather it held that the University had breached its implied contractual obligation to provide a fair evaluation, in that the limited amount and type of work that had been assigned to Cohnstaedt (and which had included no teaching or administrative responsibilities) had not simulated the normal load of a full professor. The assessment being thus invalidated, the consequential termination of employment was itself wrongful. The case was remitted to the trial level for the determination of the quantum of damages for wrongful dismissal. Matheson J.'s award<sup>6</sup> of the equivalent of a year's salary received no support in the Court of Appeal.<sup>7</sup> All three members of the court recognized that, whilst the remedy was contractual, Cohnstaedt's status as a tenured professor at the time of his termination—albeit modified by the terms of the May 1977 agreement—must be reflected in the calculation of the proper quantum. But how?

### *I. Saskatchewan Court of Appeal: The Majority Approach*

For the majority, the key to establishing what loss of future earnings was attributable to the breach lay in identifying what Cohnstaedt's position would have been had no breach been committed, or in other words if there had been a proper assessment. If he would still have failed to measure up to the required standard, the agreement provided that he would retire immediately. In that eventuality the cause of the resultant income loss for the seven years until he reached normal retirement age would be lack of competence, and not the responsibility of the University. If, however, he would have satisfied the deans on an appropriate assessment that he was of full professorial timbre, then the only impediment to seven further years of employment (excluding health-related and other non-academic contingencies) would have been the possibility of dismissal for cause during that period. These being matters of conjecture, incapable of proof like past events, the majority followed what Vancise J.A.<sup>8</sup> termed the 'simple probability approach' described by Lord Diplock in *Mallett v. McMonagle*.<sup>9</sup>

In assessing damages which depend upon its view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the

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<sup>4</sup> [1989] 1 S.C.R. 1011.

<sup>5</sup> (1986), 45 Sask. R. 197.

<sup>6</sup> (1990), 88 Sask. R. 94.

<sup>7</sup> *Supra* footnote 2.

<sup>8</sup> *Ibid.* at 174ff.

<sup>9</sup> [1970] A.C. 166 at 176 (H.L.). Cf. *Sellars v. Adelaide Petroleum N.L.* (1994), 179 C.L.R. 332 (High Court of Australia).

court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

Accordingly, evaluations were made in percentage terms of the degrees of likelihood that, on all the available evidence, Cohnstaedt would have, respectively, survived a fair assessment in 1978 (30%),<sup>10</sup> and in the event of demonstrated competence at that time retained his position until the mandatory retirement age (80%).<sup>11</sup>

The reasons for the Supreme Court of Canada's rejection of this seemingly unexceptionable analysis, and for increasing the damages to full salary for the period 1978-1985,<sup>12</sup> must be sought in the dissenting opinion of Sherstobitoff J.A., with which the Court "substantially" agreed.

## II. The Saskatchewan Court of Appeal: The Dissent

Differing from the majority on the construction of the 1977 agreement, Sherstobitoff J.A. found it necessary to consider the issue of a discount for academic contingencies exclusively in relation to the 1977-78 assessment. On his reading, the agreement gave Cohnstaedt a *guarantee*: if the assessment thereunder were favourable, "he was entitled to continued employment until his normal retirement on June 30, 1985".<sup>13</sup> Survive the threshold evaluation, and he would have "employment for a fixed term."<sup>14</sup> It is not possible to glean from La Forest J.'s laconic judgment the Supreme Court's stance on the construction issue. Not open to doubt, however, is the Court's agreement in large measure with Sherstobitoff J.A.'s approach to the major issue, of broader significance in terms of principle: how did the bungling of the 1977-78 assessment affect the

<sup>10</sup> The pessimism arose primarily from doubts as to how Cohnstaedt would have handled teaching assignments. He had done no teaching since 1971, and when assigned a class at the University of Brandon he had hired a surrogate to take his place.

<sup>11</sup> The sum thus computed was further reduced by 30% for failure to mitigate. On this issue the dissident differed only in evaluating the discount at 33 1/3%.

<sup>12</sup> Subject to the one-third reduction for failure to mitigate favoured by the dissident.

<sup>13</sup> Per Sherstobitoff J.A., *supra* footnote 2 at 191.

<sup>14</sup> *Ibid.* It should be noted that this would give him a greater degree of security than the tenured professoriate at large, dismissable for cause at any time. (An untenured faculty member on, say, a two-year term appointment, is equally vulnerable. A fixed-term appointment in itself carries no *inherent* guarantee of no premature dismissal for cause.) That the University should have intended to elevate the status of this particular faculty member above that of even its star performers—albeit contingently—by the addition of a 'no-cut' clause to his terms of employment, must be seriously doubted. That the language of the 1977 agreement could nevertheless reasonably bear such a construction was not even canvassed as a possibility in the majority judgment. Vancise J.A. was content to add his own emphasis (*supra* footnote 2 at 169) to the seemingly unambiguous words of clause 4: the University's commitment in the event that Cohnstaedt received a positive assessment was "to thereafter treat him as any other tenured professor and to waive the requirement for early retirement contained in the [1972] agreement." As Sherstobitoff J.A. gave no textual explanation in support of this 'guaranteed term' construction, one can only surmise that it derived from the wording of clause 5 (and more particularly, the words to which

determination of Cohnstaedt's damages for loss of income consequent upon his wrongful termination? In the result, the conclusion that has now been upheld is that the flawed assessment *improved* his position in that it required his compensation to reflect the *optimal* outcome of the process from his standpoint. He was to be treated as though he had received a positive evaluation, the prospects of which in actuality the majority assessed as less than one in three. Three grounds were put forward by Sherstobitoff J.A. for taking no account of even the possibility that if he had been assessed properly, on four heads instead of just the two on which he had failed, Cohnstaedt would have been adjudged substandard:

(a) Inquiry into the likely outcome of a fair evaluation "placed competence squarely in issue, and placed an onus on the appellant to prove his competence",<sup>15</sup> whereas "[t]he issue before the court was not the competence of the appellant, [but rather] the amount of damages to which [he] was entitled by reason of the wrongful termination of his employment in breach of the terms of the agreement."<sup>16</sup>

(b) The unfair assessment constituted an anticipatory breach by the University, which relieved Cohnstaedt of any contractual obligation on his part, under the agreement, to perform work to the satisfaction of the deans.

(c) Under the principle attributed to *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*,<sup>17</sup> that "a party shall not take advantage of his own wrong or of an event brought about by his own act or omission",<sup>18</sup> it was not open to the University to argue that Cohnstaedt's "loss was diminished according to the likelihood of an unfavourable assessment, when it was the respondent's own fault which denied the appellant any proper assessment."<sup>19</sup>

emphasis has been added), to which the immediately preceding clause was expressly made subject. It began:

In the event of such a waiver, Cohnstaedt shall thereafter continue to work under the Deans as a seconded member of the Department of Sociology and Social Studies *until his retirement* or until he shall be invited by the University to participate in the work of the Department of Sociology and Social Studies.

The clause went on to provide that, exceptionally, Cohnstaedt would remain in the interim under the direction of the two deans to whom had been entrusted the 1977-78 assessment, and responsible to them jointly. Giving cls. 4 and 5 together their natural meaning, it would appear that the differentiation between Cohnstaedt and his peers lay in his not being an integral part of the home unit for academic and administrative purposes. To read the thrust of cl. 5 as a prescription of the *duration* of employment seems a strained construction. Moreover, if there *were* to be drawn from the language of the clause ("Cohnstaedt shall thereafter continue to work under the Deans... until his retirement...") a commitment to Cohnstaedt's remaining in the University's employ for a *finite period*, the fetter would appear to be on the *former's* own freedom to leave to take up an appointment at another institution. Such a construction is as implausible as its effect would be ironic.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> [1919] A.C. 1 (HL).

<sup>18</sup> Per Sherstobitoff J.A., *supra* footnote 2 at 192.

<sup>19</sup> *Ibid.*

It is submitted that none of these lines of reasoning, which will now be examined in turn, withstands closer scrutiny.

(i) *The question of competence: onus and materiality*

A party claiming damages under a particular head of loss normally bears the ultimate burden of establishing that the claim meets tests of certainty, remoteness and causation. When the loss asserted (in the instant case, lost salary after July 1, 1978) is that of something that was contingent on an event or state of affairs, causation is in issue. The plaintiff/appellant was, after all, contractually bound to retire on June 30, 1978 unless his performance in 1977-78 received a positive appraisal. Although the assessment was flawed, the condition was not met. 'Competence', representing the element of contingency, was necessarily in issue. As the majority in the Saskatchewan Court of Appeal recognized, two theoretical approaches were possible. Had they adopted what Vancise J.A. described as the "American approach where damages are calculated on an 'all-or-nothing' basis",<sup>20</sup> there might have been some plausibility in Sherstobitoff J.A.'s comment that they had squarely "placed an onus on [Cohnstaedt] to prove his competence".<sup>21</sup> On that more stringent test, a claimant recovers nothing unless she establishes on a balance of probabilities that the projected outcome would have materialised but for the breach. In the instant case, the 30% likelihood arrived at by the majority would have translated into a zero attribution of legal responsibility to the University for Cohnstaedt's loss of income after 1978. Of course, a finding of a 51/49 probability would equally have been sufficient to produce a 100% award. (Despite its crudity—and lack of appeal to the Canadian judiciary, on the basis of the reported cases—the 'all-or-nothing' approach does at least simulate actuality in its result. While no-one can ever know how Cohnstaedt would have fared on a proper assessment, it is incontrovertible that in its aftermath he would have been on either full or no salary. Certainly not 30%). By evaluating the loss of a chance on the alternative basis that might be described as the 'sliding scale',<sup>22</sup> the majority were able to award substantial (if diminished) damages to a party who had not come close to proving his competence.<sup>23</sup>

Beyond the matter of onus of proof, however, Sherstobitoff J.A. took the position that Cohnstaedt's competence was not in issue at all. Given that at the relevant time the latter's own position was tenuous, this seems a remarkable proposition. It appears that the learned judge may have taken as a point of

<sup>20</sup> *Ibid.* at 174.

<sup>21</sup> *Ibid.* at 188.

<sup>22</sup> This term is preferred to Vancise J.A.'s 'simple probability' (see *supra* footnote 2 para. 50), which could be read as referable to the 'all-or-nothing' approach.

<sup>23</sup> 30% likelihood is not the lowest level for which substantial damages have been awarded by a Canadian court: a mere 20% chance yielded a commensurate proportion of the lost profits claimed in *Multi-Malls Inc. v. Tex-Mall Properties Ltd.* (1980), 108 D.L.R. (3d) 399 (Ont. HC). At some point down the scale, however, a threshold is encountered, below which nominal damages only will be granted. In *Kinkel v. Hyman*, [1939] S.C.R. 364, Crocket J., quoted by Vancise J.A. at 176, expressed the minimum requirement as being "some reasonable probability" amounting to more than "a mere chance of possible

departure for a suspect syllogism, a very condensed formulation in the majority judgment of the nub of the issue of damage quantification. In response to his own question, "what then is the breach?", Vancise J.A. gave the answer:

[I]t is the lost opportunity for a full and fair assessment, and consequently, the loss of the possibility of reinstatement to a full professorship.<sup>24</sup>

To the dissentient, this indicated a misplaced focus. Whilst the University's initial breach was the failure to provide a fair assessment, that had been followed—and superseded—by a wrongful dismissal. *That* was the subject of the instant proceedings, and

whether he could have established his competence became irrelevant when the employment was terminated without cause or justification.<sup>25</sup>

The reasoning is questionable. As for expectation claims in other contractual contexts, the measure of damages in a wrongful dismissal action must be the differential in monetary terms between what the plaintiff's position would have been absent the breach and her actual position. To deny the conjectural nature of the first element in this calculation in the instant case is to fly in the face of both principle and reality. Not unlike a tort victim with self-inflicted pre-existing injuries, Cohnstaedt was not 'whole' when the initial breach (a faultily constructed assessment) took place. The complicating factor, addressed by the 'loss of a chance' doctrine, is that his pre-breach state was only *potentially* the cause of independent harm to his job security. Contingency (in the form of the 'competency' question), however evaluated, is part of the very factual structure here. It cannot be dissociated from the wrongful termination claim on the basis that its only materiality would have been in relation to a suit for failure to provide a proper assessment.<sup>26</sup>

benefit". More recently, the Ontario Court of Appeal on this basis reduced to a nominal level a trial award exceeding \$2 million (representing a 50-50 evaluation): *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 62 O.A.C. 20. In the instant case, Matheson J., in the Saskatchewan Court of Queen's Bench, had concluded that even if Cohnstaedt were to have been given an appropriate range of assignments for a proper assessment, "there is no basis on which it could be seriously suggested that the ultimate result would have been different": (1990), 88 Sask. R. 94 at 104.

<sup>24</sup> *Supra* footnote 2 at 174.

<sup>25</sup> Per Sherstobitoff J.A., *supra* footnote 2 at 191.

<sup>26</sup> Even if the inquiry were to be characterized as 'merely' part of the history leading up to the action for wrongful dismissal, and thus not amenable to *ex post* re-evaluation, only the *form* of the analysis would be affected—not the substance. The deficiencies in the conduct of the inquiry could not have done anything to diminish the concern on the part of the University that prompted the inquiry: doubts about Cohnstaedt's fitness for his position. Had the plaintiff/appellant not accepted the termination, the University would have been entitled to institute a fresh inquiry into his competence. Indeed, there is a legal presumption that the defendant/respondent would have availed itself of this potential means of minimizing the liability: *Maredelanto Compania v. Bergbau-Handel (The Mihalis Angelos)*, [1970] 3 All E.R. 125 at 131d (C.A.), per Lord Denning, M.R.: "... if the defendant has, under the contract, an option which would reduce or extinguish the loss, it will be assumed that he would exercise it."

One further aspect of what he saw as the majority's speculation about Cohnstaedt's competence received a glancing mention from Sherstobitoff J.A.:

To now judge the appellant's competence as a professor is to do exactly what the respondent did in breach of the contract: assess his competence without giving him the means set out in the agreement to be properly assessed.<sup>27</sup>

While reference is made there only to the method of evaluation, there is a second related strand to this thread: the identity of the evaluator. Cohnstaedt's contractual entitlement was to a fair assessment by two peer professionals versed in both his discipline and the grading of academic performance. What he got was the conclusion of judges who in all probability had never read a word he had written, and could not possibly have had first-hand or indeed any recent evidence on which to assess his teaching ability. The point is an interesting one deserving attention.

It may be that had Cohnstaedt timeously elected to pursue such relief he could have obtained specific performance<sup>28</sup> (or a mandatory order akin to it)<sup>29</sup> requiring the University to ensure that a proper assessment was carried out, even if belatedly. Arguments to counter the courts' reluctance to award specific relief would have been the two-fold inadequacy of damages: in quantum they would compensate only partially, reflecting only the loss of a chance,<sup>30</sup> and even if fully commensurate with lost salary and pension benefits, there could be no substitute for the loss of job satisfaction and sense of self-worth through enforced termination.<sup>31</sup> However, Cohnstaedt had accepted the termination of his employment. What might loosely be termed the 'competency' (better, the contingency) issue, unavoidable for the reasons already canvassed, necessarily fell to be determined by the courts. Judges without expertise or experience in academic evaluation could no more be disqualified on that count than their confrères in *Multi-Malls Inc. v. Tex-Mall Properties Ltd.*,<sup>32</sup> unlikely to have been well-versed in the complexities of city planning, or the members of the jury in *Chaplin v. Hicks*<sup>33</sup>, inexperienced (it is assumed) in judging beauty contests. In none of these instances, moreover, did the court purport to pick a winner or

<sup>27</sup> *Supra* footnote 2 at 189.

<sup>28</sup> *Cf. Steiner v. E.H.D. Investments Ltd.* (1977), 78 D.L.R. (3d) 449 (Alta. SC, AD).

<sup>29</sup> *See Hogg v. Wilken* (1975), 51 D.L.R. (3d) 511 (Ont. HC).

<sup>30</sup> No lack of irony here!

<sup>31</sup> *Cf. Stevenson v. Air Canada* (1981), 126 D.L.R. (3d) 242 (Ont. HC); reversed (1982), 132 D.L.R. (3d) 406 (Div. Ct).

<sup>32</sup> (1980), 108 D.L.R. (3d) 399 (Ont. HC). Here the defendant vendor's breach lay in making insufficient efforts to obtain the zoning consents on which the plaintiff's contract to purchase land, for development as a shopping centre, was conditional. In order to quantify damages for the plaintiff's being thus deprived of the chance that a profitable project would otherwise have gone ahead, the court had to evaluate the likelihood that absent the breach the Ontario Municipal Board would have given zoning approval.

<sup>33</sup> [1911] 2 K.B. 786 (CA). The plaintiff was one of fifty aspiring actresses who went through to the final round of a competition to select three groups of four winners, the prizes being acting contracts at graduated rates of remuneration. Wrongfully prevented by the defendant contest organizer and judge from participating in the last stage of the selection process, she sued for the lost chance of being chosen as one of the winners.



otherwise determine an outcome *yea* or *nay*. When the majority in the instant case pronounced a 70% likelihood that Cohnstaedt would have failed a fair assessment, its conclusion was as artificial and unverifiable as a meteorological prediction of a 70% chance of rain in a given city on a particular day. With the benefit of the latter information one would likely leave the house in the morning with an umbrella, but not be unduly surprised to return in the evening without having had to open it. The weatherperson would not have been proved wrong, for she did not say it *would* rain. As earlier noted, the majority's 30% figure was *not* a finding of 30% competence. 'Competence' is here a proxy for success or failure in the assessment contemplated in the 1977 agreement: a black and white (or all or nothing) issue. If the majority *had*, as Sherstobitoff J.A. perhaps came close to implying, sought to put themselves into the shoes of the deans, then it would have been appropriate to insist that, as a matter of process, they equipped themselves with the full range of material on which to base a conclusion that Cohnstaedt passed or failed. Impracticable in the instant circumstances because of the absence of a teaching assignment, such an exercise of substitute *primary* evaluation would have been a theoretical possibility in *Chaplin v. Hicks*.<sup>34</sup> It would, however, have entailed the forensic interviewing and ultimately ranking of the contestants in order to determine whether the plaintiff (whom the defendant had wrongfully failed to interview) merited placement in the first-, second-, or third-prize groups. An unedifying prospect indeed. Now, the loss of a chance doctrine, by its very nature, eliminates any judicial role as substitute primary adjudicator. That does not, however, *ipso facto* lay to rest any concern about process, which may require some categorization of cases. At one end of the spectrum would be *Chaplin v. Hicks*. There the English Court of Appeal is usually taken<sup>35</sup> as having resorted to a purely mathematical formula to determine *not* the plaintiff's individual chances of finishing among the respective prize-winning groups, but the statistical odds that *any one* of the 50 remaining contestants would have placed *somewhere* among the 12 prize-winners.<sup>36</sup>

<sup>34</sup> *Ibid.*

<sup>35</sup> Most recently in Reece, "Loss of Chances in the Law" (1996) 59 M.L.R. 188 at 189.

<sup>36</sup> Gonthier J. in *Lawson v. Laferrrière* (1991), 1 S.C.R. 541, gave as raising the ultimate in indeterminacy the example of a lottery ticket not placed in the draw through the negligence of the seller of the ticket: "The judge has no factual context in which to evaluate the likely result other than the realm of pure statistical chance. Effectively, the pool of factual evidence regarding the various eventualities in the particular case is dry in such cases, and the plaintiff has nothing other than statistics to elaborate the claim in damages." Cf. *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, where, in the context of mitigation, it fell to be determined whether or not surgery, which the plaintiff had unreasonably refused to undergo, would have been successful in his case. Wilson J. did not attempt to go beyond the generalized statistic that 7 out of 10 times that particular procedure was (in the material sense) successful when performed on persons with roughly the same condition as the plaintiff. In contrast, Croom-Johnson L.J. stated in *Hotson v. East Berkshire Area Health Authority*, [1987] 1 All E.R. 210 at 223 (CA; rev'd, on grounds not here material, [1987] 2 All E.R. 909): "If it is proved statistically that 25 per cent of the population have a chance of recovery from a certain injury and 75 per cent do not, it does not mean that someone who suffers that injury and who does not recover from it has lost a 25 per cent chance. He may have lost nothing at all. What he has to do is prove that he was one of the 25 per cent ...."

Given the differential values of the prizes,<sup>37</sup> the rigorous pursuit of such a formula would have produced a far from round figure for the plaintiff's award. In actuality, after recognizing that something of pecuniary value had been lost by the plaintiff's exclusion from the final round, their lordships left its valuation in the hands of the jury—which had awarded £100. Calculation of statistical probability on a purely objective basis is not an option, however, where as in the instant case at issue is the likelihood of attainment of a standard in a situation where the plaintiff had no competitors and for which there were no relevant precedents. The profiles of any of Cohnstaedt's peers in the social sciences who had succeeded or failed in their candidacy for promotion to the rank of full professor might have been of some, but only limited value. Subjective evaluation of Cohnstaedt's individual merits and demerits would have had to be the ultimate determinant in the rating of the quality of his work. In this respect the development permission cases exemplified by *Multi-Malls Inc.* constitute an intermediate category. At issue was whether approval of plans for a proposed large suburban shopping plaza would have been given by the appropriate authority if the defendant had used due diligence in pursuing such permission. Subjective appraisal<sup>38</sup> can be seen here to be informed (though not rigidly constrained) by considerations on which evidence ought to be readily adducible: existing zoning under the applicable development plan, proximity to other malls, traffic flow and plans for future road construction, and so on.

To suggest that more attention might usefully be given to the evidentiary process adopted in applying the 'loss of a chance' doctrine is not to lose sight of the distinction between the judicial function here and that of the primary decision-maker. Granted that in *Cohnstaedt* the court was not directly assessing competence, but evaluating 'only' the likelihood that the deans (on a correct view of their responsibilities) would have found him competent, that line can be very thin. Indeed, had the majority concluded that there was a *zero* prospect that Cohnstaedt could have survived a fair assessment—or if they had chosen to adopt the 'all-or-nothing' approach that would have denied *any* substantial damages on a 30% likelihood—there would be force in the argument that the line was more apparent than real.

(ii) *Anticipatory breach*

In its normal usage 'anticipatory breach' describes an unequivocal repudiation of a contractual obligation prior to the due time for performance. The concept has remedial significance in that the promisee who elects to accept such repudiation has an immediate accelerated entitlement to damages. There was nothing anticipatory in this sense about the University's wrongful termination of Cohnstaedt's employment. *Sherstobitoff J.A.*, however, had a very different connotation in mind:

<sup>37</sup> £5, £4 and £3 per week, for the duration of a three-year acting engagement, for the respective groups of four.

<sup>38</sup> Cf. Reece, *supra* footnote 35 at 198: "all human decisions are at least quasi-indeterministic".

The breach was an anticipatory breach in that each of the parties was left with undischarged obligations under the contract at the time of the breach.<sup>39</sup>

That being so, he reasoned, "the respondent, in dismissing the appellant in breach of the terms of the agreement, repudiated the agreement and the appellant was thereby relieved of any contractual obligation on his part under the agreement to perform work to the satisfaction of the deans, or if there was such an obligation, to prove his competence."<sup>40</sup>

The analysis is again insupportable. Upon its being accepted as such, *any* repudiatory breach (*ex hypothesi* going to the heart of the agreement) relieves the other party of its own future obligations if any. In the instant case there appear to have been none owing by Cohnstaedt *under the 1977 agreement* at the time he accepted his employment as being terminated consequent upon the deans' vitiated assessment. By the terms of the agreement, the most that he can be said to have impliedly committed himself to would have been to carry out to the best of his ability the responsibilities properly assigned to him. Even this is doubtful. Assume that he had become despondent about his performance in the early part of the 1977-78 session,<sup>41</sup> and thereafter, resigned to his fate, had merely gone through the motions. It is difficult to conceive of his being regarded, even in theory, as in breach in such circumstances. The context is entirely different from that wherein implicit 'due diligence' obligations are recognized.<sup>42</sup> There can be not a scintilla of doubt, however, that Cohnstaedt assumed *no* "contractual obligation ... to perform work to the satisfaction of the deans."<sup>43</sup> To have thus guaranteed his own success in the assessment would have been as foolhardy as it would have been meaningless. If he *had* done so, then Sherstobitoff J.A.'s self-styled 'anticipatory breach' analysis could have been apt on one hypothetical scenario, to a very limited degree. Positing the actual, *faulty* assessment process, the University's breach would have been a complete answer to any action brought by it on the guarantee. In no way, however, can this line of reasoning provide a conceptual basis for in effect eliminating from the 1977 agreement the critical element of *conditionality*.<sup>44</sup>

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<sup>39</sup> *Supra* footnote 2 at 189-90.

<sup>40</sup> *Ibid.* at 190.

<sup>41</sup> The further assumption is made here that the criteria for fair assessment had been complied with by the University.

<sup>42</sup> See, for example, *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

<sup>43</sup> See text accompanying footnote 40, emphasis added.

<sup>44</sup> In *United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd.*, [1968] 1 W.L.R. 74 (CA), the appellant aircraft manufacturer entered into a 'buy-back' agreement with the respondent finance company under which it promised to buy back in specified circumstances a plane that had been leased out by the appellant. The condition was that it be required to do so within a reasonable time of the hirer falling into default under the lease. Having delayed for almost five months after such a default before requesting the appellant to honour its promise, the respondent failed in its action for damages. In the Court of Appeal, the agreement was analysed as contemplating a unilateral contract under which the promisor would become bound only if and when a timeous request were made. On the facts this had not occurred, such a request being characterized as a "condition precedent"

The deal struck with Cohnstaedt was that his employment would continue beyond June 30, 1978 (on which date he had since 1972 been contractually obliged to take early retirement) on one precondition and on one precondition only: that he was assessed as being of full professorial timbre at the end of the 1977-78 session. This had not occurred. That an unfair assessment process had been adopted put the University in breach. That the outcome, and with it Cohnstaedt's employment status, *might* otherwise have been different, is what raised the possibility of substantial damages—but only on the court's estimation of probabilities. That Cohnstaedt's acceptance of the University's repudiation (by wrongful termination) should itself as a matter of law foreclose the issue of damage quantification by an irrebuttable presumption is an untenable proposition. Sherstobitoff J.A.'s attempt to explain how the breach could (in monetary terms) excise from the 1977 agreement the condition that was its very essence, was as follows:

[T]he appellant was relieved of any obligation to prove competence by the repudiation of the contract by the respondent. *If that principle applied to liability, it necessarily applied to assessment of damages as well.*<sup>45</sup>

My point here is not to repeat the critique offered earlier of the first part of this statement, but to illustrate the faulty logic in the second. This can be done by taking a fact pattern which brings in the concept of anticipatory breach in both its normal connotation and Sherstobitoff J.A.'s usage. If a vendor under an agreement for sale makes clear in advance that she will not convey title on the date fixed for completion, the purchaser is relieved of the obligation to tender the purchase price at the time and place agreed. However, the purchaser must be able to show that he had both the capacity and willingness so to tender. Furthermore, and critically for the present discussion, in an action for damages against the vendor for breach, the purchaser must bring into account the unpaid balance of the purchase price. It is simply wrong to suggest that a repudiatory breach has the effect of enabling damages to be recovered on a basis that would leave the plaintiff in a better position than if there had been no breach. Proper assessment entails determination of the difference between what *would have been* the plaintiff's position (in monetary terms) absent breach and the actuality. The major element of contingency in the instant case complicates the first part of the calculation, but has no effect whatever on the governing principle.

to the enforceability of the appellant's promise: see *per* Lord Denning M.R. at 80-1. In a case-note entitled "Conceptualism Triumphant in the Court of Appeal" (1968) 31 M.L.R. 332, Atiyah assailed the "conceptual mumbo jumbo" (at 337) that had produced an outcome he regarded as unjust and absurd. Pertinent to the instant discussion in the text is an alternative line of reasoning put forward by the learned commentator (and thus presumably free of 'conceptualism'). It ran as follows: If the respondent is deemed to have *promised* to request a buy-back (in timely fashion, following hirer default), it would on the facts have been in breach. Being, however, not repudiatory but a minor breach sounding in damages only, its commission would not preclude the respondent's establishing the appellant's liability for its own more substantial loss. This rather dubious method of circumventing the conditionality that was of the essence of the buy-back agreement in *U.D.T. v. Eagle Aircraft* is in a sense the converse of that employed by the dissentient in the instant case.

<sup>45</sup> *Supra* footnote 2 at 192 (emphasis added).

(iii) *The New Zealand Shipping Principle*

The final rationale offered as justification for ignoring the conditionality of any salary entitlement beyond June 30, 1978, is as misconceived as those already examined. It ran:

[I]t was not open to the respondent to say that ... the loss was diminished according to the likelihood of an unfavourable assessment, when it was the respondent's fault which denied the appellant any proper assessment.<sup>46</sup>

It is interesting to note the extended form of Sherstobitoff J.A.'s summary of the principle normally associated with the House of Lords' decision in *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*.<sup>47</sup>

[A] party shall not take advantage of his own wrong or of an event brought about by his own act or omission.<sup>48</sup>

The words to which emphasis has been added, and which significantly enlarge the ambit of the principle, hark back to its earliest formulation in *Coke on Littleton*.<sup>49</sup> On so broad an understanding it becomes unnecessary to focus on the meaning of 'wrong' in this context, since the sole material question becomes that of causation. On the instant facts the analysis (of a simplicity that ought in itself to sound a caution) is: *Why* was Cohnstaedt not able to establish his competence? *Because* the University failed to carry out a proper assessment. *Therefore*, "it is not open to the [University] to say that [he] would not have been able to establish his competence." Competence is thus deemed on the basis of an estoppel, although no express reference is made to that concept. In a much earlier case, however, it was put forward as a variant of the argument that an unsatisfied condition precedent to a vendor's entitlement to the purchase price of unascertained goods—the passing of property therein—was to be taken as having been fulfilled since its non-satisfaction was attributable to the purchaser's breach. Rejecting both formulations in *Colley v. Overseas Exporters*,<sup>50</sup> McCardie J.<sup>51</sup> dispatched the estoppel argument in terms equally applicable to the so-called principle currently under discussion:

Estoppel is a vague word. It is often used to support a submission not capable of precise juristic formulation.

First, the 'deemed competence' argument proves too much. Were it sound in principle, Ms. Chaplin would have had to be compensated as though she had been chosen as one of the group of first-prize winners; it was her wrongful exclusion, by the defendant organizer, from the final round of interviews that denied her the opportunity to demonstrate her supremacy. Likewise, Multi-Malls Inc. would have been able to recover the full amount of the lost profits

<sup>46</sup> *Ibid.* at 192.

<sup>47</sup> *Supra* footnote 17.

<sup>48</sup> *Supra* footnote 2 at 192.

<sup>49</sup> 2 Co. Litt. 206b, quoted in Proksch, "In Praise of Conditions Subsequent" (1979-82) 14 U.W.A.L. Rev. 333, at 345: a person cannot take advantage of the non-fulfilment of a condition if he "is the cause wherefore the condition cannot be performed".

<sup>50</sup> [1921] 3 K.B. 302.

<sup>51</sup> *Ibid.* at 311.

from the operation of a shopping mall destined to remain only on the drawing board when the vendor of the land made insufficient efforts to obtain development permission. In other words, the 'loss of a chance' becomes a redundant concept when chances are required to be treated as certainties. Second, the simplistic 'but for' reasoning exhibited here is reminiscent of the instinctive reaction of a civil litigant left with substantial uncompensated loss determined in law to be too remote. In the instant context, moreover, the limiting principle at issue—causation—may be said to be more deeply grounded in notions of what is just. The rule of remoteness, while reflecting the concern that judicial remedies should take reasonable account of the interests of the defendant as well as those of the plaintiff,<sup>52</sup> does nevertheless leave the latter to bear some of the actual loss caused by the former. There is a residual element of arbitrariness that is not intuitively felt, for example, when the 'victim' of an unquestioned breach is denied compensation to the extent that the loss (equally unquestioned) was occasioned by the plaintiff's own improvidence.<sup>53</sup> On the face of it, Sherstobitoff J.A.'s formulation of the *New Zealand Shipping* principle purports to be predicated on an established causal nexus between the breach and the asserted loss:

a party shall not take advantage of his own wrong or of an event *brought about* by his own act or omission.<sup>54</sup>

In reality, through the pseudo-estoppel by which it was applied, that causal nexus was *irrebuttably presumed*. The only material 'event' that can safely be said to have been 'brought about' by the relevant breach<sup>55</sup> was the denial to Cohnstaedt of the *opportunity* (chance) to demonstrate competence. Thus the principle of causation required that compensation be awarded only to the degree that it was concluded that the opportunity denied—and not Cohnstaedt's inherent deficiencies—occasioned the cessation of his salary income. To reinforce the point through a *reductio ad absurdum*, change the facts so that the agreed basis of assessment was to be two research papers written during the session, to be sealed until read and assessed by the deans at a later date. Assume that for some reason the deans categorically refused to so much as look at the papers, but Cohnstaedt was terminated anyway. The issue of how to approach the assessment of damages would not be changed in the slightest on those suppositions. Now let us make one further addition to the facts: the 'research papers', when subsequently unsealed, were each less than a page in length, poorly written and in substance totally derivative. On what possible basis could the University, put in breach by the deans' dereliction of duty, be said to be taking advantage of its own wrong' unless competence were deemed to have been established and the lost income claim allowed in full?

<sup>52</sup> See H. McGregor, *McGregor on Damages*, 15th ed. (London: Sweet and Maxwell, 1988) at 12.

<sup>53</sup> See, for example, *Bowlay Logging v. Domtar*, [1978] 4 W.W.R. 105 (B.C.C.A.).

<sup>54</sup> *Supra* footnote 2 at 192, emphasis added.

<sup>55</sup> The unfair assessment, not the wrongful termination that the dissident had earlier stated to have superseded it: see *supra* text accompanying footnote 25.

'Fictional fulfilment' aptly describes the effect attributed by Sherstobitoff J.A. to the application of the *New Zealand Shipping* principle. In the most thorough recent judicial appraisal of their lordships' opinions in the eponymous decision, Scott J., sitting as Vice-Chancellor of the County Palatine of Lancaster, used the term in reference to the reasoning of Lord Atkinson in particular. His conclusion, however, in *Thompson v. ASDA-MFI*<sup>56</sup> was that

[t]he fictional fulfilment of conditions precedent and the fictional non-fulfilment of conditions subsequent may be principles of the civil law; but they are not principles of English law.

In his view *New Zealand Shipping*<sup>57</sup> was irreconcilable with two later decisions of the House of Lords: *Luxor (Eastbourne) v. Cooper*,<sup>58</sup> and *Cheall v. Association of Professional Executive Clerical and Computer Staff*.<sup>59</sup> It is beyond the scope of this comment to examine further how continued invocation of the *New Zealand Shipping* principle as a shibboleth has significantly contributed to the conceptual confusion that characterizes the jurisprudence on conditional contracts throughout the Commonwealth.<sup>60</sup> Suffice to say that to the extent that the 'principle' has a useful function, it serves as a working hypothesis as a matter of construction.<sup>61</sup> 'Fault' or a 'wrong' is of the essence, and must moreover constitute not only a breach, but breach of a duty owed to the other contracting party.<sup>62</sup> These limitations leave the 'principle' with little more than a rhetorical role, that of reinforcing the *implication* in a wide range of contexts of an obligation not to prevent the fulfilment of a contingent condition.<sup>63</sup> In the instant case, however, it had already been determined that the University had owed (and broken) a duty to Cohnstaedt to provide an assessment that was fair. The breach of the implied term *set up* the remedial issue of assessment of damages. It did not *ipso facto*, unless automatic fictional fulfilment were to be deemed, dispose of the complication that salary after June 1978 was conditional (and, all things considered, very far from a certainty).

<sup>56</sup> [1988] 2 All E.R. 722 at 741d.

<sup>57</sup> *Supra* footnote 17.

<sup>58</sup> [1941] A.C. 108.

<sup>59</sup> [1983] 2 A.C. 180.

<sup>60</sup> That is in part the focus of a work currently in progress.

<sup>61</sup> Cheall, *supra* footnote 59; *Alghussein Establishment v. Eton College*, [1991] 1 All E.R. 267 at 274h, *per* Lord Jauncey; *Zippy Print Enterprises v. Pawliuk* (1995), 20 B.L.R. (2d) 170 (B.C.C.A.).

<sup>62</sup> *Geo. Moundreas & Co. SA v. Navimpex*, [1985] 2 Ll. Rep. 515 (QBD); *contra*, Coote, "'Subject to Finance'—Again" [1974] NZLJ 392 at 394, criticizing McCarthy J.'s "second thoughts" in *Gardner v. Gould*, [1974] 1 NZLR 426 (C.A.) at 428.

<sup>63</sup> The 'duty of good faith' propounded at first instance in *Gateway Realty Ltd. v. Arton Holdings Ltd.* (No. 3) (1992), 106 N.S.R. (2d) 180 (S.C.); *aff'd* on another ground: (1992) 112 N.S.R. (2d) 180 (C.A.) articulates the same interpretative approach in positive form. Coote, "Agreements 'Subject to Finance'" (1976) 40 Conv. & Prop. Lawyer 37 at 47-48, views the principle that 'a contractor cannot be allowed to take advantage of his own wrong' as an *alternative* (and a preferable one) to what he calls 'the implied promise theory'. It is respectfully suggested that this is a fallacious characterization. *Cf.* Proksch, *loc. cit.* *supra* footnote 49 at 348, who sees the principle as an overarching rule of law ("the independent doctrine of non-interference"), nullifying party intentions inconsistent therewith.

Had the University taken the position that the absence of a positive assessment precluded Cohnstaedt from receiving salary beyond the date of his termination, or damages in lieu thereof, it would have been seeking to 'take advantage of its own wrong'. It did not do so.<sup>64</sup> Accordingly, the *New Zealand Shipping* principle, like the flowers that bloom in the spring, had nothing to do with the case.

### *A Chance Lost*

Seventeen years after a career-ending wrongful dismissal that had on the evidence left him a broken man,<sup>65</sup> Cohnstaedt held a judgment for only \$52,000 when his appeal came before the Supreme Court with quantum the sole matter still in issue. Pre-judgment interest, which could have come close to tripling that sum if the relevant provincial legislation<sup>66</sup> had been in force when the cause of action arose, had been unanimously ruled out by the Saskatchewan Court of Appeal. Whether or not such considerations increased receptivity to Sherstobitoff J.A.'s reasons for quadrupling the award,<sup>67</sup> uncritical endorsement<sup>68</sup> of those reasons is doubly unfortunate. The critique offered in this comment suggests that the grounds adduced in rejection of the applicability of the 'loss of a chance' doctrine constitute variations on the theme of 'fictional fulfilment' of conditional contracts. That concept is submitted to have no place in the common law. Its refutation, however, merely scratches the surface of a problem that has hitherto proved intractable: when a contingent condition becomes impossible of fulfilment because of the act or omission of one of the contracting parties, in what circumstances—on what theoretical basis—is the other party entitled to the same relief (full loss of bargain damages, or specific performance in an appropriate case) as if the contract had been unconditional?

Two factors make *Mackay v. Dick*<sup>69</sup> an apposite illustrative case. While involving a sale of goods, in material respects it bears an uncanny similarity to

<sup>64</sup> Employment was terminated in the belief that a valid negative assessment provided contractual justification. With the authoritative ruling in Cohnstaedt's favour on the substantive issue, quantification of damages alone remained in dispute.

<sup>65</sup> "His wife ... characterized him as a defeated man after the termination and said that he rapidly deteriorated to the extent that he could not even manage the household while she worked": *supra* footnote 2 at 195.

<sup>66</sup> *The Pre-Judgment Interest Act* S.S. 1984-85-86, c. P22.2.

<sup>67</sup> His figure of \$208,000, representing seven years' gross salary, exceeded that of the Court of Appeal majority by slightly more than the latter's discount for loss of a chance. Sherstobitoff J.A. differed from his brothers both in making no deduction for pension contributions that would have been made by Cohnstaedt had he worked for the period in question, and in disregarding pension benefits that would have accrued during this time: see *supra* footnote 2 at 196 and 179-80.

<sup>68</sup> "Substantial" endorsement, without particularization of any points of doubt or disagreement, must for practical purposes be equated with blanket approval unless discounted entirely because of the qualification.

<sup>69</sup> (1880-81) 6 App. Cas. 251 (H.L. (Sc.)).



*Cohnstaedt*—and had an identical (though arguably correct) outcome. Additionally, in successive editions of his textbook,<sup>70</sup> Treitel has used his criticism of the decision to advance a theoretical analysis that would inexorably require that the question posed at the end of the last paragraph be answered, ‘never, unless the outcome absent breach would have been beyond doubt’.

The respondent vendor (V) had invented a steam-driven digging machine which the pursuer, a railway contractor (P), believed might be suitable for excavating a particular site. A contract was concluded whereunder the purchase price was fixed, V was to deliver the machine to the site in question, and P was to put the machine through a trial to determine whether, under specified conditions, it met the performance standards claimed by V. If it passed the test P was to keep the machine and pay the agreed price. If it failed, V was to remove it within a specified time. The trial was to be carried out on a “properly opened-up face”. On the facts, P did not prepare the site in the stipulated manner and the machine broke down during the trial. V sued to recover the price of the machine. The House of Lords upheld the claim. Treitel begins his appraisal by noting that what was enforced was “the principal obligation”. His analysis then proceeds as follows:

[I]n *Mackay v. Dick* the buyer was held liable for the price; but there was no discussion as to the remedy. In principle, it seems wrong to hold him so liable, for such a result ignores the possibility that the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided. It is submitted that the correct result in cases of this kind is to award damages for breach of the subsidiary obligation: in assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach. To hold the party in breach liable for the full performance promised by him, on the fiction that the condition had occurred, seems to introduce into this branch of the law a punitive element that is inappropriate to a contractual action.<sup>71</sup>

Tempting as it may be to invoke so distinguished an ally in support of criticism of the decision in *Cohnstaedt*, I can do so only in relation to denial that the common law knows a concept of ‘fictional fulfilment’. (Even in that regard, it needs to be pointed out, as Scott J. did in *Thompson v. ASDA-MFI*,<sup>72</sup> that *Mackay v. Dick* was an appeal from Scotland, and Lord Watson had expressly acknowledged<sup>73</sup> that that doctrine as recognized in Scots law had been “borrowed from the civil law”.) Differentiation between ‘principal’ (or primary) and subsidiary obligations does indeed have major remedial significance. In the instant context, however, to focus exclusively on the breach of a subsidiary obligation—even when rightly identified—is to foreclose the range of remedial choice, and in some instances to preclude the correct outcome. I would go further and suggest that a new characterization of the issue is needed, one that

<sup>70</sup> Most recently G.H. Treitel, *The Law of Contract*, 9th ed. (London: Sweet and Maxwell, 1995) at 61-2.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Supra* footnote 56 at 731a.

<sup>73</sup> (1880-81) 6 App. Cas. 251 at 270, after quoting a passage from Bell’s *Principles of the Laws of Scotland*, 8th ed. (Edinburgh: T. & T. Clark, 1884) (*sic*) at para. 50.

shifts the focus *away* from the phenomenon of breach. If the compensation is to fit the wrong, the decision as between full loss of bargain damages and a reduced award representing only the loss of a chance must be one that is both conceptually sound and also in accordance with the intentions of the contracting parties. The key, it is submitted, is to frame the issue at the outset as being how the parties should be taken to have *allocated the risk* that the condition would not be met. This can be properly discerned only by focusing initially on the *whole* of the bargain to determine, on a holistic basis, the relationship between the element of contingency and the promise being sued upon.<sup>74</sup> Approached in that light, the remedy given in *Mackay* is fully defensible without any recourse to Lord Watson's fictional fulfilment, as a careful reading of Lord Blackburn's opinion<sup>75</sup> will reveal. Whilst an action for the breach of a subsidiary obligation (such as that of conducting a fair evaluation) is by its very nature an action for the loss of a chance, it does not follow that an action brought on the promisor's unperformed *primary* obligation must necessarily be treated similarly merely because a contingent condition remains unfulfilled. It must be admitted that in the reported cases the preponderance of judicial opinion supports Treitel's contrary view, though conclusionary statements far outnumber reasoned arguments. *Overseas Buyers Ltd. v. Granadex SA*<sup>76</sup> is representative, and of particular interest because, although followed in subsequent cases, one detects in it a hint of unease with the received wisdom. A contract for sale of Indian groundnut kernels for delivery over a two-month period contained a provision that, if the government of the country of origin prohibited their export during this period, there should be a thirty-day extension. If delivery were still impossible at the end of that time, it was stipulated that "this contract or any unfulfilled part thereof shall be cancelled". The Indian government did at the material time impose an export ban, though there was some evidence that a loophole may have been left open that could possibly have permitted execution of the instant contract had an application therefor been pursued with more persistence by the sellers. In the arbitration here under review the buyers, who had served notice that they held the sellers in default, claimed expectation damages for non-delivery (the quantum presumably being either the additional cost of covering from another source or the liability incurred to a sub-buyer). The defence was that both parties' obligations had come to an end with the invocation of what was variously termed the 'prohibition' and the '*force majeure*' clause. In the result the sellers' reliance on the clause was upheld, their efforts to get around the ban being found to have been duly diligent. What is relevant here, however, is Mustill J.'s formulation of the two applicable principles, and more particularly their interrelationship:

<sup>74</sup> It will be recognized that the approach being advocated parallels that pioneered by Professor Coote in relation to exception clauses. The analogy is instructive, for from both the functional and conceptual perspectives such clauses have much in common with contingent conditions.

<sup>75</sup> *Supra* footnote 69 at 264.

<sup>76</sup> [1980] 2 Ll. Rep. 608 (Q.B.D.).

(1) The seller must first set out to prove that he used his best endeavours to obtain any necessary permission to export, but nevertheless was unsuccessful.

(2) If the seller fails to satisfy this requirement, he is liable for failure to ship, *unless he can prove that nothing which he could have done would have enabled him to ship*.

It will be seen that the second stage of the enquiry, on the cases as they now stand, postulates a stricter test than the first. The seller has to exclude the possibility that any steps, not any reasonable steps, would have been successful. The reasons for this contrast may one day have to be explored.<sup>77</sup>

Perhaps it would be more enlightening to probe into the premise that causation, regardless of the degree of stringency of the chosen test, is relevant *at all* to a claim brought on a less than duly diligent seller's *primary* obligation to make delivery. Analysed from the standpoint of risk allocation, is the sole material question not seen to be whether the seller could bring itself within the demarcated area of exemption from liability, namely, best endeavours nevertheless unsuccessful?

Applied to the facts of *MacKay v. Dick*,<sup>78</sup> such an analysis shows the decision to be eminently supportable: the contingent purchaser had assumed the obligation to keep and pay for the machine *unless* it failed a fair test. In *Cohnstaedt*, the deal was that the appellant would take early retirement *if he were fairly adjudged incompetent*.<sup>79</sup> He was not. The difference between the two cases, however, is that it would in context not be a reasonable reading of the parties' risk allocation in concluding the *Cohnstaedt* deal to take the University as having *guaranteed employment* until normal retirement age in the event of a less than adequate assessment process.<sup>80</sup> The more realistic allocation of risk (constructive intention, if that formulation be preferred) in that eventuality is the entitlement of *either* party to call for a fresh and fair evaluation if the appellant sought to stay on. The issue presented to the Supreme Court was whether by treating himself as dismissed, and thus asserting a purely monetary claim, he could take his 'eggshell status' out of play.<sup>81</sup>

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<sup>77</sup> *Ibid.* at 612 (emphasis added).

<sup>78</sup> *Supra* footnote 69.

<sup>79</sup> This, it is worth recalling, represented a concession on the University's part. The *status quo ante* was that *Cohnstaedt's* obligatory departure was imminent: see *supra* at 2.

<sup>80</sup> See *supra* footnote 14.

<sup>81</sup> See *supra* text accompanying footnote 26.