Non Est Factum in Canada After *Marvco Color Research Ltd.* v. *Harris*[1]

I. INTRODUCTION

The doctrine of *non est factum* has had a chequered history in Canadian law.[2] The effect of the doctrine, when it applies, has always been clear: the deed, instrument or signed contract is null and void, and neither the other party nor any subsequent purchaser will acquire any title or rights to property transferred pursuant to the transaction. But the conditions governing its application are not at all clear. The doctrine of *non est factum* was recently re-examined by the Supreme Court of Canada in *Marvco Color Research Ltd.* v. *Harris*,[3] and the decision is a significant one in several respects.

From the practical standpoint, the *Marvo* decision cures a long-standing anomaly in the law — no longer will carelessness by the signing party be legally irrelevant to the defence of *non est factum*. Henceforth, if the party signing the document has been careless, he will be barred from obtaining relief from the courts, at least on the grounds of *non est factum*. In order to reach this eminently sensible result, the Supreme Court had to overrule one of its own previous decisions.[4] The *Marvco* case, therefore, is also of some interest from the jurisprudential standpoint. In other respects, however, the decision is disappointing. Instead of taking the opportunity — the first it has had in almost thirty years — to reformulate the whole doctrine and to clarify its requirements and its relationship to other branches of the law of contract, the Supreme Court delivered a judgment that is both narrow in scope and rather superficial in its analysis.

Thus, while *Marvco* has settled the question about the effect of negligence by the signer upon the availability of the plea of *non est factum*, it offers no guidance at all on the allied issue concerning the kind of mistake needed in order to invoke the defence which, in Canada, is unclear. In essence, all the Supreme Court did in *Marvco* was to catch up with developments in English law, but it did so in a manner that was incomplete and, on a broader plane, unsatisfactory.

II. THE FACTS IN THE *MARVCO* CASE

The facts in *Marvco* raised in classic form the familiar conundrum which lies at the core of the defence of *non est factum*, namely, which of two inno-

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[1](1982), 141 D.L.R. (3d) 577 (S.C.C.); rev'g
(1981), 115 D.L.R. (3d) 512 (Ont. C.A.); rev'g
(1980), 107 D.L.R. (3d) 632 (Ont. H.C.).

[2]See generally, G.H.L. Fridman, *Law of Contract*, (Toronto: Carswell, 1976) at 102-110.

[3]*Supra*, footnote 1.

[4]*Prudential Trust Co. Ltd.* v. *Cugnet*, [1956] S.C.R. 914.

cent parties should suffer for the fraud committed by a third.[5] The defendants were tricked into mortgaging their home by what the trial judge described as "a monstrous fraud"[6] perpetrated by Johnstone, who lived with the defendants' daughter, and one Clay, who worked in a lawyer's office.

The defendants had already mortgage their home to the Bank of Montreal to enable Johnstone and their daughter to buy out their partner in a business purchased from the plaintiff. In addition, the father had agreed to become party to a chattel mortgage on the assets of the business in favour of the plaintiff, replacing the partner whose share was being acquired. Mr. and Mrs. Harris were approached separately by Johnstone and Clay and were persuaded to sign a document placed before them, which they were told was needed to correct certain minor details in their mortgage to the Bank of Montreal. In fact, the document in question was a second mortgage on their home, in favour of the plaintiffs, to secure the personal covenant Mr. Harris had given as a party to the chattel mortgage. Neither party had read the document before signing it. The business failed, the plaintiff sued the defendants and the defendant sought to repudiate the mortgage they had signed by pleading *non est factum*.

At trial, Grange J. made clear where his sympathies lay. There was, he said, "no doubt"[7] that the defendants had been careless in not reading the document before signing it. Nor could they be excused because of any educational disability. As Grange J. stated,

> The wife is well educated, the husband less so, but both are literate and English speaking and both have a basic understanding of mortgages, having executed at least three others since the purchase of their home.[8]

The plaintiff, on the other hand, was "perfectly innocent throughout".[9] Nevertheless, the learned Judge felt constrained by binding authority to apply the prevailing law. According to that law, in order to succeed on a plea of *non est factum*, it had to be shown only that the defendant had been inveigled into signing a document different in "character" or "class" from what it was represented to be, and not merely different in "contents". Provided it could be established that the document in question was sufficiently "different" in this legal sense, it did not matter that the defendant had signed without bothering to read it or that his carelessness had facilitated the fraud and the resulting loss to the innocent third party. As a general rule,[10] the carelessness of the signer, however inexcusable, was legally irrelevant.

In the *Marvco* case, it appears to have been conceded that the second mor-

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[5] As Lord Wilberforce put it: "[The law] has two conflicting objectives: relief to the signer whose consent is genuinely lacking; protection to innocent third parties who have acted upon an apparently regular and properly executed document", *Saunders* v. *Anglia Building Soc.*, [1971] A.C. 1005, at 1023 (H.L.); aff'g *sub nom Gallie* v. *Lee*, [1969] 2 Ch. 17; rev.g [1968] 2 All E.R. 322.

[6] (1980), 107 D.L.R. (3d) 632, at 634.

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] Subject only to an exception in the case of negotiable instruments. See *Prudential Trust Co.* v. *Cugnet*, *supra*, footnote 4 and *Carlisle & Cumberland Banking Co.* v. *Bragg*, [1911] 1 K.B. 489 (C.A.). This rule and these cases are discussed *infra*.

tgage to Marvco was different in class or character from the existing first mortgage to the Bank of Montreal. This, no doubt, avoided what might probably have been a fruitless re-examination of the case law, with its mound of artificial and technical distinctions; but it also left Grange J. with no alternative but to uphold the defence of *non est factum* and dismiss the plaintiff's claim on what was, in consequence, a void mortgage.

The authority which required this conclusion was the decision in *Prudential Trust Co. Limited* v. *Cugnet*,[11] where the Supreme Court of Canada with a notable dissent by Cartwright J., adopted as Canadian law the much criticised decision of the English Court of Appeal in *Carlisle & Cumberland Banking Co. Limited* v. *Bragg*.[12] In that case, the Court of Appeal, largely through a misinterpretation of prior authorities, managed to turn the sensible proposition that a party who was careless in executing a document would not be permitted to plead *non est factum* but even the utmost care would be no defence if the document in question happened to be a negotiable instrument, into a new, illogical rule that carelessness would bar the defence of *non est factum* where the document was a negotiable instrument, but not in any other case. *Bragg's* case had attracted considerable criticism, both judicial and academic, but despite its obvious deficiencies and dubious origins,[13] it was the law prevailing in England when the issue of the effect of carelessness upon the plea of *non est factum* came up squarely before the Supreme Court of Canada in *Prudential Trust Co. Limited* v. *Cugnet*.

III. *BRAGG'S* CASE IN CANADA: *PRUDENTIAL TRUST CO.* V. *CUGNET*

In *Prudential Trust Co. Limited* v. *Cugnet*,[14] the defendant was tricked into signing a document which he was told granted an option to lease certain mineral rights over a certain tract of his land but, in fact, was a deed assigning those rights for a very nominal consideration. When a subsequent innocent purchaser of those rights attempted to assert his claims, Cugnet raised the defence of *non est factum* and pleaded that the transaction was void. Cugnet had not troubled to read the document before signing it although he was an experienced businessman dealing with a total stranger, but a majority of the Supreme Court held, citing *Bragg's* case, that such carelessness was not a bar to an otherwise successful plea of *non est factum*.

Nolan J., who delivered judgment on behalf of three of the five man court, scarcely adverted to Cugnet's conduct, and focussed instead on the question of whether there was in this case a difference in "nature", "character" or "class" between the document Cugnet thought he was signing and the document he had actually signed. It would appear that Nolan J. and his brethren never really addressed the issue of carelessness by the signer

[11] *Supra*, footnote 4.

[12] *Supra*, footnote 10.

[13] See, e.g. W. Anson, "Carlisle and Cumberland Banking Co. v. Bragg" (1912), 28 *L.Q.R.* 190; A. Guest, "Documents Negligently Signed" (1963), 79 *L.Q.R.* 346; A. Goodhart, "Non Est Factum" (1971), 87 *L.Q.R.* 145.

[14] *Supra*, footnote 4.

because they were under the impression that it had already been decided by the Supreme Court of Canada. "The principle in *Carlisle & Cumberland Banking Co. Ltd.* v. *Bragg*", Nolan J. said, "was approved by this Court in *Minchau* v. *Busse*".[15] There were, in fact, two limbs to the Court of Appeal's judgment in *Bragg's* case. The first restated and reaffirmed the "class/contents" distinction developed by earlier courts; the second and notorious branch created and expounded the controversial rule that carelessness by the signing party was of no legal relevance. It is clear from even a perusal of *Minchau* v. *Busse*[16] that the only "principle" in *Bragg's* case that was approved was the innocuous reformulation of the "class/contents" distinction. Nothing whatsoever was said about the effect of negligence by the signer. Had it not been for the separate judgment of Locke J. in *Cugnet*, the controversial rule in *Bragg's* case might have slipped into Canadian law at the highest level, completely unnoticed.

Locke J., who delivered a separate concurring judgment, did consider the issue of carelessness and the impact of *Bragg's* case. He concluded that "the result of the authorities was correctly stated in *Bragg's* case".[17] but his analysis was brief, and was based largely on the specious proposition that the absence of a legal duty of care for the purpose of the tort of negligence entailed the absence of a duty to take reasonable care when signing documents for the purposes of estoppel.

Cartwright J. dissented. He pointed out how the supposed rule in *Bragg's* case had arisen from a misinterpretation of earlier authorities, and a confusion between the tort of negligence and the rules of estoppel. The failure to take reasonable care could not give rise to liability in tort in the absence of a pre-existing legal duty, but it could, and should, estop the careless party from pleading *non est factum*.

> An anxious consideration of all the authorities...has brought me to the conclusion that, in so far as *Carlisle* v. *Bragg* decides that the rule that negligence excludes a plea of *non est factum* is limited to the case of negotiable instruments and does not extend to a deed such as the one before us, we should refuse to follow it. I do not read the judgment of Sir Lyman P. Duff C.J.C. in *Minchau* v. *Busse*...as binding us to follow everything that was decided in *Carlisle* v. *Bragg*.[18]

Unfortunately, the view of Cartwright J. did not prevail, and the Supreme Court of Canada missed an opportunity to develop for itself sound rules in this area, preferring instead to follow English law which, in this case, was a very poor guide. For a time, therefore, the defence of *non est factum* was governed by uniform, and uniformly defective, rules. However, some ten years later English law moved on. In *Saunders* v. *Anglia Building Society Limited*[19] the House of Lords unanimously overturned *Bragg's* case, for reasons similar to

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[15] *Ibid.*, at 925.

[16] [1940] 2 D.L.R. 282 (S.C.C.). The only reference by Duff C.J.C. to *Bragg's* case is to that part of the judgment concerning the "class/contents" distinction.

[17] *Supra*, footnote 4, at 929.

[18] *Ibid.*, at 934.

[19] *Supra*, footnote 5.

those advanced by Cartwright J. in *Prudential Trust Co.* v. *Cugnet*[20]. They rewrote the rules governing the defence of *non est factum* and, in particular, made the defence unavailable to persons of full age and capacity who had failed to take reasonable care when signing documents.

Thus, when Grange J. had to decide the *Marvco* case in January, 1980, he was faced with the prospect of applying the rule in *Bragg's* case long after it had been utterly discredited and discarded by its creators. While some courts in other provinces have vacillated[21], and others have ignored *Cugnet* and applied *Saunders* v. *Anglia,*[22] it is submitted that Grange J. was correct in applying the rule in *Bragg's* case even though, as he made clear, he chafed at the result.[23] In face of the Supreme Court decision in *Prudential Trust Co.* v. *Cugnet* he really had no choice. As he said, "[I]t is the majority judgment in *Prudential* that is the law of the land and I find that case and the case at bar indistinguishable."[24]

The Ontario Court of Appeal shared his misgivings but agreed with his analysis. In a brief, unanimous, oral judgment they declared, "Like Grange J. we are bound by the judgment in *Prudential Trust Co.* v. *Cugnet*...We agree with his reasons and share his concern about the principle in issue."[25]

IV. *MARVCO* IN THE SUPREME COURT

The Supreme Court could, and did, correct both the injustice and the law. In allowing the appeal, Estey J., who delivered the single unanimous judgment, traced the development of the rule in *Bragg's* case in England and in Canada, noted the divergence between the majority view in *Cugnet* and the more recent House of Lords decision in *Saunders* v. *Anglia*, and concluded,

> In my view, with all due respect to those who have expressed views to the contrary, the dissenting view of Cartwright, J....in *Prudential*, correctly enunciated the principles of the law of *non est factum*. In the result the defendants-respondent are barred by reason of their carelessness from pleading that their minds did not follow

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[20]"It does not need much force to demolish this battered precedent." *Ibid.*, at 1026 (Lord Wilberforce).

[21]*Commercial Credit Corp. Ltd.* v. *Carroll Bros* (1971), 20 D.L.R. (3d) 504 n. (Man. C.A.); *C.I.B.C.* v. *Shotbolt*, [1981] 5 W.W.R. 738 (Man. Q.B.); *Ghadbon* v. *Bd. of N.S.* (1982), 132 D.L.R. (3d) 475 (Ont. H.C.); *C.B.C.* v. *Jamestown Const. Ltd.*, [1982] 4 W.W.R. 299 (Sask. Q.B.); *McEachern* v. *Bancroft* (1977), 27 N.S.R. (2d) 407 (T.D.); *Zed* v. *Zed* (1980), 28 N.B.R. (2d) 580 (Q.B.T.D.).

[22]*Hall's Estate* v. *Watton* (1973), 4 Nfld & P.E.I.R. 587 (Nfld T.D.); *Dwinell* v. *Custom Motors Ltd.* (1975), 12 N.S.R. (2d) 526 (N.S.C.A.); *Van de Sande* v. *Kirk* (1978), 22 N.S.R. (2d) 339 (T.D.); *Prov. Bk. of Can.* v. *Whiteoak Const. Ltd.* (1975), 15 N.B.R. (2d) 408 (Q.B.); *C.I.B.C.* v. *Kanadian Kiddee Photo Ltd.*, [1979] 3 W.W.R. 256 (B.C.S.C.); *Bk. of Nova Scotia* v. *Battiste* (1979), 22 Nfld & P.E.I.R. 192 (Nfld T.D.); *Merchants Consol. Ltd.* v. *George* (1981), 15 Sask. Rep. 372 (Q.B.); *Royal Bk. of Can.* v. *MacPhee* (1980), 33 N.B.R. (2d) 370 (Q.B.); *Royal Bk. of Can.* v. *Smith* (1980), 27 Nfld & P.E.I.R. 40 (Nfld T.D.); *Bk. of N. Scotia* v. *Ross & Sons Ltd.* (1982), 40 N.B.R. (2d) 563 (Q.B.). All these cases hitherto have involved two party situations, and perhaps because of this, Courts also appear to be interpreting *Saunders* v. *Anglia Building Soc.* rather generously; see *Royal Bk. of Can.* v. *Gannon* (1981), 42 N.S.R. (2d) 526 (T.D.); *Island Glass Ltd.* v. *O'Connor* (1980), 28 Nfld & P.E.I.R. 377 (P.E.I.S.C.).

[23]"I say with great respect that the reasoning and conclusion of Cartwright, J. appeals to me; the signer has it within his power to prevent the fraud while the third party does not." *Supra*, footnote 6, at 636. See also *Horvath* v. *Young* (1980), 15 R.P.R. 266 (Ont. H.C.).

[24]*Ibid.*

[25](1982), 115 D.L.R. (3d) 512 n. (Ont. C.A.).

> their hands when executing the mortgage so as to be able to plead that the mortgage is not binding upon them.[26]

So far as the effect of carelessness by the signer on the plea of *non est factum* is concerned, the law in Canada is now clear. It is nothing less than that proposed by Cartwright J. some twenty-five years earlier in *Prudential Trust Co.* v. *Cugnet*, and essentially the same as the modern rule in England laid down by the House of Lords in *Saunders* v. *Anglia Building Society Limited*. Such differences as exist in the law propounded in the two cases relate to the form of legal analysis and terminology, rather than substance. As noted earlier, Cartwright J. regarded carelessness as creating a form of estoppel preventing the signer from pleading that his mind did not go with his pen.[27] In *Saunders* v. *Anglia*, the House of Lords, after a far more thorough examination of the law, considered the term "estoppel" or "estoppel by negligence" as misleading, and preferred to explain the bar to the defence created by carelessness as an illustration of the principle that no man may take advantage of his own wrong.[28] The Supreme Court of Canada in *Marvco*, either did not notice the difference, or considered it immaterial, for they made no mention of it in their judgment.

In order to determine the meaning of the requirement to exercise due care when signing documents, resort must be had to the elaborate opinions of the House of Lords in *Saunders* v. *Anglia Building Society*. As Viscount Dilhorne stated, "what amounts to reasonable care will depend on the circumstances of the case and the nature of the document which it is thought is being signed."[29] It is clear that an experienced businessman, who chooses to sign a document unread rather than absent himself for a few more minutes from a game of cards (which was the case in *Cugnet*[30]), has failed to exercise reasonable care, as did the defendants in *Marvco*. The general rule, although not articulated by the Supreme Court of Canada, is that rarely if ever will a literate person in possession of all his faculties be allowed to plead *non est factum* if he signs a document without reading it. At the same time, however, if the law in Canada requires Cartwright J.'s dissent to be supplemented by the reasons of the House of Lords in *Saunders* v. *Anglia Building Society*, signing a document unread is not an absolute bar in every case. There will always be a residue of difficult cases which are not necessarily restricted to the illiterate or infirm. In sum, it is suggested that the following propositions reflect the law in Canada after *Marvco*

> (i) If the person signing the document failed to exercise reasonable care he will not be allowed to repudiate it on the ground of *non est factum*. What amounts to reasonable care will depend on the circumstances of the case and the nature of the document he signed.
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> (ii) A literate person of full age and understanding who does not read a

[26](1982), 141 D.L.R. (3d) 577 at 585 (S.C.C.).

[27]*Supra*, footnote 4, at 935.

[28]See *e.g.* Lord Pearson, [1971] A.C. 1005 at 1038-39.

[29]*Ibid.*, at 1023.

[30]*Per* Cartwright J., *supra*, footnote 4, at 935.

document before signing it will be deemed to have failed to exercise reasonable care. Exceptions may be made "on rare occasions" for a "residue of difficult cases", but the category of such exceptions is a very narrow one and will be determined, it seems, on an *ad hoc* basis.[31]

(iii) The defence of *non est factum* will be available to a person who, because of illiteracy or infirmity, was unable to read or comprehend the document he had signed, provided it can be established by "clear and positive evidence"[32] that he acted responsibly in the circumstances and that, despite his signature, he did not in fact consent to the transaction.

The current position represents a considerable improvement in the law, but certain questions (some of which ought to have been dealt with by the Supreme Court in *Marvco*) still remain.

From the practical standpoint, perhaps the most important issue left unanswered is the extent of the difference between perception and reality needed to bring the doctrine of *non est factum* into operation. While the rationale underlying the doctrine is a lack of *consensus* between the contracting parties, it is clear that the courts are, and should be, slow to allow a man to disavow his signature, particularly where to do so would prejudice the rights of innocent third parties. The plea of *non est factum* quite properly will only be entertained by the courts where it can be shown that there has been a serious misunderstanding about the very essence or subject-matter of the transaction. The perennial problem confronting the courts has been how to define and articulate against this background the kind of misunderstanding and the degree of difference needed to satisfy the requirements of the doctrine.

As noted earlier, the test approved and applied by the Supreme Court of Canada in *Prudential Trust Co.* v. *Cugnet* turned on the distinction between the "character" of the document and its "contents". A party who had signed a document that was different in "character" (or "class" or "nature") from what he had believed it to be could invoke the defence, but he could not do so if the difference related merely to its "contents". As various critics have observed, this test, which was formulated in the English case of *Howatson* v. *Webb*[33] was "terminologically confusing and in substance illogical"[34] for the "contents" of a document often determine its true "character" or "class". Its application has also produced a plethora of cases, "some strange results and nice distinctions which are difficult to reconcile with justice and common sense".[35]

It is also a test that is difficult to apply, as the division of opinion in *Prudential Trust Co.* v. *Cugnet* illustrates. The majority of the Supreme Court

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[31] *Supra*, footnote 28, at 1025-26 (Lord Wilberforce).

[32] *Ibid.*, at 1019 (Lord Hodson).

[33] [1907] 1 Ch. 537; aff'd [1908] 1 Ch. 1 (C.A.).

[34] *Supra*, footnote 28, at 1025 (Lord Wilberforce).

[35] Salmon L.J. in *Gallie* v. *Lee*, [1969] 2 Ch. 17 at 43 (C.A.); aff'd *sub nom Saunders* v. *Anglia Building Society Ltd.*, [1971] A.C. 1005 (H.L.). The basic weaknesses in the class/contents distinction were trenchantly dealt with in *Gallie* v. *Lee* by Lord Denning at 31-32.

took the view that an action to obtain a 99 year lease to mineral rights was different in character from an outright sale of those rights. Cartwright J., on the other hand, considered the difference in the document to be one relating to its contents. It was presumably the majority view in *Cugnet* that prompted the plaintiff in *Marvco* not to challenge the legal sufficiency of the distinction between the supposed and real effect of the document in issue. An amendment of an existing mortgage to one mortgagee is probably different in character from a new mortgage of the same property to another mortgagee. Nevertheless, given the viscissitudes of the case law, the equities of the case and the evident reluctance of the courts to uphold the plea of *non est factum*, it is rather surprising that an argument that the document fell on the wrong side of the "class/contents" division was neither made nor invited by the court.[36]

The old test was swept away by the House of Lords in *Saunders* v. *Anglia Building Society* and replaced with a more flexible, if imprecise, criterion that attaches more importance to the practical result rather than to the difference in legal character. The defence of *non est factum* would be admissible provided the document was "radically" or "totally" or "fundamently" different, and whether that difference related to the character or the contents of the document was immaterial.[37] Even before the *Marvco* case, some Canadian courts had begun to apply the new English test, although in face of the *Cugnet* decision, which was unanimous on this point, their right to do so as a matter of law was open to serious question. By the time *Marvco* was decided, the "class/contents" test had been somewhat eroded but was it, nevertheless, to continue to be the law in Canada? The Supreme Court offered virtually no guidance on this important matter. While the Court took note of recent trends, it did so in a neutral manner which offered no real assistance to either lower courts or future litigants. On the nature of the difference required to invoke the defence, Estey J. stated:

> It is not necessary for us to concern ourselves with the second leg of *Saunders*, namely, those circumstances in which a defendant who has not been guilty of negligence may raise the defence of non est factum.[38]

With regard to the growing practice of Canadian courts to use the English test rather than that approved in *Cugnet*, Estey J. merely observed:

> The decision of the House of Lords in *Saunders* has been considered by a number of Canadian courts. In *Commercial Credit Corp. Ltd.* v. *Carroll Bros.* ... the question of whether the principles laid down in *Saunders* are good law in Canada was left open by the court. In a number of more recent decisions, however, the reasoning of the House of Lords has been directly applied...[39]

Surely, the Supreme Court of Canada ought to have provided more guidance on an issue which, if it did not fall precisely within the literal boundaries of the question put to the Court, was nonetheless part and parcel of the real issue that gave rise to the appeal, namely, the extent to which the principles in *Saunders* v. *Anglia Building Society* were good law in Canada. The

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[36] As occurred, for example, in *Linton Const. Ltd.* v. *C.N.R.* (1975), 49 D.L.R. (3d) 548 (S.C.C.), an important case on the old doctrine of fundamental breach.

[37] See, *e.g.*, the judgment of Lord Reid, *supra*, footnote 28, at 1017.

[38] *Supra*, footnote 1, at 584.

[39] *Ibid.*, at 585.

fact that the Court chose not to deal with this issue is puzzling, because the judge who queried the state of the law on *non est factum* in *Commercial Credit Corp.* v. *Carroll Bros. Ltd.*,[40] referred to by Estey J. in his judgment, was none other than Dickson J., delivering judgment in his former capacity as a Judge of the Manitoba Court of Appeal. Dickson J. was a member of the Supreme Court which heard the *Marvco* case. Dickson J.A., as he then was, was not alone in wondering aloud about the impact of *Saunders* v. *Anglia* upon Canadian law in the absence of any pronouncement from the Supreme Court but, unlike his colleagues, he enjoyed the singular advantage of having the opportunity to provide the authoritative guidance he then felt was sorely needed. That he chose to remain silent and simply concur with a judgment which left lower courts in the same state of uncertainty is disappointing.

The failure of the Supreme Court to deal comprehensively with the doctrine of *non est factum* may have unfortunate effects for future litigants. While it is as predictable that the Supreme Court will adopt the law laid down in *Saunders* v. *Anglia Building Society* on the kind of misapprehension needed to invoke the plea as it was that it would overturn *Cugnet* on the effect of carelessness by the signer, it will probably require another appeal to the Supreme Court to settle the law, with all the attendant delays and costs. On the subject of costs, it is instructive to note how the Supreme Court dealt with the matter in *Marvco*. Estey J. declared:

> The appellant...was required to persevere to the level [of the Supreme Court] in order to bring about a review of the reasoning which led to the determination in the *Prudential* case. The respondents, on the other hand, acted reasonably in founding their position upon that decision notwithstanding the revision of the law of England consequent upon the judgments in *Saunders*.[41]

The normal rule that costs follow the event was varied. Marvco, the successful appellant, was awarded costs only in the court of first instance; no costs were awarded to either party for the proceedings in the Court of Appeal and the Supreme Court.

Would it not be equally "reasonable", in a dispute over the validity of a transaction involving a fundamental difference in the contents of a document but not in its character, for one party to rely on the "class/contents" distinction approved by all the members of the Supreme Court in *Cugnet*, as well as in its previous decision in *Minchau* v. *Busse*,[42] and for the other to invoke the more flexible test which has replaced it in *Saunders* v. *Anglia Building Society*? Had proper guidance been provided by the Supreme Court in *Marvco*, such questions would no longer be necessary, and the prospects of another case on this issue appearing on the overloaded dockets of the Supreme Court, after years of litigation and heavy, and probably irrecoverable, court costs, would have been avoided.

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[40] *Supra*, footnote 21.

[41] *Supra*, footnote 1, at 587.

[42] *Supra*, footnote 16.

V. RELATIONSHIP BETWEEN *NON EST FACTUM*, MISTAKE AND UNCONSCIONABILITY

The *Marvco* case raises once more the question of the relationship between *non est factum* and the doctrines of mistake and unconscionability. At one time, the doctrines of mistake and *non est factum* were regarded as conceptually distinct.[43] *Non est factum* was confined to deeds and similar instruments, while the doctrine of mistake applied to simple contracts. However, the conceptual differences that once distinguished the doctrines have largely disappeared and today, *non est factum* is treated by the major texts as a discrete branch of the law of contractual mistake applicable to signed contracts. Practically, they involve the same basic issue, the legal effect of a mistaken belief that a transaction was intrinsically different from what it was in fact or law, and the same basic allegation of lack of consent. Functionally, both mistake and the doctrine of *non est factum* serve a common purpose which, as Grange J. said in *Marvco*, is to determine which of two innocent parties is to suffer for the fraud of a third. What then, is the relationship between *non est factum* and mistake, when the party alleging that the transaction is void, is of full age and capacity?[44]

The precise relationship between the doctrines has yet to be fully worked out, but one difference between them is that *non est factum* has traditionally been regarded as narrower in scope than mistake. Lord Denning stated in *Gallie* v. *Lee:* "In my opinion a man cannot plead *non est factum* simply because he has made a mistake as to the person in whose favour the document is executed."[45] The rationale behind the distinction is the extra reluctance of the courts to allow a person to disavow a signed, as opposed to an unsigned, contract and, as such, it is both sound and reasonable. However, it appears that the distinction has been clouded for (largely as the result of Lord Denning's efforts and developments subsequent to *Saunders* v. *Anglia Building Society*) it seems that today, while a mistake of identity will render an unsigned contract voidable, it is doubtful whether it will ever be void.[46] At the same time, it is clear from *Saunders* v. *Anglia Building Society* that there still exists a small category of cases in which a mistake of identity, or other "very serious", "radical" or "fundamental" error made by the signing party, can render a signed contract void on the ground of *non est factum*. The result may be that the doctrine of mistake of identity has become narrower than the doctrine of *non est factum*. Viewed from the standpoint of the innocent third party, it seems possible that he will be more secure if the original contract was unsigned than if it was signed. Admittedly, there is little if any recent case law directly

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[43]See, J.H. Baker, "Non Est Factum" (1970), 23 *Current Legal Problems* 53.

[44]See generally, R.J. Bragg, "Fundamental or Radical Changes in the Law of Non Est Factum" (1971), 35 *Conveyancer and Property Lawyer (N.S.)* 231 at 234-38.

[45]*Supra*, footnote 35, at 33. See also Salmon, L.J. *Ibid.*, at 44-45.

[46]See, *e.g.*, *Lewis* v. *Averay*, [1972] 1 Q.B. 198 (C.A.) and D.W. Grieg, "The Passing of Property and the Misidentified Buyer" (1972), 35 *Mod. L. Rev.* 306. The low in this area is confused. See Fridman, *supra*, footnote 2, at 89-92. Lord Denning insisted that virtually all forms of contractual mistake rendered the contract voidable. See, *e.g.*, *Solle* v. *Butcher*, [1950] 1 K.B. 671 at 693 (C.A.); *Magee* v. *Pennine Insurance Co. Ltd.*, [1969] 2 Q.B. 507 (C.A.). In *Gallie* v. *Lee*, *supra*, footnote 35, at 33, he repeated his views about the effect of a mistake of identity and Salmon L.J. (as he then was) agreed with Lord Denning (at 45). Nevertheless, there is an "inconvenient" House of Lords decision, *Cundy* v. *Lindsay* (1878), 3 App. Cas. 329. The House of Lords did little to clarify the matter in *Saunders* v. *Anglia Building Soc.*, *supra*, footnote 5.

on point in England and in Canada, and it is entirely possible that Lord Denning's controversial views about the effect of a contractual mistake may one day be "explained" if not condemned as heretical. In the meantime, however, the relationship between the doctrines of *non est factum* and mistake needs clarifying.

Similar questions surround the relationship between *non est factum* and the doctrine of unconscionability.[47] Aspects of unconscionability will frequently be present in cases of *non est factum* where the defendant suffers from a severe educational disability, or mental or physical infirmity, and is persuaded to sign the document by conduct amounting to overreaching, if not outright, fraud. However, unconscionability *per se* will not be enough to satisfy the requirements of *non est factum*, and the differences between the doctrines are important. The doctrine of unconscionability will only render the transaction voidable, and is thus of little use where third party rights are involved. *Non est factum*, it would seem, requires an aggravated form of unconscionability, but precisely what those extra elements consist of, and how much more is needed to cross the dividing line, are far from clear.

Issues like these lead inevitably to the question of whether, instead of adding more verbal refinements to the ingredients of *non est factum* in order to distinguish it from mistake and unconscionability, it would not be better to review the adequacy of the "all or nothing" solution presently imposed by the courts. Where, as in *Marvco*, there is negligence on one side but none on the other, and no question of any infirmity, the present solution can be perfectly appropriate and fair. But there are shades of carelessness and degrees of fairness, and the "all or nothing solution" is often too blunt to do complete justice between the original transferor and the third party transferee. The case for a judicial power to apportion the loss caused by the "rogue" has been made often enough in the context of contractual mistake, though rarely more persuasively than by Devlin, L.J. in *Ingram* v. *Little*:

> The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognise as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principles they should be within his understanding and merit his approval....The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice. For the doing of justice, the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part.[48]

Lord Devlin was, admittedly, dealing with mistake of identity, although his arguments would appear to apply equally to the doctrine of *non est factum*.

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[47]See S. Waddams, *The Law of Contracts*, (Agincourt: Canada Law Books, 1977), chap. 14; and *Gillis* v. *McDonald and McDonald* (1980), 44 N.S.R. (2d) 60 (T.D.).

[48][1961] 1 Q.B. 31 at 73-74 (C.A.).

His suggestion was rejected by the English Law Reform Committee in 1966[49] on the questionable ground that security of title would be jeopardized if judicial discretion were to replace clear-cut rules, and that apportionment of losses by a court would be unworkable in a complex transaction involving a chain of third party transferees. However, opinion may have shifted since 1966 on the value and practicability of a residual judicial power to reopen third party transactions and apportion losses where the interests of justice so require.[50] Perhaps it is time to consider giving a limited discretionary power to the judiciary in Canada, properly circumscribed by a list of appropriate factors which a court would be required to take into account, to enable them to deal justly with difficult cases involving mistake and *non est factum*.

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[49]Law Reform Commission of England, *Twelfth Report* (1966), (cmnd. 2958). It was also rejected by the New Zealand Contracts and Commercial Law Reform Committee, *Report On the Effect of Mistakes on Contracts* (1976), and by Parliament in the *Contractual Mistakes Act*, 1977, No. 54, (N.Z.). But see the critical reviews of this Act by J.N. Finn, "The Contractual Mistakes Act 1977" (1979), 8 *N.Z.U.L. Rev.* 312, and G.L. Lang, "Joshua Williams Memorial Essay 1978. The Contractual Mistakes Act 1977" (1978), 4 *Otago L. Rev.* 245.

[50]See, *e.g. Chesire & Fifoot's Law of Contract*, 10th Ed. (London: Butterworths, 1981) at 235.

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