INJUNCTIONS TO RESTRAIN BREACH OF CONTRACT - STIPULATED REMEDY CLAUSES – OLD HABITS DIE HARD

INTRODUCTION

The issues that were before the court in *1465152 Ontario Limited v Amexon Development Inc.*[1] are substantial and far-reaching, particularly for the commercial real estate leasing industry. The decision is an excellent vehicle for the discussion of important issues relating to injunctions in the context of contractual property rights, equitable extortionate conduct, abuse of process, permissible breaches of contract on the basis of economic efficiency, and the interpretation and enforceability of contractual limitation of remedies clauses, particularly in the context of a claim that can be made under a concurrent tort.

OVERVIEW

The Landlord in *Amexon* wished to demolish a large commercial building in which the Tenant occupied leased premises, and redevelop the property. The premises constituted approximately 3% of the rentable area of the building. All of the other tenants had left as a result of agreements made with the Landlord, which offered to relocate the Tenant into similar (and better) premises in an adjoining building owned by the Landlord, and to pay compensation. After some bargaining, the Tenant refused to move.

It was the Landlord's position that the only reason for the Tenant's refusal to relocate was its desire to extract as much money from the Landlord as possible. There was nothing

[1] 2015 ONCA 86, affirming an unreported decision delivered by handwritten endorsement. A separate costs endorsement is reported at 2014 ONSC 4384. An application for leave to appeal to the SCC was dismissed (2015 CanLII 38341, 2015 CarswellOnt 10072), although a settlement had been made between the parties shortly prior to the release of that dismissal. The author was counsel for the Landlord at the Court of Appeal and has a partisan view of the decisions made both there and in the court below.

unique or special about the leased premises, nor any other reason why the Tenant had any need or compelling interest to remain there. The Landlord argued that damages were an adequate and suitable remedy for the Tenant in the circumstances of the case, that an injunction was an unreasonable and grossly disproportionate remedy, and that in any event the lease contained a stipulated remedy clause that plainly limited the remedies available to the Tenant for breach by the Landlord of any of its obligations under the lease to a claim for damages.

It is the author's view that the decisions made by the application judge and the CA in *Amexon* conflict with decisions of the Supreme Court of Canada,[2] the House of Lords,[3] the High Court of Australia,[4] the British Columbia Court of Appeal,[5] the Alberta Court of Appeal,[6] and even sister panels of the Ontario Court of Appeal.[7]

FACTUAL BACKGROUND

The leased premises comprised approximately 3750 square feet of space in a Class B 5-storey-plus-basement office building originally constructed *circa* 1973 with a total rental area of 132,775 square feet. The nominal tenant was the management company for a law firm which included four lawyers and approximately 25 legal assistants and law clerks. The Landlord wished to redevelop the property and was able to negotiate agreements to

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[2] *Semelhago v Paramadevan* [1996] 2 S.C.R. 415; *Highway Properties Limited v Kelly, Douglas and Company Limited* [1971] S.C.R. 562; *J.G. Collins Insurance Agencies Ltd. v Elsley* [1978] 2 S.C.R. 916.
[3] *Co-operative Insurance Society v Argyll Stores* [1998] A.C. 1.
[4] *Progressive Mailing House Pty. Ltd. v Tabali Pty. Ltd.* (1985) 157 CLR 17.
[5] *Denovan v Lee* (1989) 65 D.L.R. (4th) 103; *Evergreen Building Ltd. v IBI Leaseholds Ltd.* (2005) 262 D.L.R. (4th) 169.
[6] *Allard v Shaw Communications Inc.* 2010 ABCA 316.
[7] *Rahawanji v Gwendolyn Shop (1973) Ltd.* 2011 ONCA 771; *Pointe East Windsor Limited v Windsor (City)* 2014 ONCA 467.

vacate with all of the other tenants in the building. The Tenant was willing to relocate, so long as it received what it considered adequate compensation.

There were 35 suitable substitute office buildings, with a total of 74 postings for rentable space. The closest buildings were located at the abutting property and were owned by a sister company of the Landlord. Those buildings were of similar design and construction and provided a higher level of amenities. The Landlord ultimately made a proposal that the Tenant relocate to premises in the next-door building, with one year's free rent and other inducements or, if the Tenant were to choose to relocate to premises owned by a third party, the Landlord would provide compensation in the sum of $100,000 to the Tenant. The proposal was not accepted. The Landlord then gave notice to vacate to the Tenant.

Section 13.07 of the lease provided (in relevant part):

> Whenever the Tenant seeks a remedy in order to enforce the observance or performance of one of the terms, covenants and conditions contained in this Lease on the part of the Landlord to be observed or performed, the Tenant's only remedy shall be for such damages as the Tenant shall be able to prove in a court of competent jurisdiction that it has suffered as a result of a breach (if established) by the Landlord in the observance and performance of any of the terms, covenants and conditions contained in this Lease on the part of the Landlord to be observed or performed.

Upon application, the Tenant was granted a declaration that the notice to vacate was void and of no force and effect and, to implement that declaration, a permanent injunction to prevent the Landlord from reentering the leased premises and otherwise failing to fulfil

its obligations to supply the leased premises with services and utilities and all other goods and services required by the lease.

A. INJUNCTIONS TO RESTRAIN BREACH OF CONTRACT

GENERAL PRINCIPLES REGARDING THE CIRCUMSTANCES IN WHICH AN EQUITABLE REMEDY, SUCH AS AN INJUNCTION, WILL BE ISSUED

It is a general rule that an injunction will not be granted where damages are an adequate remedy.[8] On a higher level, the approach that is taken is reflected in the following comment:[9]

> The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways …Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case".

An analogous comment, made in the context of damages rather than remedies, refers to "the central importance of reasonableness in selecting the appropriate measure of damages".[10] As it ought to be in most aspects of the law, reasonableness should similarly be a necessary criterion when selecting the remedy suitable to the facts and circumstances of the case, as should proportionality, which has in more recent times become an important consideration in several areas of law and practice and which is, in reality, merely an aspect of reasonableness.[11]

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[8] *Pointe East,* at para. 17; *Denovan,* at paras. 11-12; *472448 B.C. Ltd. v 343554 B.C. Ltd.* 2006 BCSC 1075 at paras. 22-23 and 30.
[9] *Kerr v Baranow* 2011 SCC 10 at para. 71.
[10] *Ruxley Electronics and Construction Ltd. v Forsyth* [1996] 1 A.C. 344, at p. 368.
[11] As indicated in the following comment in *Ruxley* (at p. 369): "[M]itigation is not the only area in which the concept of reasonableness has an impact on the law of damages. If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the

As an injunction is an equitable and discretionary remedy, equitable considerations are at the forefront of the matters taken into consideration by the court:

> The court can withhold [an injunction] in the interests of fairness…So for example an injunction will not be given which would give the plaintiff no substantive useful benefit, except a negotiating advantage because of the harm done by the injunction to the person enjoined.[12]
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> …
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> A clear breach of a clear right is not enough to force the court to issue an injunction. The injunction would also have to be consistent with the principles on which the court grants equitable relief, e.g. relief is withheld if the relief would be oppressive, harsh, illegal, or against public policy.[13]
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> …
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> In my view, before determining the appropriate remedy, the chambers judge should have considered the equities between the parties, including any factors relating to the "uniqueness" of the property demised and the relative hardship, if any, of holding the landlord to the strict terms of the lease.[14]
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> …
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> Relief from forfeiture is a discretionary remedy and is not granted as a matter of course. As Doherty J.A. noted in *Ontario (Attorney General) v 8477 Darlington Crescent* 2011 ONCA 363, at para. 93, both in civil and criminal cases:
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> > Relief from forfeiture is very much the exception and will be granted only where the party seeking that

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work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value."

[12] *Allard,* at paras. 29-30.

[13] *Allard*, at para. 32.

[14] *Evergreen Building*, at para. 32.

> remedy clearly makes the case that forfeiture would be an inequitable and unjust order in all the circumstances.

This is particularly so with respect to a commercial lease.[15]

THE ONUS OF PROOF RESTS WITH THE PARTY SEEKING INJUNCTIVE RELIEF

As would be expected, the applicant for an injunction has the onus of proof:[16]

> Ultimately, the determining factor in the granting of injunctive relief is whether the plaintiff has established on a balance of convenience that it would be just and convenient to make such an order. Irreparable harm, or the inadequacy of damages, is merely one factor among several to be considered in assessing the overall balance of convenience.

CONFLICT WITH SEMELHAGO

The SCC decision in *Semelhago* involved the issue of specific performance of an agreement of purchase and sale of land. The following comments were made:[17]

> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Both residential, business and industrial properties are mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.
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> It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.
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> …
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> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique

[15] *Rahawanji,* at paras. 2-3.
[16] *472448 B.C. Ltd.,* at para. 26; *Rahawanji,* at para. 2.
[17] At paras. 20-21 and 22.

> to the extent that its substitute would not be readily available.

As the evidence in *Amexon* itself showed, commercial rental properties are at least as fungible as are properties for sale. In addition, there is a high degree of similarity between the equitable remedies of specific performance and injunction. An injunction granted to a tenant corresponds to the remedy of specific performance granted to a purchaser of property. In the circumstances of *Amexon*, the permanent injunction was the functional equivalent of an order for specific performance by the Landlord of the lease agreement. It is therefore equally inappropriate "to maintain a distinction in the approach to [injunctions] as between realty and personalty".

If a purchaser has no automatic entitlement to the remedy of specific performance where the purchased property is not proved to be unique,[18] then why should a tenant have that entitlement to the remedy of an injunction where the leased premises are not shown to be unique? There is no principled rationale or justification for treating a request by a tenant for an injunction any differently than a request by a purchaser for an order for specific performance. There is no basis for affording greater protection for a tenant's property rights than for those of a purchaser.

Semelhago has reversed the presumption that all properties are unique. Instead, there is now a presumption that damages are an adequate remedy; to rebut that presumption, there must be evidence that the property *is* unique or, if that cannot be proved, that damages,

[18] In addition to *Semelhago,* see also on this point *Co-operative Insurance Society,* at p. 11.

for some reason other than the absence of uniqueness of the property, would *not* be an adequate remedy. A tenant should have the same onus.

OTHER OBSERVATIONS ON WHETHER THERE SHOULD BE SPECIAL TREATMENT FOR AN INJUNCTION SOUGHT IN THE CONTEXT OF PROPERTY RIGHTS

In addition to *Semelhago*, the SCC decision in *Highway Properties* shows that the view that property rights deserve special treatment is now merely a historical anomaly for which there is no longer any persuasive justification. As stated in *Highway Properties*:[19]

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

Despite those SCC decisions, the BCCA made the following statement:[20]

> [T]he law has not yet developed to the point where the remedies available for breach of lease are co-extensive with those for breach of other contracts such that the distinction between a lease as a demise of land and a lease as a contract has completely disappeared.

I disagree. In my view, the SCC decisions referenced above have established the principle that where an equitable remedy, whether it be specific performance, injunction, or another, is sought in the context of a property or proprietary right (including a leasehold interest), the principles to be applied are no different than if the remedy were

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[19] At para. 27. That passage was quoted with approval by the High Court of Australia in *Progressive Mailing House,* at p. 28, and the following was said (at p. 29): "The decisions in Australia and Canada, and the speeches in *Panalpina*, reflect the point made by William O. Douglas and Jerome Frank in Landlords' Claims in Reorganizations, Yale Law Journal, vol. 42 (1933), p. 1003, in footnote 6, that, as the law of landlord and tenant had outgrown its origins in feudal tenure, it was more appropriate in the light of the essential elements of the bargain, the modern money economy and the modern development of contract law that leases should be regulated by the principles of the law of contract."

[20] *Evergreen Building,* at para. 28.

sought in a non-property context. More particularly, the applicant has an obligation to show that damages would not be an adequate remedy, and the normal (although not the only) way to do that in a property context is to prove that the property is unique.

If I am wrong in saying that that principle has been established, then "it is time to take…incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just."[21] Borrowing a phrase from a recent SCC decision, the continuation of special treatment for injunctions because of a property context would be to "turn a blind eye to current economic reality".[22]

There is little to recommend adherence to an outdated principle which is based on archaic conditions. When faced with a choice between:

> (a) granting an injunction which has the effect of enabling the applicant to seek a windfall gain through what has been described in case law as extortionate conduct (which, as indicated below, is in my view a proper characterization), and
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> (b) the fundamental principle that a victim of wrongdoing ought to receive no less, but no more, than the actual loss sustained,

there should be no hesitation in choosing to apply the fundamental principle.

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[21] *Bhasin v Hrynew* 2014 SCC 71 at para. 33.
[22] *Chevron Corp. v Yaiguaje* 2015 SCC 42 at para. 57.

The grant of an injunction in *Amexon* can be described both as an order for specific performance of the lease and as relief from forfeiture of tenancy rights. Both the application judge and the CA granted the injunction as a matter of course because a leasehold interest was involved. Not only do the SCC decisions cited above show the error in that view, but *Rahawanji* directs that an injunction ought to be granted only in an exceptional case where the applicant has clearly demonstrated that forfeiture would be inequitable and unjust in all the circumstances. *Rahawanji* states, in fact, that that test is *particularly* appropriate where a commercial lease is involved. As outlined below, there can be little doubt that a forfeiture of the Tenant's leasehold rights in *Amexon* would have been neither inequitable nor unjust; nor would it be in the large majority of such cases.

ARE DAMAGES AN ADEQUATE REMEDY?

While a relatively rare occurrence, the owner of a building which contains leased units may wish to redevelop the property prior to the expiry of all of the leases. The normal process in those circumstances is the negotiation of termination agreements with the tenants. The consideration provided to the tenant may vary, including payment of a lump sum of money in addition to reimbursement for expenses and losses, and/or the arrangement of substitute leased premises. One or more of the tenants may, however, seek to take advantage of the situation by demanding compensation far greater than any true loss they would sustain through early surrender of possession. This is what I characterize as a demand for a windfall benefit, one which bears no relationship to the actual loss that would be suffered. Where the owner/landlord refuses to make such a payment, would damages be an adequate remedy for the tenant, or ought an injunction be

issued that would enable the tenant to remain in the leased premises until the completion of the lease term?

The general principle to be applied in assessing damages for breach of contract is that the plaintiff is entitled to be restored to the position it would have been in had the contract been performed.[23] An important qualification to that principle is that a plaintiff is entitled to be restored to the financial, not the physical, position it would have been in had the contract been performed, so long as that does not create an unreasonable result.[24]

A corollary "fundamental principle…[is] that an injured person should be compensated for the full amount of his loss, but no more…[H]e is not entitled to turn an injury into a windfall."[25] Stated differently: "[A plaintiff] cannot be allowed to create a loss, which does not exist, in order to punish the defendants for their breach of contract. The basic rule of damages, to which exemplary damages are the only exception, is that they are compensatory not punitive."[26]

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[23] *Hamilton v Open Window Bakery Ltd.* 2004 SCC 9 at para. 17. "[I]t is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed…That is a ruling principle. It is a just principle": *Agricultural Research Institute of Ontario v Campbell-High* (2002) 58 O.R. (3d) 321, C.A. at para. 26, quoting from *Wertheim v Chicoutimi Pulp Co.* [1911] A.C. 301.

[24] *Ruxley Electronics*, at p. 366. The following statement emphasizing the importance of reasonableness was made at p. 371 (emphasis added): "But the principle that a plaintiff cannot always insist on being placed in the same physical position as if the contract had been performed, *where to do so would be unreasonable*, is not confined to building cases."

[25] *Ratych v Bloomer* [1990] 1 S.C.R. 940 at paras. 21-22 and 71. Similarly, "Damages are intended to put a plaintiff in the position he would have been in had his right not been violated. They are not intended to give a plaintiff a windfall": *Stacey Heating and Plumbing Supplies Ltd. v Tamasi* (1991) 6 O.R. (3d) 341, C.A. at para. 7, and "Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party": *Ruxley Electronics,* at p. 357.

[26] *Ruxley Electronics*, at p. 373.

Contrary to the last statement, there *is* a further exception to the principle that damages are compensatory, and that occurs where a claim based on unjust enrichment, made in a non-fiduciary context, includes a claim for disgorgement of profits. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor.[27] It is, however, "an exceptional remedy that should not be invoked unless all other remedies are inadequate. The remedial unjust enrichment cases…all involve contexts where the ordinary remedies were insufficient to address the injury committed against the plaintiff's interest."[28]

The critical facts in *Amexon* were:

- The Tenant occupied leased premises which comprised 3% of a large commercial building in which it was the sole remaining tenant.
- The leased premises were neither special nor unique and there was no shortage of equivalent replacement premises.
- The Landlord in fact offered to relocate the Tenant into similar (and better) premises in an adjoining building owned by the Landlord as part of a compensation package. After some bargaining, the Tenant refused to move.
- The Tenant's only genuine purpose for remaining in the leased premises was to seek to obtain from the Landlord as much money as possible as the price for the Tenant's relocation.

[27] *Apotex Inc. v Eli Lilly and Company* 2015 ONCA 305 at paras. 47 and following.
[28] *Apotex*, at para. 56.

- While the Landlord's attempt to terminate the lease prior to the expiry of its term was undoubtedly a breach of the contract, it acted for a legitimate business purpose.
- Damages were an adequate remedy for the Tenant. The Tenant did not identify, nor was there any evidence of, any loss or harm for which it could not be compensated by an award of damages.
- In addition to the enormous cost to the Landlord of maintaining a large building for the sake of a single tenant occupying a fraction of it, there was also real and significant abuse to the environment resulting from the wasteful inefficiencies in the use of energy and other resources necessary to do that.

Had the injunction not been granted, the Tenant in *Amexon* would have had a wide choice of alternative leasable premises that would have been at least as suitable as the subject premises (including premises in an adjacent building offered to the Tenant by the Landlord). The Tenant could have made a claim for damages, including out-of-pocket expenses, business interruption, general damages for relocation inconvenience and bother, and any other head of damages, such as a claim for disgorgement of profits because of unjust enrichment, it might have wished to include. Businesses, including law firms, routinely move from one premises to another. There was nothing in the evidence that showed that a move would have caused any real, much less undue, loss or hardship to the Tenant for which compensation through damages would not have been an adequate remedy.

Just as disgorgement is "an exceptional remedy that should not be invoked unless all other remedies are inadequate",[29] so too is an injunction. In the circumstances of *Amexon*, the Tenant would have sustained no loss that could not have been monetized and recovered in the form of damages. That would have restored the Tenant to the financial position it would have been in had the lease not been terminated early. The result would not have been unreasonable. To the contrary, there would have been, as discussed below, economic efficiency.

It is my view that the injunction in *Amexon* created a result that was neither reasonable nor sensible. Employing the language in *Kerr,* an injunction was not a principled and realistic remedy, nor was it just in all the circumstances of the case. Damages were an adequate remedy, while an injunction was a wholly disproportionate and unfair remedy.

EQUITABLE EXTORTION

The evidence in *Amexon* indicated that the Tenant had no business need to remain in the leased premises. It was argued by the Landlord that the true reason for the Tenant's position that it wished to remain in those premises was to employ that as a lever to obtain a windfall gain at the Landlord's expense. The Landlord submitted that that amounted in equity to extortionate pricing or conduct, as characterized in the passages below which were reproduced with approval in the *Santarsieri* decision:[30]

> I hold it, therefore, to be the duty of the Court in such a case as the present not, by granting a mandatory injunction, to deliver over the Defendants to the Plaintiff bound hand and foot, in order to be made subject to any *extortionate*

[29] *Apotex*, at para. 56.
[30] *Michael Santarsieri Inc. v Unicity Mall Ltd.* (1999) 181 D.L.R. (4th) 136, Man. C.A.

> *demand* that he may by possibility make, but to substitute for such mandatory injunction an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained.[31]
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> …
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> I do not think I ought to make a decree which would enable an *extortionate price* to be obtained for the injury sustained by the Plaintiff.[32]
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> …
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> [T]he Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of *extorting money*.[33]
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> …
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> The effect of granting such an order [an injunction] would, of course, be to put the plaintiffs in a very strong bargaining position, for unless the defendants were prepared to leave the building unused, they would be forced to buy a release of the injunction.[34]

It was argued by the Landlord that the refusal by an owner/landlord to make a windfall payment would result in delay, if not outright loss, of the opportunity to redevelop, and that that has led the case law, as shown by the passages reproduced above, to characterize this, in equity, as a form of extortionate pricing or conduct.[35] The court should not lend its aid to inequitable conduct of that nature.

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[31] At para. 21, quoting from *Isenberg v East India House Estate Co., Ltd.* (1863) 3 De G.J. & S. 263, 46 E.R. 637 (emphasis added).
[32] At para. 22, quoting from *Senior v Pawson* (1866) L.R. 3 Eq. 330 (emphasis added).
[33] At para. 23, quoting from *Colls v Home and Colonial Stores Ltd.* [1904] A.C. 179 (emphasis added).
[34] At para. 24, quoting from *Baxter v Four Oaks Properties Ltd.* [1965] 1 Ch. 816.
[35] The following comment (obviously referring to equitable, not criminal misconduct) was made in a different context: "This is the introduction, sanctioned by [the court], of that kind of business practice which in less honorable circles is called extortion": attributed to Mathias Dopfner, CEO of Axel Springer, regarding allegations made against Google in a non-landlord/tenant setting, quoted in Bloomberg Businessweek, August 10-23, 2015 edition at p. 55.

ABUSE OF PROCESS

The following comments have been made regarding the doctrine of abuse of a court's process:[36]

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice"…and as "oppressive treatment"…[37]
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> …
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> The doctrine of abuse of process is used in a variety of legal contexts…[38]
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> …
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> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would…bring the administration of justice into disrepute"…[39]
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> …
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> In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays…or whether it prevents a civil party from using the courts for an improper purpose…the focus is less on the interest of parties and more on the integrity of judicial decision-making as a branch of the administration of justice.[40]

Applying the language cited above, a tenant's use of an injunction as a lever to pry a windfall gain from the Landlord, and to circumvent the need to prove entitlement to all or

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[36] In *Toronto (City) v C.U.P.E., Local 79* 2003 SCC 63.
[37] At para. 35.
[38] At para. 36.
[39] At para. 37.
[40] At para. 43.

some of the profit from redevelopment of the property, constitutes an attempt to "use the court for an improper purpose" and is a "misuse of [the court's] procedure, in a way that would…bring the administration of justice into disrepute".

It is not the purpose of an injunction to provide a tool to be employed for purposes that are inequitable, or to enable a plaintiff to circumvent the requirement to prove entitlement to a remedy such as disgorgement of profits. To seek an injunction for either of those purposes amounts to an abuse of the court's process.

It was the Tenant's position in *Amexon* that it had no obligation to identify any purpose for its request for an injunction, for the simple reason that it had a right to remain in the premises, and an injunction was merely the mechanism for enforcing that right. The Landlord argued that the evidence showed that there *was* a purpose for the requested injunction, and that was to "hold up" the Landlord for more money in exchange for vacating the premises. Whether that was so or not, the mere fact that the Tenant had a contractual right to remain in the premises was no more a sufficient ground for the grant of an injunction than the fact that the purchaser in *Semelhago* had a contractual right to receive title to the purchased property was a sufficient ground for a grant of specific performance.

NEGOTIATING ADVANTAGE

If I am wrong, on the basis of the case law referenced above, to characterize conduct such as that of the Tenant in *Amexon* as extortionate in equity's eyes, and if it is wrong as well to classify it as an abuse of the court's process, the appellate decisions in *Denovan* and

Allard are nevertheless in direct conflict with *Amexon*, as reflected in the following statements:

> …I am of the opinion that damages, including the availability of possible punitive damages, provides an adequate remedy for any loss or inconvenience experienced by the [tenant] as a result of the landlord's alleged wrongful acts. I do not consider the negotiating advantage afforded to the [tenant] by the presence of the injunction is a justification for its continuation.[41]
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> …
>
> The court can withhold [an injunction] in the interests of fairness…So for example an injunction will not be given which would give the plaintiff no substantive useful benefit, except a negotiating advantage because of the harm done by the injunction to the person enjoined.[42]

One of the ordinary objectives, and one of the reasonable expectations, of a purchaser of real property is to reap the reward of any increase in the value of the property. That would not, however, be a normal or usual objective or expectation of a lessee, particularly a lessee of a small part of a large commercial building. A purchaser who is wrongfully denied title by the vendor would have a strong claim for the loss of any increase in value of the purchased property (although the relevant time period might be a matter of dispute). On the other hand a lessee, absent special circumstances, would have a weak claim for loss of a share of profit resulting from a redevelopment of the property. There was no evidence in *Amexon* that the parties to the lease had any agreement, understanding, or expectation, at the time the lease was entered into, that the Tenant would share with the Landlord in the profit from any future redevelopment of the property, nor would it be reasonable, in my view, to assume that there was any such

[41] *Denovan*, at para. 12.
[42] *Allard,* at paras. 29-30.

expectation. It is also my view that a claim for disgorgement of profits because of unjust enrichment, which is available only in exceptional cases,[43] would not succeed in circumstances such as these.

The important point, however, is not whether the Tenant in *Amexon* was entitled to receive or share in the profit from redevelopment, but rather that the question whether the Tenant had that entitlement was a matter to be determined through a claim for damages. Regardless of the strength or weakness of the Tenant's claim for profits, this was an issue to be raised and determined in the context of a claim for damages. The Tenant had no need for an injunction to advance that claim, nor should it have been permitted to metaphorically put a gun to the Landlord's head by way of an injunction.

WAS ASSESSMENT OF DAMAGES A MATTER OF CONCERN?

The lease in *Amexon* was assignable and the premises could have been sublet.[44] It would have been open to the Tenant to prove that there was a monetary value to the remaining term of the lease by showing that it was paying below-market rent, or that it would have sustained a loss because of a requirement to pay higher rent for equivalent premises. Had the remaining term of the lease, in other words, had some monetary value to the Tenant, or would continued occupation have avoided a monetary loss, then that economic gain/loss could have been included in a claim for damages, as could a claim for disgorgement of profits from redevelopment. The Tenant could even have included a claim for some alleged intrinsic value adhering to the remaining term of the lease,

[43] *Apotex*, at paras. 47, 49 and 56.
[44] Section 10.01 of the lease was a standard type of provision that permitted assignment or sublease with the prior written consent of the Landlord, such consent not to be unreasonably withheld or delayed.

although it is difficult to envisage what intrinsic value there could have been where the leased premises were not unique or special and there was no shortage of available equivalent premises.

The assessment of damages in those claims would hardly have been unusual or difficult:

> It is settled law that damages attributable to loss of goodwill, loss of sales and revenues, inconvenience, loss of quiet enjoyment, and lost rights under a lease, are quantifiable and compensable.[45]
>
> …
>
> The plaintiff further submits that the quantification of damages for its anticipated loss of sales, diminished marketability, interference with its ongoing business, and loss of opportunity occasioned by the elimination of its access to the interior corridor, would be virtually impossible to calculate because of the numerous variables that could affect this claim. However, these types of claims are regularly addressed by this court.[46]

BREACH OF CONTRACT ON THE BASIS OF ECONOMIC EFFICIENCY

If the early termination of the lease in *Amexon*, wrongful though it was (in the sense that it was a breach of contract), caused no loss or harm for which the Tenant could not have been compensated through an award of damages, then the situation would fall into the category of breaches of contract that are permissible on the basis of economic efficiency. In accordance with the definition of that concept in the *Bank of America* decision,[47] the Tenant would have been fully compensated and the Landlord would have been better off than if it had performed the contract. The court in *Bank of America* said:[48]

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[45] *472448 B.C. Ltd.,* at para. 22.
[46] *472448 B.C. Ltd.,* at para. 25.
[47] *Bank of America v Mutual Trust Co.* 2002 SCC 43 at para. 31.
[48] At para. 31.

> Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of a contract equal to the value of the bargain to the plaintiff.

In the SCC decision in *Bhasin*, the court said:[49]

> In commerce, a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of self-interest: *Bram Enterprises Ltd. v A.I. Enterprises Ltd.* 2014 SCC 12 at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v Mutual Trust Co.* 2002 SCC 43 at para. 31.

Amexon is a classic example of a breach of contract that should be permissible (and, despite the right to recover damages, not characterized as wrongful conduct) on the basis of economic efficiency. The Tenant would have recovered money damages for whatever loss or harm it could show that it would have sustained from having to relocate, and for whatever value (if any) the bargain associated with its remaining leasehold interest might have had for it. In fact, the Landlord had offered such compensation and (probably) more. The Landlord, for its part, would have been able to proceed with its redevelopment plan. This would have furthered the economic interests not just of the Landlord but of the general public. It would have encouraged, rather than hindered, the advancement of commerce.

Instead, the result in *Amexon* was disproportionately one-sided and wasteful. It was contrary to, and impaired, sound and efficient economic activity. This is an example of a

[49] *Bhasin,* at para. 70.

case where the emerging principle of economic efficiency ought to have been applied. An injunction ought not to be available where not only does the applicant sustain no loss or harm for which it cannot be compensated by way of damages, but the conduct of the respondent is actually to be encouraged because the societal economic consequences are beneficial.

REWARDING AN INTENTIONAL BREACH OF CONTRACT?

The argument can certainly be made that to deny an injunction in circumstances such as those in *Amexon* would be to condone, and perhaps even promote, intentional breaches of contract (although account must be taken of the fact that the "wrongdoer" remains subject to the remedy of damages, potentially including the disgorgement of profits from redevelopment of the property). That argument, however, applies equally in the case of a vendor who unilaterally refuses to transfer title to a purchaser, and the SCC in *Semelhago* demonstrated no qualms about disregarding that concern. That decision makes it clear that the focus of the court's attention should be directed at the test for granting an equitable remedy, not on whether the breach was intentional. The spotlight in circumstances such as those that existed in *Amexon* should be on the following matters:

a. whether damages would be an adequate remedy;
b. the true purpose for which the equitable remedy is being sought;
c. the principle of proportionality;
d. whether the breach of contract was permissible on the basis of economic efficiency; and (perhaps most importantly)

e. whether granting the equitable remedy would lead to a reasonable and sensible result.

The following comment in another high court decision supports that view:[50]

> It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust. From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship.

Not only was a claim for damages the reasonable, proportionate, and suitable remedy in *Amexon*, but the breach of contract was, as will be suggested hereafter, indirectly permissible because of the stipulated remedy clause in the lease.

B. STIPULATED REMEDY CLAUSES

INTERPRETING CONTRACTUAL LIMITATION CLAUSES

A limitation clause should be strictly construed against the party seeking to invoke it.[51] Clear and unambiguous language cannot, however, be circumvented through resort to the principle of strict construction. The primary rule of construction is that the language of a contractual provision should be interpreted in accordance with the ordinary and plain meaning of the words employed. That longstanding principle is reflected in the following passages in the *Sattva* decision:[52]

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[50] *Co-operative Insurance Society,* at pp. 15-16.
[51] *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.* [1997] 3 S.C.R. 1210 at para. 114.
[52] *Sattva Capital Corp. v Creston Moly Corp.* 2014 SCC 53 at paras. 47 and 57 (citations omitted).

> [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding"…To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.
>
> …
>
> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

The language of the stipulated remedy clause in *Amexon*, while not elegant, was clear and unambiguous. In the event of a breach by the Landlord of a term, covenant or condition contained in the lease, the clause manifestly limited the Tenant's remedies to a claim for damages.

BARRING OR LIMITING A CLAIM MADE UNDER A CONCURRENT TORT

The fact that a contract contains an express clause that deals with the matter in issue is not sufficient, *per se*, to bar a claim under a concurrent tort duty of care where the latter provides some benefit or advantage (such as a lengthier limitation period, or a more

beneficial assessment of damages) not available were the claim made in contract.[53] A concurrent claim in tort *can*, however, be barred or limited, indirectly as well as directly, by an effectively-worded exemption or limitation clause in the contract.[54] The general rule is summarized as follows:[55]

> The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

When considering the question whether a contract precludes the plaintiff from suing in tort, the basic principle to be applied is: "[I]n assessing the rights and obligations of the parties, [the court] must commence with the contract. It must look to what the parties themselves had to say about those rights and obligations."[56]

Section 13.07 of the lease in *Amexon* did not make express reference to trespass. This was held sufficient for a finding that the clause did not apply to a concurrent claim in the tort of trespass. That reasoning failed, however, to take into account the following principle regarding indirect contractual prohibition of a concurrent claim in tort:[57]

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation

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[53] *BG Checo International Ltd. v British Columbia Hydro & Power Authority* [1993] 1 S.C.R. 12 at paras. 13-15 and 42.
[54] *BG Checo*, at paras. 15-16, 21 and 42.
[55] *BG Checo*, at para. 16.
[56] *BG Checo*, at para. 7.
[57] *Central Trust Company v Rafuse* [1986] 2 S.C.R. 147 at para. 59(3).

> of liability for the act or omission that would constitute the tort.

That conclusion was based on the following earlier statements made in *Central Trust*:

> Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of the contract.[58]
>
> …
>
> [Pigeon J.] also said that the representations relied on as the basis of tortious liability were not acts independent of the contractual relationship between the parties because they would not have been made had the parties not been in a contractual relationship.[59]
>
> …
>
> What the [*Scruttons*] case decided in essence was that the contractual exclusion of liability for bad stowage in the bill of lading could not be circumvented by reliance on a liability in tort where the act or omission complained of was one connected with the performance of the contract.[60]

The principle was subsequently adopted in two later SCC decisions. The first was *BG Checo*, where the following was said:

> We conclude that the actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise. This excludes, of course, cases where the contractual limitation is invalid, as by fraud, mistake or unconscionability. Similarly, a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract…[61]

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[58] *Central Trust* at para. 16.
[59] *Central Trust* at para. 16.
[60] *Central Trust* at para. 17.
[61] *BG Checo*, at para. 21.

…

> Le Dain J. [in *Central Trust*] recognized that liability in tort can be limited or excluded by the terms of a contract. A plaintiff will not be permitted to plead in tort in order to circumvent a contractual clause which excludes or limits the defendant's liability.[62]

The second was *Bow Valley Husky,* where the plaintiff was not permitted to avoid the effect of contractual exemption clauses by making a claim for breach of a duty to warn, when that duty did not arise independently of the contract. As stated by McLachlin J. (as she then was, and dissenting on other grounds):[63]

> The parties' planned obligations must be given appropriate pre-eminence. Where those planned obligations negate tort liability, contract "trumps" tort…It follows that a tort claim cannot be used to escape an otherwise applicable contractual exclusion or limitation clause.

In *Amexon*, the conduct of the Landlord that constituted the tort of trespass was one and the same as the conduct which constituted the breach of the contractual covenant for quiet enjoyment. The conduct of the Landlord which constituted the tort of trespass:

> was not "'an independent tort' unconnected with the performance of the contract",[64] or a "tort [that was] independent of the contract in the sense of falling outside the scope of the contract",[65] but rather "was one connected with the performance of the contract";[66] and
>
> did not involve "acts independent of the contractual relationship between the parties because they would not have been made had the parties not been in a contractual relationship".[67]

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[62] *BG Checo*, at para. 101 (Iacobucci J. dissenting on other grounds). See also paras. 124-26 and 130.
[63] *Bow Valley*, at para. 27 (citations omitted).
[64] *Central Trust* at para. 16.
[65] *BG Checo*, at para. 21.
[66] *Central Trust* at para. 17.
[67] *Central Trust* at para. 16.

The Landlord's duty not to commit a trespass did not "arise independently of the contract".[68] To the contrary, the acts of the Landlord which the Tenant sought to enjoin were directly and intimately connected to the lease agreement. The application for an injunction to restrain trespass in *Amexon* was merely a dressed-up or disguised attempt to restrain the Landlord from breaching its contractual obligation to provide quiet enjoyment, a breach which the parties had agreed would be subject to a claim for damages only.

The courts in *Amexon* considered only the first question: whether there was an actionable concurrent tort. They failed to proceed to a consideration of the second issue: whether the stipulated remedy clause in the contract limited the remedies not just for a claim in contract, but also for a claim under the concurrent tort of trespass. While there undoubtedly *was* a concurrent claim in trespass, that was not sufficient *per se* to permit the Tenant to circumvent or escape the impact of the stipulated remedy clause.[69] The claim in trespass "constituted an attempt to avoid [an] express contractual [limitation], something that cannot be done".[70] The grant of an injunction was an unjustified and unprincipled interference with the fundamental policy goal of the enforcement, absent fraud, mistake or unconscionability, of the bargain made by the parties.[71]

Another way of looking at it is that the application judge and the CA in *Amexon* engaged in a form of improper analysis through labelling. The analogous principle that an

[68] *Bow Valley*, at para. 31.
[69] *Central Trust,* at para. 59(3).
[70] *Bow Valley*, at para. 31.
[71] *BG Checo*, at para. 21.

insurer's duty to defend is determined not by the labels used in the statement of claim, but rather by the true nature and substance of the alleged acts,[72] applied with equal force. Regardless of how the Landlord's conduct was labelled, that conduct fell squarely within the scope of the stipulated remedy clause, with the result that the Tenant's remedies were limited to a claim for damages.

THE ABSENCE OF A DEMOLITION CLAUSE

The CA in *Amexon* adopted the view of the application judge that the lease agreement did not contain a demolition clause, and that the failure by the Landlord to have negotiated the inclusion of such a clause was telling.[73] That argument, however, does not apply where the contractual provision is clear on its face.[74] Intention implied from the absence of contractual language cannot override intention demonstrated by clear and unambiguous contractual language. This was another unmerited justification for the refusal to apply the plain meaning of the stipulated remedy clause.

THE ENFORCEABILITY OF THE STIPULATED REMEDY CLAUSE – THE TERCON TEST

One of the reasons given by the application judge in *Amexon* for the refusal to apply the stipulated remedy clause was: "[T]he parties cannot oust the jurisdiction of a court of equity." To the extent that that remark was intended to mean that a court is entitled to disregard or nullify the agreement made by the parties because of general concerns about equitable considerations, there is ample authority for the incorrectness of that view,

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[72] *Non-Marine Underwriters, Lloyd's London v Scalera* 2000 SCC 24, at paras. 50-51 and 79-89, *Progressive Homes v Lombard* 2010 SCC 33 at para. 20, and *Monenco Ltd. v Commonwealth Insurance Co.* 2001 SCC 49, at paras. 34-36.
[73] At para. 17 of the C.A. reasons for decision.
[74] *Unifund Assurance Company v D.E.* 2015 ONCA 423 at para. 27.

including the appellate decisions in *Peachtree II*,[75] *Birch*,[76] and *Aqua*,[77] and culminating in the SCC *Tercon* decision.[78]

The recent judicial history regarding the enforcement of forfeiture clauses begins with the *H.F. Clarke* decision.[79] Laskin C.J.[80] said that the courts have an inherent jurisdiction to refuse to enforce a penalty clause (which, in the context of his remarks, appeared to include all clauses which had a penalty aspect to them, including forfeiture clauses) on the basis of fairness and reasonableness.[81] That decision has been described as "a bad detour",[82] one that was implicitly rejected in the later SCC decision in *Elsley Estate,*[83] which emphasized the importance of holding parties to their contractual bargain,[84] a consideration that has only increased in weight in more recent case law.

In *Peachtree II*, Sharpe J.A. referred to *Elsley* and adopted the statement that the common law rule refusing to enforce penalty clauses was "an inroad upon freedom of contract".[85] He also referred to

> the policy of upholding freedom of contract. Judicial enthusiasm for the refusal to enforce penalty clauses has

[75] *Peachtree II Associates – Dallas LP v 857486 Ontario Ltd.* (2005) 76 O.R. (3d) 362, C.A.
[76] *Birch v Union of Taxation Employees, Local 70030* 2008 ONCA 809.
[77] *Aqwa v Centennial Home Renovations Ltd.*, (2003) 24 C.C.E.L. (3d) 16, Ont. C.A.
[78] *Tercon Contractors Ltd. v British Columbia (Minister of Transportation & Highways)* [2010] 1 S.C.R. 69.
[79] *H.F. Clarke Ltd. v Thermidaire Corp.* [1976] 1 S.C.R. 319.
[80] Speaking for the majority in a 3-2 decision.
[81] *H.F. Clarke*, at paras. 15-17.
[82] *Canadian Contract Law*, 2nd ed., Angela Swan, at s. 9.229.
[83] *Canadian Contract Law* at s. 9.232, referring to *J.G. Collins Insurance Agencies Ltd. v Elsley* [1978] 2 S.C.R. 916. It may be noted that *Elsley* was a 7-0 decision and that Laskin C.J. was a member of the court.
[84] Dickson J. said (at para. 47): "It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression."
[85] *Peachtree II*, at paras. 32-33.

> waned in the face of a rising recognition of the advantages of allowing parties to define for themselves the consequences of breach.[86]

The leading decision is now *Tercon*, where the following was said:[87]

> [T]he principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff…can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties.
>
> …
>
> [F]reedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised.

Tercon then established a three-part test for the determination of whether to refuse to enforce a contractual term:[88]

> The present state of the law, in summary, requires a series of inquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

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[86] *Peachtree II* at para. 34.
[87] *Tercon*, at paras. 82 and 117 respectively, Binnie J. dissenting on other grounds.
[88] *Tercon*, at paras. 121-23 (original emphasis).

> If the exclusion is held to be valid and applicable, the Court may undertake a third inquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

Just as "There is nothing inherently unreasonable about exclusion clauses",[89] there is nothing inherently unreasonable about an agreement that the obligations undertaken by one of the parties to the contract will not be subject to all of the usual remedies or means of enforcement, so long as the result is not unconscionable in that some real remedy, such as a claim for damages, remains available.[90] While the *Tercon* test of unconscionability focuses on the formation, rather than breach, of contract stage, the basic requirement for proof of an "overriding public policy…that outweighs the very strong public interest in the enforcement of contracts" should be equally employed at either stage.

The stipulated remedy clause in *Amexon* did not require the Tenant to do anything. It did not, in other words, create an affirmative obligation, as for example would a penalty clause which requires the making of a payment. It was a negative provision which restricted the Tenant's remedies to a claim for damages and resulted in a forfeiture of all other remedies, including an injunction. The modern approach is that a forfeiture clause

[89] *Tercon*, at para. 82.
[90] There is no difference in principle between a stipulated remedy clause and a clause which excludes either certain types of damages (such as consequential damages) or all damages for certain types of conduct (such as negligent conduct). Each of the latter is enforceable if sufficiently clear and if not unconscionable in the circumstances of the case.

will be enforced unless it is shown that it leads to an unconscionable result,[91] as illustrated in the following more general statement:[92]

> We accept that it will be appropriate for a court to decline to enforce a contract or a provision in a contract where it would be unconscionable to enforce that term or that contract.

The test for unconscionability was considered in *Birch*,[93] where these concluding remarks were made:[94]

> However one articulates the test for unconscionability, I am satisfied that it involves more than a finding of inequality of bargaining power between the parties to a contract. Both the test adopted by the application judge in *Eckstein* and the test in *Harry* of the British Columbia Court of Appeal recognize that a determination of unconscionability involves a two-part analysis - a finding of inequality of bargaining power and a finding that the terms of an agreement have a high degree of unfairness. I see little, if any, difference between a description of terms of a contract as "very unfair" or "substantially unfair". I am also of the view that "abuse of the bargaining power" identified by Robins J.A. in *Fraser Jewellers* is another way of describing substantial unfairness.

There was no evidence in *Amexon* of any inequality in bargaining power between the Landlord and the Tenant; the application judge described both as "sophisticated parties".[95] There was no evidence of any abuse by the Landlord of its bargaining power at the time the contract was entered into, or that the stipulated remedy clause had a high degree of unfairness. The Tenant was offered alternative (and better) premises in an adjoining building, reimbursement of expenses associated with the move, and other

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[91] *Peachtree II*, at paras. 23, 26, 27 and 32; *Birch*, at paras. 38-39
[92] *Aqwa*, at para. 3.
[93] *Birch*, at paras. 41-45.
[94] *Birch*, at para. 45.
[95] At para. 3 in the costs endorsement.

inducements. The Tenant provided no evidence of any unique or peculiar advantage adhering to the leased premises, nor of any loss for which compensation could not adequately have been made through monetary damages. The Landlord had a legitimate commercial reason – redevelopment of the property – for acting as it did. In my view, there was no unconscionability in those circumstances, either at the formation or breach of contract stage.

The application judge in *Amexon* did not even consider the issue of unconscionability, and contrary to the view expressed in the CA decision, the Landlord did not act arbitrarily, which was said to mean acting "without lawful authority or purpose".[96] Conduct that is without lawful authority or purpose is not necessarily arbitrary in nature. A person who robs a bank is acting "without lawful authority or purpose", but is not acting "arbitrarily". Arbitrary conduct must instead mean conduct that has no purpose or objective, but rather is based on caprice or whimsy, or is frivolous in nature.

The Landlord in *Amexon* had a specific and legitimate commercial purpose for reentering the leased premises. The redevelopment of the property was a "lawful purpose", and s. 13.07 in the lease indirectly provided "lawful authority", so that even under the CA's definition the Landlord did not act arbitrarily.

Most importantly, the result of a refusal to issue an injunction would not have been unconscionable. There was therefore no basis for granting an injunction instead of

[96] At para. 15 of CA reasons for decision.

holding the Tenant to its bargain by limiting its remedies to a claim for damages. The following comments were applicable in *Amexon*:[97]

> The most that can be said is that the [Tenant] was presented with a standard form agreement which he could accept or reject as he saw fit. There was no evidence of pressure or duress or the other usual indicia of unconscionability.
>
> …
>
> In summary, we see no justification for rewriting the agreement entered into by the parties.

The final part of the *Tercon* test required the Tenant to identify the existence of an overriding public policy that outweighed the very strong public interest in the enforcement of contracts. The application judge in *Amexon* made brief reference to two matters. He said:

a. "The Landlord is walking away from its fundamental promise…I do not read s. 13.07 as applying when the Landlord commits not just a breach of covenant, but a complete repudiation of its grant and consideration"; and

b. "This is not a balanced win-win but an effort by the Landlord to make more money by denying or rescinding its bargain. Allowing landlords to evict tenants because something better has come along is fraught with a risk of abuse."

The first position taken by the application judge was merely a restatement of the fundamental breach of contract doctrine which was jettisoned in *Tercon*. The whole point of that decision is that a contract provision which satisfies the tripartite test must be enforced regardless of whether it is associated with what previously was described in the case law as a fundamental breach of contract.

[97] *Aqwa*, at paras. 4 and 5 respectively.

If the application judge was relying on this first position as an "overriding public policy that outweighs the very strong public interest in the enforcement of contracts", then he was using circular and incorrect reasoning. The "overriding public policy" necessary to justify the refusal to enforce a contract provision must be something other than the fact that there has been a "fundamental breach" of the contract.

The second position taken by the application judge was, although couched in different language, similarly based on the discarded doctrine of fundamental breach of contract. In addition, it was based on the false premise that the Landlord was "denying or rescinding its bargain". The application judge failed to appreciate that the stipulated remedy clause was designed in anticipation of, and to govern, precisely the sort of situation where "something better has come along" for the Landlord. The Tenant must, or at least should, have known that. It is difficult to imagine any other objective purpose for the inclusion of the clause in the contract. The parties expressly agreed to a limitation of the Tenant's remedies should the eventuality of a breach of contract by the Landlord materialize. That was the bargain made by the parties. Contrary to the view expressed by the application judge, the Landlord was not "denying or rescinding its bargain", but rather was enforcing that bargain.

Stated differently, the Landlord's contractual obligations were qualified by the agreed limitation of remedies, but the Tenant's obligation to limit its remedies was unqualified. The Landlord kept its bargain; the Tenant did not.

The application judge furthermore erred in saying that the Landlord's conduct did not result in a "balanced win-win" situation. The Tenant would have been placed in equivalent (in fact better) premises in an adjoining building, or elsewhere, and would have been made whole by an award of damages for any loss or harm sustained. The Tenant did not identify any genuine detriment or harm that would have resulted from its relocation for which it would not have been fully compensated.

The application judge's comment that "Allowing landlords to evict tenants because something better has come along is fraught with a risk of abuse" was another error. That statement involved a hypothetical possibility. There undoubtedly *is* a risk of abuse in a situation where a landlord evicts a tenant prior to the expiry of the term of the lease, but the fact is that there was no abuse in *Amexon*. A risk of abuse is not the same as actual abuse. Operating an automobile is fraught with the risk of negligent driving, but that is not a reason to prevent all driving. The theoretical possibility of abuse is not a basis for refusing to apply well-established principles.

The CA's view that "A commercially unreasonable interpretation of s. 13.07 would result if the Landlord could act without lawful authority to bring the Lease to an end and reoccupy the premises, and then rely on the disclaimed Lease to prevent the Tenant from restraining the Landlord's unlawful conduct",[98] involved flawed reasoning framed in hyperbole.[99]

[98] At para. 16 of CA reasons for decision.
[99] The Landlord's breach of contract was almost made to appear as criminal conduct.

To begin with, it is clear that s. 13.07 was intended to survive a breach of the lease by the Landlord. That was its whole purpose. It was therefore inappropriate to say that the Landlord was relying on a "disclaimed lease". Similarly, the clause was plainly intended to preclude the Tenant from having access to any remedy other than damages in the event of a breach by the Landlord, so that it was incorrect to say that the Tenant ought not to have been "prevented from restraining the Landlord's [breach of contract]".

Second, why is an interpretation which gives effect to the plain meaning of a contract provision that clearly was intended to govern in the type of situation that transpired, a commercially unreasonable interpretation? To the contrary, it was a commercially unreasonable interpretation not to enforce the bargain made between the parties where the result was not unconscionable. It cannot be said that reading a clause out of a contract is a commercially reasonable interpretation or result.[100]

THE WATCHCRAFT DECISION

The application judge in *Amexon* said that the matter fell "squarely" within the decision in *Watchcraft.*[101] The facts and circumstances of the two cases, however, were significantly different. The lease in *Watchcraft* did not contain a stipulated remedy clause; the tenant in *Watchcraft* "insist[ed] that it wish[ed] to remain in business at its present location"[102] and, unlike the Tenant in *Amexon*, presumably had a persuasive business reason for taking that position; the injunction that was issued in *Watchcraft* was

[100] The principle that a contract provision ought not to be interpreted in a manner that would render it meaningless has been described as a "fundamental rule": *Reliance Petroleum Ltd. v Stevenson* [1956] S.C.R. 936 at para. 46.
[101] *Watchcraft Shop Ltd. v L & A Development (Canada) Ltd.* [1996] O.J. No. 5479, Div. Ct.
[102] *Watchcraft*, at para. 7.

an interlocutory injunction, a factual finding having been made that the balance of convenience favoured injunctive relief, and with the Tenant having given the usual undertaking regarding damages.[103]

Perhaps most importantly, it is unclear whether the leased premises in *Watchcraft* were unique.[104] If not, then it is my view that *Watchcraft* cannot be applied in the case of an application for a permanent injunction because it is inconsistent with the decision in *Semelhago* and with the other case law and principles referenced above.

THE BARGAIN MADE BY THE PARTIES WAS NEGATED

The application judge in *Amexon* said the following in his costs endorsement:[105] "I held that, based on precedent, in circumstances like these, the Court will not get involved in affecting the balance of negotiating power between sophisticated parties." By failing to give effect to the unambiguous stipulated remedy clause, the application judge in my view did precisely what he said he ought not to be doing. The grant of a permanent injunction nullified the bargain made by the parties, thereby unilaterally and retroactively tilting the negotiating power firmly in the Tenant's favour.

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[103] *Watchcraft*, at paras. 13-14.
[104] The following statement was made (at para. 14): "[I]t is by no means clear that there is other space in the building that would be a suitable relocation site during the construction."
[105] At para. 3.