Marvco Color Research Limited v. *Harris and Harris*[1]—Contracts—*Non Est Factum*—Signer's Negligence—Failure to Read

The recent decision of the Supreme Court of Canada in *Marvco Color* provides a necessary re-examination and clarification of the Canadian law of *non est factum*, and further illustrates a welcome willingness on the part of the Court to reconsider the status and validity of prior, controlling precedents in this area of contract law.[2] The facts of *Marvco Color* furnish a classic and striking example of the problematic features of the pleas of *non est factum* within the context of contemporary contract law and, while the decision in the particular case may raise more issues than it answers, it indicates a radical departure from previous authority concerning the effect of a signer's negligence upon the enforceability of a contractual document and, to that extent, may serve as a basic conceptual framework within which a solution to more difficult problems associated with the plea of *non est factum* may be discovered. The Supreme Court is therefore to be commended for its efforts to devise a more flexible test by which to assess the competing claims inherent in every instance in which a plea of *non est factum* is raised, in order to afford the necessary degree of protection to both truly non-consenting contractors and to innocent third parties who have acted to their detriment in reliance upon an apparently valid document.

Marvco Color Research Limited (the appellant-mortgagee) initiated an action for foreclosure on a mortgage executed by Mr. and Mrs. Harris (the respondent-mortgagors). The mortgage, the validity of which was in issue, had been the result of a protracted series of financial transactions involving Marvco Color, the Harrises and three other individuals. In January, 1975, the mortgagees sold a business to Johnston and Suwald, who executed a chattel mortgage in part payment. In January, 1976, Suwald decided to surrender his interest in the business and, in order to assist Johnston, (a friend of the Harrises' daughter, Delia McMullen), the respondents borrowed $15,000 from the Bank of Montreal, which loan was secured by means of a mortgage on their home. Additionally, in January, 1976, Mr. and Mrs. Harris executed a second mortgage which had the effect of functioning as a collateral security to a contract of guarantee, previously entered into by Mr. Harris and Johnston, in which Marvco Color agreed to abandon any outstanding claims against Suwald arising out of the chattel mortgage of 1975. According to a term in the collateral security, Mr. and Mrs. Harris agreed to assume liability in the event of any default by Johnston in payment upon the original chattel mortgage. Inevitably the business failed, Johnston

[1][1983] 45 N. R. 302, subsequently referred to as *Marvco Color*.

[2]For example, *Prudential Trust Co. Ltd. et al.* v. *Cugnet et al.* (subsequently referred to as *Prudential Trust* [1956] S.C.R. 914; *Brown* v. *Prairie Leaseholds Ltd.* (1953), 9 W.W.R. (N.S.) 577 (Man. Q.B.); *Marks* v. *Imperial Life Assce. Co. of Canada*, [1949] 1 D.L.R. 613 (Ont. H.C.); *Thomas* v. *Crown Trust Co.* (1958), 13 D.L.R. (2d) 425 (Man. C.A.); *Perry* v. *Prudential Trust Co. Ltd.* (1957), 11 D.L.R. (2d) 689 (Man. C.A.); *Commercial Credit Corp. Ltd.* v. *Carroll Bros. Ltd.* (1970), 16 D.L.R. (3d) 201 (Man. Q.B.).

defaulted, and Marvco Color proceeded against the mortgagors on the basis of the aforementioned covenant contained in the collateral security. The amount for which the mortgagors were potentially liable was $55, 650.43.

As a defence to the action for foreclosure, the mortgagors advanced the plea of *non est factum*, contending that the mortgage had been executed on the assumption that the document signed represented only minor amendments to the original mortgage extended by the Bank of Montreal. It was clearly established by the evidence presented at trial[3] that the misapprehension as to the nature of the document was the result, not of any actions undertaken or statements made by the mortgagees, but rather, of representations made by Johnston and an individual named Clay who were, according to the trial judge, "engaged in a monstrous fraud upon the defendants".[4] The evidence revealed that the fraud had been perpetrated in the following way:

> . . . the defendant wife was asked by Johnston to have lunch with him and her daughter at the Lord Simcoe Hotel in Toronto. When she arrived Johnston said they were to wait for Clay who was bringing a paper for her to sign. Clay arrived, said there was an error in the document, left and returned and presented the document to the wife. At some point Johnston, perhaps in the presence of Clay, said it was 'just to correct the date' in the Bank of Montreal mortgage. In any event the defendant wife signed it without reading it. Later that day Johnston and Clay attended upon her husband at home and got him to sign as well. The husband testified they told him it related to discrepancies in the date of the Bank of Montreal mortgage. He signed without question and without reading.[5]

At both the trial[6] and appellate[7] levels the mortgagors successfully resisted foreclosure on the basis of *non est factum* despite a finding at trial that the mortgagees had been neither parties to the fraud nor had made any representations respecting the legal effect of the document and that

> . . . the defendants were careless in not reading the document before signing. 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]

Notwithstanding the evident intellectual competence of the mortgagors, the doctrine of *non est factum* was determined by both the Ontario High Court and the Court of Appeal to be applicable owing to the nature of the mistake made by the mortgagors as to the legal significance of the docu-

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[3](1980), 107 D.L.R. (3d) 632 (Ont. H.C.).

[4]*Ibid.* at 634, per Grange J.

[5]*Ibid.*

[6]*Ibid.*

[7](1980), 115 D.L.R. (3d) 512 (Ont. C.A.).

[8]*Supra*, footnote 3, at 634.

ment: ". . . they were told it was an unimportant amendment to the Bank of Montreal mortgage when in reality it was a second substantial mortgage to the plaintiff."[9] With clear reluctance, the trial judge dismissed, as irrelevant, arguments advanced by the mortgagees in relation to the carelessness of the signers due to what was perceived to be the controlling effect of an earlier decision of the Supreme Court of Canada—that of *Prudential Trust Co. Ltd. et al.* v. *Cugnet et al.*[10]—in which a majority of the Court[11] elected to adopt the reasoning of the English Court of Appeal in *Carlisle & Cumberland Banking Co.* v. *Bragg*.[12] In general terms, the view advanced in *Bragg's* case denied the relevance of negligence, except in relation to negotiable instruments, as a factor conditioning the availability of the defence of *non est factum*.

However, the decision of the Supreme Court of Canada, delivered by Mr. Justice Estey, reversed the judgments of the two lower courts and held that the mortgagees could successfully maintain an action for foreclosure. In permitting the mortgagees to proceed upon the security, the Supreme Court ruled that the mortgagors were to be denied reliance upon *non est factum*. In the opinion of the court, the mortgagors were to be precluded from raising an argument of *non est factum* on the basis that "the defendants-respondents are barred by reason of their carelessness from pleading that their minds did not follow their hands when executing the mortgage so as to plead that the mortgage is not binding on them."[13]

In so confining the operation of the principle of *non est factum* the Supreme Court of Canada has effected a fundamental break with previous authority[14], and in expressly approving the decision of the House of Lords in *Saunders* v. *Anglia Building Society*[15], has achieved a degree of consistency between English and Canadian law in this facet of contracts. Uniformity is not, of course, in itself a necessarily desirable feature of any judicial decision. However, for the reasons which will be advanced in the remainder of this comment, the ultimate result in *Marvco Color* and the reasoning advanced in support of that result suggest a more rational framework for the application of the doctrine of *non est factum*.

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[9]*Ibid.*

[10]*Supra*, footnote 2.

[11]The majority opinion was delivered by Mr. Justice Nolan, concurred in by Mr. Justice Taschereau and Mr. Justice Fauteux Mr. Justice Locke agreed in the result but delivered a separate concurring opinion. Mr. Justice Cartwright dissented.

[12][1911] 1 K. B. 489 (C. A.), subsequently referred to as *Bragg's* case.

[13]*Supra*, footnote 1, at 314.

[14]See authorities cited *supra*, footnote 2.

[15][1971] A. C. 1004 subsequently referred to as *Saunders*, affirming *Gallie* v. *Lee*, [1969] 2 Ch. 17 (C.A.).

The doctrine of *non est factum* operates so as to attack the validity of a contract at the preliminary level of contract formation, and successful recourse to the plea results in a judicial determination that the contract is void *ab initio*. To the extent that the plea is invoked to defeat a claim for the enforcement of a contractual document objectively consented to by the signer (as evidenced by the empirical reality of actual signature), a judicial conclusion favouring the applicability of the doctrine results in the avoidance of the contract on the basis that absence of a consenting mind accompanying the physical act of signature indicates that the signer "in contemplation of law never did sign".[16] *Non est factum* is, therefore, a constructive denial of consent founded upon a discrepancy between the actual intent of the signer and the provisions of the contractual agreement assented to. *Non est factum* will be applied to avoid a contract in circumstances in which "the import of the error for the interests of the party invoking the plea, in the whole actual situation from which the disputed instrument arose, placed that party in a position analogous to that of a party whose hand is taken and forced through the motions of signature."[17] Since the underlying foundation of the plea is lack of consent, it has generally been assumed that the means by which consent is obtained are, to a large extent, immaterial: the contract is invalid ". . . not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign . . .".[18] The method by which consent was induced, be it fraud, misrepresentation, duress or compulsion, may provide a separate ground for relief; *non est factum* constitutes an independent, consent-based mechanism for a declaration of nullity, designed to afford relief "to a signer whose consent is genuinely lacking".[19]

However, the scope of *non est factum* must accommodate other fundamental and often opposing contractual values. Since it may be at least a *prima facie* inference that actual (in the sense of non-forged) signature connotes volitional consent to contractual terms, and since a successful plea of *non est factum* entails the drastic conclusion of nullity, it is evident that the operation of the doctrine must, for both philosophical and pragmatic reasons, be contained within fairly narrow and rigid limits. As to the practical necessity for restrictions upon resort to arguments founded on *non est factum*, the policy favouring limitation of the doctrine has been expressed in a variety of ways. In *Waberly* v. *Cockeral* it was stated:

> Although the truth be that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which

[16]*Foster* v. *MacKinnon* [1869] L.R. 4 C.P. 704, at 711, *per* Byles J.

[17]J. Stone, "The Limits of Non Est Factum After Gallie v. Lee", (1972), 88 L. Q. R. 190, at 197.

[18]*Supra*, footnote 16, at 711, *per* Byles J.

[19]*Supra*, footnote 15, at 1023-24, *per* Lord Wilberforce.

> would subvert a law; for if a matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing should be of no greater authority than a matter of fact.[20]

More recently, pragmatic arguments addressed to a circumscription of the availability of the plea of *non est factum* were articulated in the following manner:

> Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he had signed.[21]

Explicit in such views is a concern to ensure the integrity and stability of commercial transactions which, at least in appearance, are volitional and consensual, and on the basis of which third parties may acquire rights and incur liabilities. Such a statement constitutes nothing more than a realistic appreciation that "the wider the scope we allow to this relief, the greater becomes the invasion of the interests in security of transactions, putting at hazard even the well established cautious procedures of transferees and mortgagees in the checking of land titles."[22]

The functional need to extend legal protection to parties who have relied on their detriment upon documents which are "apparently regular and properly executed"[23] itself is a pragmatic correlative of a more fundamental proposition. It has often been asserted that at least one, if not the sole, purpose of contract law consists in the protection of reasonable expectations.[24] The requirement that expectations, in order to merit legal recognition, be 'reasonable' entails a corollary: that undisclosed reservations and covert assumptions ought generally to be insufficient to vitiate the appearance of assent, engendered by signature, on the basis that it is the objective manifestation of consent, rather than proof of its subjective actuality, with which the law is concerned, since that can alone be the source and yardstick of the reasonableness of expectations. The objective theory of contract formation (to which the principle of *non est factum* may be an

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[20](1542), 1 Dyer, 51a quoted by Estey J. *supra*, footnote 1, at 315.

[21]*Muskham Finance Ltd.* v. *Howard*, [1963] 1 Q.B. 904, at 912, per Donovan J.

[22]Stone, *supra*, footnote 17, at 217.

[23]*Supra*, footnote 15, at 1023-24, *per* Lord Wilberforce.

[24]See, in this regard, *Corbin on Contracts*, (St. Paul: West Publishing Co., 1963), esp. ss. 1, 3, 9, 13. According to Corbin, "The underlying purpose of law and government is human happiness and contentment, to be brought about by the satisfaction of human desires in the highest practicable degree . . . That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose. The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one."

See also, S. Waddams, *The Law of Contracts*, (Toronto: Canada Law Book Limited, 1977), particularly Chapters 1 and 3; B. Reiter and J. Swan (eds.), *Studies in Contract Law*, (Toronto: Butterworths, 1980), particularly Studies 1, 7 and 8.

anomalous exception if applied in an unrestricted fashion) is thus grounded in more generalized considerations of fairness. Adhesion to this principle has been a consistent theme of contract law and premises the development of rules referable to offer and acceptance, estoppel, waiver and mistake. In short, the conceptual framework of contract formation in both its affirmative (that is, rules stipulating prerequisites of a valid agreement) and defensive (that is, rules and doctrines operating to defeat the initial assumption of validity generated by compliance with formalities) dimensions is, itself, the inevitable product of the objective theory of contract. This point is clearly made in, for example, *Smith* v. *Hughes*:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other's terms.[25]

At the same time, the objective theory of contract formation alluded to above must be qualified. Literal adherance to its tenets might dictate an attitude of universal enforceability. Therefore, the objective theory has been refined so as to permit limited recognition of remedial relief in certain instances in which the substance of the complaint consists in proof of discrepancy between internal intent and the external manifestations of consent, as is the case in arguments related to mistake and misrepresentation. Further, the means by which consent is obtained may be relevant in determining the issue of enforceability, as evidenced by principles concerning the effect of fraud, duress, unconscionability and inequality of bargaining power. Arguments against enforceability premised upon these, and analogous grounds, operate less as exceptions to the objective theory than as elaborations of its original premises.

In order to be acceptable, a rational and intelligible theory of *non est factum* must exhibit consonance with fundamental contractual values. These values may be identified as the necessity for genuine consent and the need to protect reasonable reliance and reasonable expectations. Such interests are, in many cases, a coincident. A plea of *non est factum*, however, implicitly indicates an antagonism (or at least a potential conflict) between the need to ensure true consent, on the one hand, and the desire to promote the integrity of commercial transactions, on the other. Refusal to permit the plea in any instance could result in the judicial endorsement of serious and illegitimate invasions of proprietary interests.[26] Unlimited availability of the plea would impair and undermine the security of contractual relationships and thus frustrate realization of the broader goals of certainty, stability and predictability. The objective of a theory of *non est factum* must be to achieve a compromise between these interests, which would enable a defensible selection of the more significant interest in a particular case. In devising such a theory, consideration must be given to the following issues. What

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[25][1871] L.R. 6 Q.B. 597, at 607, *per* Blackburn J.

[26]Stone, *supra*, footnote 17, at 216.

is the nature of the mistake which must be made by the signer? What, if any, are the bars precluding resort to the plea? Are these bars absolute or discretionary? What is the significance of the interposition of third-party interests?[27] Certain of these questions are addressed by the judgment of the Supreme Court in *Marvco Color* in an explicit way. While other issues remain unresolved, it is possible to extrapolate at least tentative conclusions as extensions of the primary arguments advanced in the decision.

The Nature of the Mistake: The Preliminary Inquiry

To the degree that arguments found upon *non est factum* exhibit clear affinities with assertions advanced in the context of the traditional 'mistake' cases[28], it is reasonable, at a preliminary stage, to restrict the scope of the doctrine by reference to the type or quality of the signer's mistake necessary to support the plea. The availability of the plea has, therefore, been contingent upon proof of a divergence between the inward intent of the signer as to the transaction envisaged and the transaction actually effected by the provisions of the contractual document. Prior cases[29] support the proposition that the only mistake classified as operative in the context of *non est factum* would be one relative to the nature and character of the document as opposed to a misapprehension as to its contents. The distinction between "what the deed actually (as a matter of detail) contains . . . contrasted with what is called its legal character"[30] was, however, repudiated by the House of Lords in *Saunders* on the basis (as explained by Lord Wilberforce) that

> The distinction . . . is terminologically confusing and in substance illogical . . . On the one hand, it cannot be right that a document should be void through a mistake as to the label it bears, however little this mistake may be fundamental to what the signer intends; on the other hand, it is not satisfactory that the document should be valid if the mistake is merely as to what the document contains, however radical this mistake may be and however cataclysmic its result.[31]

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[27] In the context of this comment, the term 'third party' will be employed to describe any individual who is not a party to the original fraud or misrepresentation inducing consent, whether or not a party to the original (potentially) defective contract.

[28] The mistake cases to which a pleas of *non est factum* exhibits the strongest resemblance would be those relating to a mistake as to contractual terms (or, according to an alternative scheme of classification, those involving unilateral or mutual mistake) such as *Hartog v. Colin and Shields*, [1939] 3 All E.R. 566; *Hobbs* v. *Esquimault and Nanaimo Ry. Co.* (1899), 29 S. C. R. 450; *Colonial Investment Co.* v. *Borland* (1912), 6 D. L. R. 211 (Alta. S. C. App. Div.); *Paget* v. *Marshall* (1884), 28 Ch. D. 255; *Brooklin Heights Homes* v. *Major Holdings* (1977), 17 O. R. (2d) 413 (H. C.).

That the essence of a plea of *non est factum* is founded upon a mistake by the signer is recognized by Corbin, *supra*, footnote 24, s. 607: "One who signs or accepts a written instrument without reading it with care is likely to be surprised and grieved at its contents later on . . . The case is materially different when a party signs or accepts a written instrument without reading it, thinking that he knows its content. If the contents are not what he supposed, he is assenting under a mistake of fact. This case would be dealt with just as are other cases of unilateral mistake . . .".

[29] *Bragg*'s case, *supra*, footnote 12, approved by the Supreme Court of Canada in *Minchau* v. *Busse*, [1940] 2 D.L.R. 282, in which Duff C.J.C. stated at 294: "The law is stated in the most satisfactory way in the judgment of Buckley L.J. in *Carlisle & Cumberland Banking Co.* v. *Bragg* . . .".

[30] The distinction is drawn by Warrington J. in *Howatson* v. *Webb*, [1907] 1 Ch. 537, at 549: "He was told they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with that property . . . He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents."

[31] *Supra*, footnote 15, at 1034-35, *per* Lord Pearson.

The difficulty in differentiating between 'nature and character' and 'contents'[32], coupled with the obviously arbitrary nature of the classification and, on occasion, the substantively unfair result entailed by such categorization, has prompted the abandonment of this test and the substitution of a more flexible formula emphasizing, instead, the materiality of the mistake made by the signer. According to the *Saunders* case, in order to activate a plea of *non est factum*, it is necessary to establish that the discrepancy is 'radical', 'fundamental', 'serious', 'very substantial' or otherwise of such a nature as to render the transaction "entirely or fundamentally different from that which it was thought to be"[33] or such as to go "to the substance of the whole consideration or to the root of the matter."[34] Finally, the extent of the discrepancy, in a quantitative sense is, according to this test, to be assessed both subjectively and objectively, taking into consideration the provisions of the contract in comparison with the 'belief', 'object', and 'understanding' of the signing party.[35]

Canadian courts have, however, continued to apply the prior character/contents dichotomy as a means of classifying the nature of the signer's mistake.[36] The nature of the discrepancy required to entitle the signer to initiate a plea of *non est factum* was not canvassed in the judgment of the Supreme Court in *Marvco Color*, although the facts of the case might suggest that the mistake made by the mortgagors was either as to the nature and character of the document, according to the earlier test, or was sufficiently material, according to the criteria proposed by the House of Lords in *Saunders*, to meet the threshold requirement of entitlement. It is worth noting, however, that Mr. Justice Estey, although not required to do so, referred to this aspect of *Saunders* with apparent approval[37] and in this respect, *Marvco Color* may signal an implicit rejection of the former basis of classification. The criteria, described in *Saunders*, to be applied to de-

[32]For example, even in *Prudential Trust*, *supra*, footnote 2 Cartwright J. dissented on the point of characterization of the mistake made by Cugnet. According to Stone, *supra* footnote 17, at 197 ". . . the distinction between 'class and character' and 'contents' offered by the case is in the area of overlap meaningless". *Accord*, Denning L.J. in *Gallie* v. *Lee*, *supra* footnote 15 at 31-33. In rejecting this principle of classification as "not a sensible distinction", Lord Denning correctly perceived that the contents of a document are determinative of its class and character and further, that actual decisions did not, in fact, support the application of the distinction.

[33]*Per* Lord Reid, *supra*, footnote 15, at 1016-17. *Accord*, Lord Pearson at 1034, 1039.

[34]*Per* Lord Hodson, *supra*, footnote 15, at 1018-1019; See also the opinion of Lord Wilberforce, *supra*, footnote 15, at 1022 who thought the discrepancy must make the document "entirely . . . or fundamentally different from that which it was thought to be.".

[35]*Per* Lord Pearson, *supra*, footnote 15, at 1031; See also Stone, *supra*, footnote 17 at 206 who in summarizing the effect of *Saunders* observed: "What has now emerged then, in the unanimous view of all the Lords, is that the criterion justifying the constructive plea is a 'fundamental' or 'radical' discrepancy between what the actual effects of the signed document would be if it were allowed to stand and what the signing party intended to bring about by his signature. In assessing whether the degree of this discrepancy meets this criterion all the Lords also made clear that the effects were to be assessed in terms not merely of legal but also factual objectives. They included for example, in this case the plaintiff's objective, in natural love and affection, to help her nephew somehow or other out of his financial difficulties."

[36]See, for example, *Homeplan Realty Ltd.* v. *Rochon* (1972), 30 D.L.R. (3d) 748 (Sask. Q.B.); *Prudential Trust Co. Ltd.* v. *Forseth* (1959), 21 D.L.R. (2d) 587 (S.C.C.); *Bradley* v. *Imperial Bank*, [1926] 3 D.L.R. 38 (O.S.C.).

[37]*Supra*, footnote 1, at 312-313.

termine the operative nature of mistake in the context of *non est factum* are highly suggestive of indicia controlling the disposition of other arguments based upon mistake as to contractual assumptions.[38] Since the latter have been adopted rather enthusiastically by Canadian courts,[39] it is arguable that a parallel development in the analysis of mistake necessary to support a plea of *non est factum* may be anticipated.

Bars to the Availability of the Plea

A mistake either as to the nature and character of the document, or one which is sufficiently fundamental or essential, is the *sine qua non* of the potential application of a plea of *non est factum*. Is it, as well, a sufficient condition for the availability of the defence? The decision in *Marvco Color*, like that in *Saunders*, departs from previous authority in holding that certain species of conduct on the part of the signer may, in an appropriate case, disentitle the non-consenting party to relief. In short, it is clear that while the preliminary requirement of materiality in mistake must be met in order to establish the possibility of a *non est factum* argument, mere proof of such a mistake on the part of the signer is no longer conclusive of the issue. In *Marvco Color* itself, it will be recalled, benefit of the plea was withheld from the respondents on the basis that:

> . . . the respondents apparently sought to attain some advantage indirectly for their daughter by assisting Johnston in his commercial venture. In the Saunders case, supra, the aunt set out to apply her property for the benefit of her nephew. In both cases the carelessness took the form of a failure to determine the nature of the document the respective defendants were executing. Whether the carelessness stemmed from an enthusiasm for their immediate purpose or from a confidence in the intended beneficiary to save them harmless matters not. This may explain the origin of the careless state of mind but is not a factor limiting the operation of the principle of *non est factum* and its application. The defendants, in executing the security without the simple precaution of ascertaining its nature in fact and in law, have nonetheless taken an intended and deliberate step in signing the document and have caused it to be legally binding upon themselves.[40]

The concept of carelessness as a preclusionary device, articulated by Mr. Justice Estey, is sufficiently complex to merit further explication. However, as a preliminary matter, it is necessary to discuss briefly the extent of the break with previous authority effected by this ruling, and the rationale underlying consideration of negligence of the signer as a bar to the availability of *non est factum*. Prior to the decision in Marvco Color, the governing

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[38]See for example, the tests employed in *Solle* v. *Butcher*, [1950] 1 K.B. 671 (C.A.), at 693 per Lord Denning: "A contract is . . . liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to se it aside was not himself at fault." See also *Magee* v. *Pennine Ins. Co.*, [1969] 2 Q.B. 507 (C.A.).

[39]Illustrative of this trend are cases such as *Hyrsky* v. *Smith* (1969), 5 D.L.R. (3d) 385 (Ont. H. C.); *Marwood* v. *Charter Credit Corp.* (1971), 20 D.L.R. (3d) 563 (N.S.S.C. App. Div.); *Toronto-Dominion Bank* v. *Fortin et al. (No.2)* (1979), 88 D.L.R.(3d) 232 (B.C.S.C.).

[40]*Supra*, footnote 1, at 314.

law in relation to the effect of negligence on the part of the signer was that contained in the earlier decision of the Supreme Court in *Prudential Trust Co. Ltd.*. This decision represented the implementation in Canada of a 1911 decision of the English Court of Appeal, *Bragg's* case. The cumulative effect of these decisions, as is well-known, was to deny the relevance of the signer's negligence as a factor conditioning the availability of a plea of *non est factum*, except in relation to negotiable instruments.

The decision, as a matter of law, that negligence on the part of the signer was immaterial to the scope and operation of *non est factum*, constituted a reversal of earlier authority which had suggested, with varying degrees of intensity, that carelessness could negative the availability of the defence. Thus, in *Foster* v. *MacKinnon* Byles J. observed:

> It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (*not implying negligence*) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, *at least if there be no negligence*, the signature so obtained is of no force.[41] (emphasis added)

The substance of the above passage is to demonstrate clearly that a signer of a document may be under a certain (undefined) duty to take reasonable precautions in examining the contents and determining the significance of a legal document prior to signature. It is further evident that the duty to exercise reasonable care is one imposed not only upon those who are competent (in the sense of being able to read) but also upon those who are impaired by either blindness or illiteracy. The responsibility with respect to the latter class, although not specified by Byles J., may be to ensure that the trust reposed in the reader of the document is well-founded.

The rejection of the general rule concerning the effect of the signer's negligence in *Bragg's* case, and subsequently in *Prudential Trust Co.* was based upon two contentions. First, it was argued that the decision in *Foster* v. *MacKinnon* was to be confined to the category of negotiable instruments, in which case the signer of a negotiable instrument, with full knowledge that the document was a negotiable instrument, was to be denied the benefit of the plea, irrespective of negligence. As to this point, Lord Wilberforce, in *Saunders*, observed:

> . . . the judgment proceeds on a palpable misunderstanding of the judgment in *Foster* v. *MacKinnon*; for Byles J. so far from confining the relevance of negligence to negotiable instruments (as *Bragg's* case suggests), negligence

[41] *Supra*, footnote 16, at 712 per Byles J. See also *Thoroughgood* v. *Cole* (1582), 2 Co Rep 9a and *Hunter* v. *Walters* (1871), L.R. 7 Ch. 75 at 86-86 in which Mellish L.J. observed: "Now, in my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it."

> or no negligence, and that negligence was relevant in relation to documents other than negotiable instruments . . .[42]

Secondly, negligence on the part of the signer was dismissed as a preclusionary mechanism in both *Bragg's* case, and in its Canadian counterpart, *Prudential Trust*, on the basis suggested by Mr. Justice Locke in *Prudential Trust*:

> To say that a person may be estopped by careless conduct when the instrument is not negotiable, is to assert the existence of some duty on the part of the person owing to the public at large, or to other persons unknown to him who might suffer damage by acting upon the instrument on the footing that it is valid in the hands of the holder. I do not consider that the authorities support the view that there is any such general duty, the breach of which imposes a liability in negligence.[43]

In other words, carelessness in signing an unread document could only be germane in those instances in which a clear duty of care existed on the part of the signer to all those who might ultimately rely upon the validity of the document. The test for the existence of such a duty of care, suggested by both *Bragg's* case and *Prudential Trust*, was whether the signer could be sued in tort for negligence by the ultimate holder of the document.

That the equation of negligence as denoting a tortious duty of care (breach of which could give rise to an action in damaged against the signer), and that negligence noted in *Foster* v. *MacKinnon* rested upon a fallacious foundation was noted by Mr. Justice Cartwright in dissent in *Prudential Trust*:

> . . . in the passages quoted the term [negligence] is . . . used as meaning that lack of reasonable care in statement which gives rise to an estoppel. As it was put by Sir William Anson in an article on *Carlisle & Cumberland Banking Co.* v. *Bragg* . . .: 'And further, there seems some confusion between the negligence which creates a liability in tort, and the lack of reasonable care which gives rise to an estoppel.'[44]

The import of *Foster* v. *MacKinnon* was, therefore, to stipulate carelessness, rather than negligence in a tortious sense, as a bar precluding application of the doctrine of *non est factum*.

The substance of Mr. Justice Cartwright's dissent in *Prudential Trust*, concerning the preclusionary operation of negligence on the part of the signer, anticipates the subsequent decisions in *Saunders* and *Marvco Color*

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[42]*Supra*, footnote 15, at 1027; *Accord* Lord Pearson at 1083, Viscount Dilhorne at 1023 and Lord Hodson at 1019. Lord Reid concurred in the effect of negligence at 1015.

[43]*Supra*, footnote 2, at 929.

[44]*Supra*, footnote 2, at 935. See also, in the context of contributory negligence, the decision in *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 (C.A.) in which Lord Esher M. R. said:

"It is true that [the workman] could not have recovered unless, as between himself and the plaintiffs, the plaintiffs had been guilty of want of care; but the plaintiffs say that, as between themselves and the defendant, they were not bound to examine the chain because the defendant had warranted it sound, that they had a right to rely on that warranty, and did not rely on it, and the defendant cannot rely on a duty to use due care which was owed, not to him, but to the workman."

in relation to this issue. In *Saunders*, Lords Hodson, Pearson and Wilberforce, while differing in expression, were in accord in holding that the effect of negligence on the part of the signer was to prohibit a successful resort to the plea of *non est factum*.[45] Limitation of the benefit of the plea on this basis was justified on a number of grounds. It was felt that to permit a careless signer to raise an argument of *non est factum* would be to allow an individual 'to take advantage of his own wrong'.[46] Alternatively, certain of the Law Lords viewed carelessness either as creating an estoppel or as operating as the proximate cause of loss.[47] Similarly, in *Marvco Color*, Mr. Justice Estey, rejected the controlling effect of both *Bragg's* case and *Prudential Trust*, and denied to the respondents the benefit of the doctrine, reasoning that negligence "precludes the defendants in this circumstance from disowning the document, that is to say, from pleading that their minds did not follow their respective hands when signing the document and hence that no document in law was executed by them"[48] since "the respondents, by their carelessness, have exposed the innocent appellant to risk of loss, and even though no duty in law was owed by the respondents to the appellant to safeguard the appellant from such loss, nonetheless the law must take this discard opportunity into account."[49] In electing to apply the reasoning of the House of Lords in *Saunders*, and in approving the dissenting judgment of Mr. Justice Cartwright in *Prudential Trust*, the Supreme Court has clearly acknowledged the force of the substantial body of academic criticism which *Bragg's* case has generated[50] and has endorsed those decisions of lower courts such as *C. I. B. C.* v. *Jamestown Const. Ltd.*[51], *Royal Bank* v. *Smith*[52], *Royal Bank* v. *Churchill*[53] and *Bank of N. S.* v. *Omni Const. Ltd.*[54] in which the benefit of the plea of *non est factum* had been withdrawn from negligent signers.

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[45]Approving the references *supra*, footnote 41.

[46]*Supra*, footnote 15, at 1038 *per* Lord Pearson adopting with approval the opinion of Salmon L.J. in *Gallie* v. *Lee*, *supra*, footnote 15, at 48, the effect of which was to hold that a person who negligently fails to read prior to signing is barred from the plea of *non est factum* on the basis that no man may take advantage of his own wrong.

[47]See for example the opinion of Lord Hodson in *Saunders* at 1018, *supra*, footnote 15, and that of Lord Pearson at 1034.

[48]*Supra*, footnote 1, at 314.

[49]*Ibid.*

[50]See for example, Sir W. Anson, "Carlisle and Cumberland Banking Co. v. Bragg", (1912) 28 L.Q.R. 190 in which he observed: "Shortly stated, the court was asked to say which of two innocent parties would suffer for the fraud of a third, and the Lords Justices decided in favour of the man whose admitted negligence was the cause of the trouble." See also the comments of Waddams, *supra*, footnote 24, at 181-185.

[51][1982] 4 W.W.R. 299 (Sask. Q. B.).

[52](1980), 74 A.P.R. 40 (Nfld. T.D.).

[53](1980), 74 A.P.R. 31 (Nfld. T.D.).

[54][1981] 3 W.W.R. 301 (Sask. Q.B.).; See also in this regard *Royal Bank* v. *MacPhee* (1980), 33 N.B.R. (2d) 370 (Q.B.); *Bank of Montreal* v. *Taurus Tpt. Ltd.* (1980), 22 B.C.L.R. 154 (S.C.); *Zed* v. *Zed* (1980), 28 N.B.R. (2d) 580 (Q.B.); *Bank of N.S.* v. *Forest F. Ross & Son Ltd.* (1982), 40 N.B.R. 92d) 563 (Q.B.).

The failure to advert to the role of negligence as a determinant of the availability of the plea of *non est factum*, which is characteristic of decisions such as *Bragg's* case and *Prudential Trust*, is justifiable on neither conceptual nor pragmatic grounds. Analytically, the denial of the relevance of negligence in earlier decisions appears to proceed from the initial assumption that, absent a situation in which a reciprocal duty of care as between the signer and the holder of the document may be discovered, fault is (generally) immaterial in contract law.[55] This proposition is derived from the theoretically strict nature of contract liability. Therefore, it has been argued, to examine the signer's conduct and to withdraw the plea in the case of carelessness entails the introduction of fault-based considerations which are inappropriate in the context of contract law. However, upon closer scrutiny, such an assertion appears ill-founded. While contractual liability may be strict in the sense that a breach of contract (irrespective of the manner in which the breach occurred) is immediately actionable without proof of further fault on the part of the individual in breach and, in the sense that an award of damages in contract is designed to function in a compensatory rather than punitive fashion, it is untrue that conduct performs no role in determining the creation and extent of contractual obligations. As Glanville Williams has observed, many doctrines and principles of contract law are premised upon the effect of the conduct of one or both of the contracting parties:

> We need not pause to inquire into the exact verbal mechanism by which a court might introduce the question of [contributory] negligence into a contract case: whether in terms of causation, or of implied duty on the part of the plaintiff to use care in co-operating with the defendant, or of estoppel by negligence, or of the duty to mitigate damages, or of contributory negligence *eo nomine*: the fact remains that whatever the language the subject of enquiry is whether the negligence of which the plaintiff has concurred with that of the defendant to produce the misfortune for which damages are claimed . . .[56]

Negligence, in the sense of carelessness, in the context of a plea of *non est factum*, simply operates to refute the constructive denial of consent inherent in the defence. In other words, carelessness on the part of the signer may indicate a tacit waiver by the signing party of the conventional necessity for proof of genuine consent. If the signer, by his conduct, has dispensed with the necessity and opportunity to inform himself of the contents or legal significance of the contractual document, he has implicitly assumed the risk that he may be mistaken. In such a case, there appears to be no compelling reason to extend to him the legal protection afforded to those whose consent is genuinely lacking by reason of innate infirmity, or whose consent has been induced by fraud, misrepresentation or duress on the part of their contractual opposite.

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[55]See for a discussion of this principle the authorities referred to by N. E. Palmer and P.J. Davies in "Contributory Negligence and Breach of Contract" (1980) 29 Int. & Comp. Law Quarterly 414.

[56]*Joint Torts and Contributory Negligence* at 214, as cited in Palmer & Davies, *supra* footnote 53, at 419.

Arguments supporting restriction of the plea of *non est factum* in situations in which the signer's conduct may be characterized as negligent or careless, assume even greater validity when the careless party attempts to assert lack of true consent as a grounds for setting aside the contract against innocent third parties. To the extent that a plea of *non est factum* is analytically and functionally aligned to cases of mistake as to contractual terms,[57] judicial refusal to examine the effect of negligence in the former category is theoretically anomalous. As a general rule, in those cases in which one part is mistaken as to the meaning and effect of contractual terms, judicial attitudes favour an assessment of the significance of the mistake according to conventional contract values. In order to determine whether the mistake constitutes a sufficient basis upon which to refuse enforceability, attention must be focussed upon the actual understanding of the mistaken party as to the operation or meaning of the contract and the extent to which any misapprehension was either known to, or induced by, the non-mistaken party. This approach is dictated by the objective theory of contract formation which is founded upon the "initial proposition that reasonable expectations are entitled to protection"[58] with the result that relief will be denied to the mistaken party "when his opposite has such expectations."[59] If one accepts, as an original premise, that "one who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words he uses their reasonable meaning"[60] judicial denial of the plea to careless signers and judicial favouring of the interests of innocent third parties is explicable and defensible as a method of restricting resort to the plea and of ensuring the integrity of commercial transactions. In a case in which third parties have acquired rights pursuant to a contract to which consent on the part of the signer was genuinely lacking, but in which it is apparent that the signer was negligent, the issue is 'which of two innocent parties is to suffer for the fraud of a third'. While a careless party will not be directly penalized for negligence which consists, not in the breach of a legal duty owed to others, but in a simple neglect of his own interests, it is evident that, in any contest between a careless signer and an innocent third party, the legal system must draw a distinction which is based on comparison of conduct. As Mr. Justice Estey observed in *Marvco Color* itself,

> . . . as between an innocent party (the appellant) and the respondents, the law must take into account the fact that the appellant was completely innocent of any negligence, carelessness or wrongdoing, whereas the respondents by their careless conduct have made it possible for the wrongdoers to inflict a loss. As between the appellant and the respondents, simple justice requires that the party, who by the application of reasonable care was in a position to avoid a loss to any of the parties, should bear any loss that results when the only alternative available to the courts would be to place the loss

[57]See discussion, *supra*, footnote 28.

[58]Waddams, *supra*, footnote 24, at 191.

[59]*Ibid.*

[60]*Ibid.*; see also discussion at 195-210.

> upon the innocent appellant. . . . The two parties are innocent in the sense that they were not guilty of wrong-doing against any other person, but as between the two innocent parties there remains a distinction significant in the law, namely that the respondents, by their carelessness, have exposed the innocent appellant to risk of loss . . .[61].

The purpose of the foregoing discussion has been simply to suggest that there exists no compelling reason, derived either from principle or policy, to reject carelessness when considering the scope of the doctrine of *non est factum*. However, the concept of negligence must be further refined in order to determine how carelessness will operate to defeat arguments founded upon *non est factum*. An analysis of Mr. Justice Estey's opinion in *Marvco Color* reveals, in fact, two alternative bases, both subsumed within the general rubric of conduct, upon which carelessness may preclude the availability of the plea of *non est factum*: negligence *simpliciter* and estoppel *in pais* or estoppel by conduct.

a) Negligence simpliciter

It is clear that Mr. Justice Estey recognized that negligence on the part of a signer may, in some circumstances, be sufficient to exclude the operation of *non est factum*. Negligence on the part of the respondents in *Marvco* in signing an unread document certainly functioned as one reason for denial of the benefit of the plea. Underlying the operation of negligence in this context appears to be the premise that "no one may take advantage of his own wrong"[62] in the sense that negligent contractors ought not to be permitted, by reliance on the defence of *non est factum*, to attribute a loss to innocent third parties when it is clear on the facts that such loss was caused by the carelessness of the signer.

In acknowledging that negligence may function as a distinct and independent exclusionary device, Mr. Justice Estey appears to have approved the sentiments expressed by Lord Wilberforce in *Saunders* to the effect that "a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence, to take care what he signs which, if neglected, prevents him from denying his liability under the document according to its tenor."[63] In other words, while negligence in the context of *non est factum* does not entail recognition of a tortious duty of care owed to one's contractual opposite, it does involve recognition of, at least, a duty of care to oneself which may be described as the duty to ensure that adequate precautions are taken to inform oneself

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[61] *Supra*, footnote 1, at 314-315. See also statement of Ashurst J. in *Lickbarrow* v. *Mason* (1787), 2 T.R. 63: "We may lay it down as a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."; and the statement of Lord Denning, M.R. in *Gallie* v. *Lee*, *supra*, footnote 15, at 32 "His [the signer's] remedy is against [the man who deceived him.]." Similar sentiments were expressed in *Lewis* v. *Averay*, [1972] 1 W.B. 198 (C. A.).

[62] *Supra*, footnote 46.

[63] *Supra*, footnote 15, at 1027.

as to the tenor of a contractual document. This responsibility is, according to *Saunders*, one imposed on all signers, including those who suffer from impaired capacities. As explained by Lord Wilberforce, while "there are still illiterate or senile persons who cannot read, or apprehend, a legal document" who may exhibit a *prima facie* entitlement to the plea, if the mistake made is sufficiently radical, the law "will require even of signers in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents."[64] Since "those who suffer from blindness or illiteracy or illness, or other innate incapacity have to trust someone to tell them what they were signing, and are thus misled . . . it is necessary here that the handicapped party did so trust the informant and was misled to the degree"[65] necessary to establish preliminary entitlement. That is, while a signer may be incapable for any of the above or analogous reasons of "understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer believed it to be"[66] he or she is still subject to the same responsibility to exercise due care and caution, the degree of which will, of course, depend upon the particular circumstances. The standard of care imposed upon individuals of normal intelligence and full capacity to exercise due care and caution in entering into a contractual relationship will, correspondingly, be much higher.

While it is clear that any identification of negligence in the above sense with negligence in its tortious aspect has been rejected by both the House of Lords in *Saunders* and by the Supreme Court of Canada in *Marvco Color*, it is arguable that the carelessness on the part of the signer of an unread document which will negative availability of the defence of *non est factum* does, in a certain material respect, approximate the underlying basis of the tort of negligence. If negligence is to be defined as a breach of a duty of care coupled with foreseeability of harm, it does not seem wholly unrealistic to regard the signer of an unread document as negligent in this sense. Although "No one signs a document negligently unless in signing he is in breach of a duty of care to someone . . . there are circumstances in which such a duty of care can be owed to the whole world"[67]. To the degree that it is both a tacit assumption in *Saunders* and an express assertion in *Marvco Color* that the negligence of the signer consists "in signing what is known to be a legal document without finding out what the document is and contains"[68], carelessness may constitute negligence in the tortious sense since "as at the moment of signing the document might be any kind of legal document, the range of persons who might act on it to their prejudice

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[64]*Ibid.*, at 1026.

[65]Stone, *supra*, footnote 17, at 193.

[66]*Supra*, footnote 15, at 1034 *per* Lord Pearson.

[67]*Per* Lord Denning M.R. in *Gallie* v. *Lee*, *supra*, footnote 15, at 41. See also the remarks of Salmon L.J., in *Gallie* v. *Lee* at 48 that "No one signs a document negligently unless in signing he is in breach of a duty of care to someone."

[68]Stone, *supra*, footnote 17, at 216.

is correspondingly wide."[69] The 'neighbour' principle underlying *Donoghue* v. *Stevenson*[70] is expressed in sufficiently expansive language so as to impose liability on individuals who ought to have foreseen damage to 'all persons within the range of those whom he should reasonably have foreseen' would be affected by his actions. Similarly, a careless signer might well be regarded as negligent since he or she ought to have contemplated the possibility that individuals might suffer detriment by acting in reliance on the validity of the contractual document. While Lord Wilberforce in *Saunders* clearly preferred to formulate this concept in terms of a 'responsibility' to take care, rather than as a duty of care, preclusion of the defence of *non est factum* in respect of careless signers may be a further illustration, albeit in an attenuated sense, of the increasing coincidence of tortious and contractual theories of individual responsibility.

Whatever view one wishes to adopt as to the theoretical operation of negligence in this context—whether attribution of loss to the careless signer is to be justified on the basis of deterrence or whether by reference to a duty of care owed to all those who may ultimately rely upon the document—it is firmly established that the onus of proof in negating negligence rests upon the signer and not upon the third party.[71]

b) Estoppel in Pais

While negligence on the part of the respondents in *Marvco Color* clearly formed one basis for the denial of the benefit of the defense, it is further evident that an alternative ground of exclusion was that of estoppel. According to Mr. Justice Estey, carelessness on the part of the signer assumed relevance to the extent that such negligence could give rise to an estoppel in favour of the appellant since "the appellant, as it was entitled to do, accepted the mortgage as valid, and adjusted its affairs accordingly. For example, the appellant released Suwald from the chattel mortgage held by the appellant".[72] In short, the carelessness of the respondents in signing the document had directly occasioned the detriment suffered by the appellant who had acted in reliance upon the validity of the document.

The possibility that the plea of *non est factum* might be denied on the basis of an estoppel was argued for by Lord Denning in *Gallie* v. *Lee*:

> Whenever a man of full age and understand, who can read and write, signs a legal document which is put before him for signature—by which I mean a document which, it is apparent on the face of it, is intended to have

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[69] *Ibid.*

[70] [1932] A. C. 562 (H.L.).

[71] All the Law Lords agreed on this point in *Saunders*, although with degree of proof required was not specified. Lord Wilberforce required (at 1027) "a clear and satisfactory case" while according to Lord Reid (at 1017), the degree of proof required "must be left to the courts to determine in each case in light of all the facts." Russell L. J. (at 41), in the Court of Appeal, would have required corroboration." Imposition of the burden of proof upon the party raising *non est factum* was justified as a further method of restricting the operation of the plea.

[72] *Supra*, footnote 1 at 305.

> legal consequences—then, if he does not take the trouble to read it but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document; and once they act on it as being his document, he cannot go back on it, and say that it was a nullity from the beginning.[73]

Estoppel in this sense refers to the representation generated by signature as to the existence of consent to the terms of the contract. While the origin of this representation may lie in the signer's negligence, estoppel is not confined to instances of carelessness for, according to Lord Denning "even if he was not negligent . . . his conduct in signing will work an estoppel."[74] The essence of the estoppel consists in the conduct (and not merely in the carelessness) of the signer, since "to sign what you know to be a legal document, relying on the word of another as to what are its nature and contents, is a standing representation to all into whose hands the document innocently comes, that signer has signed that document with whatever nature or contents it may have."[75]

While negligence and estoppel, as limitations upon the availability of the plea of *non est factum*, may originate in the same act of careless signing, that they are distinct bars is reflected in the different elements constituting each. Negligence on the part of the signer denotes a failure to exercise due care and diligence in contract formation, which failure is, loosely speaking, culpable. Allegations of carelessness, therefore, emphasize the conduct of the signer. Estoppel, in contrast, concerns itself less with the conduct of the signer than with the effect of signature upon third parties. The type of estoppel required to defeat a plea of *non est factum* is that which is necessary to prevent strict insistence upon contractual rights. Estoppel by conduct therefore occurs when "a promise was made which was intended to create legal relations and which to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on."[76] The effect of estoppel in cases in which *non est factum* is raised as a defence is to preclude the signer from denying the validity of the objective manifestation of consent when others have acted in reliance upon the contract. In terms of the definitions of estoppel, proposed by Lord Denning in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[77], signature to an unread document grounds a putative promise of validity to all those individuals who are likely to incur detriment in reliance of its genuine nature. "The critical point is not whether the conduct is negligence or not, but whether in the circumstances the

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[73] *Supra*, footnote 15 at 305.

[74] *Ibid.*

[75] *Ibid.*

[76] As defined by Lord Denning M.R. in *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] 1 K. B. 130 at 134.

[77] *Ibid.*

conduct implies a false representation on which the party claiming estoppel has relied to his detriment."[78]

The protection of third party interests requires the development of a basis other than that of negligence for preclusion of the defence of *non est factum*. There will be many instances in which the interests of third parties would be seriously jeopardized if negligence were considered as the sole bar to a plea of *non est factum*. Several examples may be suggested. There may be individuals who can read, yet, because of limited capacities, are incapable of fully appreciating the legal consequences attaching to the document even after explanation, and are thus functionally equivalent to those who sign without reading. While one would hesitate to reach a conclusion of negligence in such circumstances, it is evident that in certain situations, the interest in protecting third party rights will outweigh the value placed upon true consent. Similarly, the executive who signs 'blind' a group of papers presented by his secretary may not, in a strict sense, be negligent, since signing 'blind' is merely one aspect of the "exigency of busy lives"[78]. Yet it would seriously impair the integrity of commercial transactions were such individuals permitted to avoid liability on the basis of *non est factum*. The distinction between negligence as a special basis of preclusion and estoppel *in pais* or estoppel by conduct as a further limitation on the operation of *non est factum* was explicitly articulated by Lord Wilberforce who, in *Saunders*, was careful to differentiate between the two categories:

> . . . a man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect. This principle is sometimes found expressed in the language that 'he is doing something with his estate . . . but it really reflects a rule of common sense on the exigency of busy lives.
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> Thirdly, there is the case where the signer has been careless, in not taking ordinary precautions against being deceived . . .[80]

Mr. Justice Estey was not required to distinguish between negligence, as a bar, and estoppel in the case of *Marvco Color* since the factual situation clearly supported denial of the plea on either of the bases suggested. However, the tenor of the judgment indicates that the Court was prepared to recognize the existence of both estoppel and negligence as restrictions upon the scope of *non est factum*, in the sense that the existence of either would serve to defeat the claims of the careless signer when weighed against the expectations of third parties.

c) Operation of the Bars

While, in order to plead *non est factum* it is imperative to establish a sufficient degree of discrepancy between the contract intended and that

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[78]Stone, *supra*, footnote 17, at 212-214.

[79]*Supra*, footnote 15, at 1026, *per* Lord Wilberforce.

[80]*Ibid.*

actually assented to, neither negligence nor estoppel constitute absolute bars to the availability of relief. In such cases, denial of the plea is discretionary only. Application of the bars as absolute is impossible due to the nature of the conflicting objectives of the legal system in this area:

> Such situations, in many legal systems, are regulated by the requirement of execution before a notary who, if he is competent and honest, as he usually is, can do much to ensure that the signer understands and intends what he is doing. In other systems, such as ours, dependence has to be placed on the level of education and prudence of the signer and on the honesty and competence of his professional adviser. But as, inevitably, these controls are sometimes imperfect, the law must provide some measure of relief. In so doing, it has two conflicting objectives: relief to a signer whose consent is genuinely lacking . . .; and protection to innocent third parties who have acted on an apparently regular and properly executed document. Because each of these factors may involve questions of degree or shading any rule of law must represent a compromise and must allow to the court some flexibility in application.[81]

Similar sentiments were expressed by Mr. Justice Estey in *Marvco Color*:

> I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case. This has been said throughout the judgments written on the principle of *non est factum* from the earliest times. The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence.[82]

Conclusion

The ultimate result of the decision in *Marvco Color* is the restoration of clarity to the law concerning the scope and operation of *non est factum*. The rejection of *Bragg's* case and *Prudential Trust* and the revival, in a modified form, of the principles articulated in *Foster* v. *MacKinnon* indicate a willingness on the part of the Court to re-examine various aspects of contract law to ensure continued consonance between the substance of that law and contemporary commercial reality. The decision also reflects a heightened sensitivity on the part of the Court to the needs and interests of third parties, a receptivity to the arguments of which may be noted in other facets of contract law.[83]

The extension of legal protection to such third parties is a consequence of the fairly rigid framework within which the doctrine of *non est factum* is to operate. Decisions such as *Saunders* and *Marvco Color*, in imposing strin-

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[81]*Supra*, footnote 15, at 1023-24, *per* Lord Wilberforce.

[82]*Supra*, footnote 1, at 315.

[83]See Waddams, *supra*, footnote 24, at 176-185, for a discussion of mistake and third parties. A converse trend may be noted with respect to the problem of third party beneficiaries as exemplified by decisions such as *Greenwood Shopping Plaza Ltd.* v. *Beattie*, [1980] 2 S.C.R. 228.

gent requirements relative to entitlement on the part of the signer of a document, will no doubt have the effect of confining the plea to fairly exceptional circumstances. It now appears that for a constructive denial of consent to entail the conclusion of nullity, a court must be satisfied as to the following three elements. In the first place, the signer must establish a divergence between his subjective appreciation of the intended operation of the contract and the actual provisions of the document, which discrepancy is, according to one test, relative to the nature and character of the document, or, alternatively, 'fundamental' or 'radical'.[84] Secondly, a signer must additionally establish a lack of negligence by showing that adequate precautions and due care were exercised in assenting to the terms of the contract. In this respect, failure by literate and experienced contractors to apprise themselves of the legal significance of the document, the validity of which is in dispute, by an examination of its provisions, will, only in an exceptional case, not amount to carelessness sufficient to preclude resort to the plea.[85] Finally, and this assertion can only be tentative, it is arguable that, even absent negligence, the principle of estoppel may be invoked to prevent denial of the validity of the signature, at least in those cases where the requirements of representation on the part of the signer and detrimental reliance on the part of the opposite are satisfied. As to the former component of estoppel, it is evident that the signer "will always have made an untrue representation by the act of signature that the document is his."[86] The operation of these *desiderata* are cumulative and in conjunction with one another have the effect of seriously restricting the operation of *non est factum*.

In light of the inhibiting impact upon recourse to the plea of *non est factum* achieved by *Marvco Color* and similar decisions, the continued utility of the plea must be seriously questioned. Would it not be a more sensible, logical and practical course to abandon the doctrine altogether? While such a proposal was considered and rejected in *Saunders* on the ground that "to eliminate it would . . . deprive the courts of what may be, doubtless on sufficiently rare occasions, an instrument of justice",[87] it is extremely difficult to envisage situations in which application of the doctrine would be possible. Clearly, in the conventional two-party situation, in which consent is induced by fraud, misrepresentation or duress (to cite a few examples), contract law already provides adequate vehicles by which to permit relief to the aggrieved or mistaken party without the necessity for the preservation

[84]In this regard, it is worth noting that, at least in Canada, there may be an additional requirement that the mistake made by the signer be induced by a misrepresentation: *Dorsch* v. *Freeholders Oil Co. Ltd.*, [1965] S.C.R. 670.

[85]Apparently, in order to raise the plea, in addition to proof of a sufficiently material mistake, one would have to negative negligence and further show that, because of the lack of detrimental reliance by the third party, an estoppel had not arisen.

[86]Stone, *supra*, footnote 17, at 218.

[87]*Supra*, footnote 15 at 1027, *per* Lord Wilberforce. With reference to this point, Lord Pearson at 1035-1037 posited that the plea might be available where the party did not intend to sign the document at all and where the signer was not recklessly careless. At the same time, however, Lord Pearson appeared also to embrace the concept of estoppel as a bar.

of the plea of *non est factum*, which in this situation is both redundant and superfluous. In those cases in which the constructive denial of consent by the signer is addressed to remote third parties seeking to rely upon the document, the arguments in favour of abandonment of the defense assume even more compelling dimensions as the arguments in favour of protecting the non-consenting signer diminish proportionately. In such cases, the interests of the innocent third parties must inevitably receive priority since, as between the signer and the third party, it is the signer who has the superior advantage in that he has the initial opportunity to inform himself as to the nature and contents of the document.[88] In electing to forego this opportunity, the signer may have been negligent; he will certainly have made a tacit representation as to validity; and he may fairly be characterized as having assumed the risk that he is mistaken. To allocate to a third party the risk of the signer's mistake appears indefensible: the third party has neither induced, nor is aware of, the signer's mistake and is fully entitled in such circumstances to rely upon the document. To hold otherwise would be to seriously threaten the stability and security of all commercial transactions, and to defeat the legitimate expectations of third parties, which expectations are, according to the premise advanced earlier, reasonably entertained.

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[88]Similar sentiments were expressed by Lord Denning, M.R. in *Lewis* v. *Averay*, [1972] 1 Q.B. 198 (C.A.) who, in an analogous context, stated, "... I felt it wrong that an innocent purchaser (who knew nothing of what passed between the seller and the rogue) should have his title depend on such refinements. After all, he has acted with complete circumspection and entire good faith; whereas it was the seller who let the rogue have the goods and thus enabled him to commit the fraud."

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