Cliffnotes

Contract Law

The University of Hong Kong

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Introduction to Contract

Contract:	Voluntary agreement that law will enforce.
Freedom of contract:	Terms set and agreed upon voluntarily by parties. The court will avoid remaking the contract.

Promisor:	Maker of promise that was breached.
Promisee:	Receiver of promise.

The Process

Plaintiff to prove:

existence > legal intent > consideration > breach > damage

Plaintiff to prove **existence** of contract: oral/written/conduct. The contract is to be in a valid form.

Plaintiff to prove parties had the **intention** to create legal relations.

Legal presumption of intent between businesses but not between family members – this can be rebutted.

Plaintiff to prove agreement was supported by **consideration**. A promise given in exchange for consideration. Exception if under seal.

Plaintiff to prove **breach** of terms (promises) by defendant.

Express and implied terms.

Terms split into conditions (cessation and damages) and warranties (damages only).

Plaintiff to prove **damage** was suffered from breach.

The defendant may be found liable for breach of contract if the 5 items can be proven on the balance of probabilities (as opposed to beyond reasonable doubt).

Formation of an Agreement

Offer and acceptance to help but not strictly decide a contract's formation.

Bilateral Contracts – 2 promisors

Exchange of promises.

"I will sell my car for $500".	An offer
"I accept".	Acceptance, consideration is executory – promises exchanged but consideration yet to be performed.

Unilateral Contracts – 1 promisor

"I will pay $5 for return of my lost cat".	An offer
[Action: cat returned]	Acceptance of the offer and performance of consideration combined. Consideration was executed.
[Action: provide goods / services]	An offer
[Action: knowingly accept goods]	Provided that no reasonable person would believe the goods were free, this is acceptance and must be paid for.

'Offer'

An indication of the **willingness to be bound by certain terms**. Intention to be bound follows as soon as offer is accepted.

The offeror / master of the offer can designate how the offer is to be accepted. He can withdraw the offer before acceptance.

'Acceptance'

Final, **unqualified** assent to the offer.

Unqualified: No more new terms, i.e. not a counteroffer.

Cross Offers

An offer to sell and an offer to buy at the same price that coincidentally arrive at the respective parties through the post do not constitute a contract. No knowledge and no agreement.

Tinn v Hoffman

Offers and Invitations to Treat

Interest to sell may not constitute a true offer. It cold be an *invitation* for an offer to be issued by the other party.

Harvey v Facey [PC]

Telegram stating lowest price interpreted as an invitation to treat. Following 'acceptance' reply not valid.

Gibson v Manchester CC [HoL]

Sentence: "may be prepared to sell" interpreted not to mean 'offer' but simply an expression of interest.

Spencer v Harding

Property may not necessarily be awarded to highest/lowest bidder unless following explicit wording.

Bilateral contracts

In general, **shop displays** and catalogues are considered invitations to treat.

Pharmaceutical Society v Boots [CA]

Fisher v Bell

If offer was on seller's side, then you would be forced to pay after taking the goods from the shelves, there would be no second chance. But see *Thornton v Shoe Lane Parking* where Denning suggested that automatic vending machines could make offers since money could not be extracted once entered. Note modern technology renders this statement invalid.

Unilateral contracts

An advertisement might constitute an offer if worded properly and the intent is clear.

Carlill v Carbolic Smokeball	*Partridge v Crittenden*
Deposit of £1,000 interpreted to be clear intent by offeror to be bound by his terms.	**Limited stock of chickens denotes that offeror cannot possibly entertain all the world's requests so no intent to be bound by terms, not an offer for sale.**

Difficult unilateral contracts

A [rewards] notice must have motivated the offeree to perform his part otherwise there is no contract. The **motivation** just needs to be M > 0.

R v Clarke Motivated by other means, not by notice. No contract.

Williams v Carwardine Some motivation, contract. **M > 0**

The offer must be **known** before it can be accepted.
Acceptance must mirror offer.

Clarke, Australia.

Gibbons v Proctor

Revocation

Generally, unilateral offers cannot be revoked after initiation of performance.

Errington **Continuous** performance of consideration (mortgage installations), revocation not possible.

Luxor v Cooper Offer revoked before point of sale. Since judge considered sale to be a **one off** action, revocation was allowed. Judge may have been influenced by low level of work involved to complete sale.

Offers in Bilateral Contracts

Offers must be **communicated**.

Knowledge of the offer is required.

Offer must be **open** for acceptance. Period may be set (consideration is an issue).

Offer may have specific **acceptance terms**.

Offer is **revocable** anytime before acceptance.

Acceptance in Bilateral Contracts

Unqualified acceptance: no counter offers: *Hyde v Wrench*

Communication of acceptance.

When acceptance takes effect

When it is **communicated** to the offeror.

Powell v Lee

There was no communication of acceptance by plaintiff to managers.

There was no contract by analogy to eavesdropping. No intent by defendants to make any offer.

Authorized communication preferred – by offeror to offeree and not by 3rd party.

Silence cannot be acceptance.

Felthouse v Bindley

The Postal Rule

Acceptance as soon as acceptance letter is posted.

Only for **acceptance**: *Adams v Lindsell | Byrne v Van Tienhoven*

Post office regarded as authorized **agent** for contracting parties: *HFI v Grant*

Only if post is impliedly/expressly **allowed**: *Quenerdaine v Cole*

Only if **reasonable** to use post: *Henthorne v Fraser*

Revocation of posted acceptance

Can an offeree withdraw his acceptance, after it has been posted, by a later communication, which reaches the offeror before the acceptance? There is no clear authority in English law. The Scottish case of *Dunmore v Alexander* (1830) appearing to permit such a revocation is an unclear decision. A strict application of the postal rule would **not permit such withdrawal**. This view is supported by decisions in: New Zealand in *Wenkheim v Arndt* (1873) and South Africa in *A-Z Bazaars v Ministry of Agriculture* (1974). However, such an approach is regarded as inflexible.

Instantaneous Communications

Postal rule not valid: *Entores v Miles*

Instantaneous may not mean it is **communicated**: *Brinkibon*

Susanto: Applied *Entores* and states that **place** and **time** of acceptance is **where** and **when** offer was accepted.

Method of Acceptance

Method of acceptance **may be prescribed** in the offer.

Holwell Securities v Hughes:	Postal rule held not to apply where offer was to be accepted by "notice in writing". Other communication was required.

If a method is prescribed but does not exclude others, the other party may use an **equally advantageous** method: *Tinn v Hoffman*:

Acceptance by Estoppel

If there is **no fault** on the part of the offeror that he did not get the communication of acceptance, then there is no contract | contract made where acceptance was received: *Entores*.

If the notice is sent during normal **business hours**, it will be considered valid. If not, it will be considered valid on the next day's business hours.

Contract Law Week 3

Duration of an Offer

An offer lasts until

A **rejection** / counter offer (both *Hyde v Wrench*);
Request for information not CO (*Stevenson v McLean*)…

Withdrawal before acceptance;

Lapse of specified / reasonable (*Ramsgate Victoria Hotel*) time;

Offeror **dies** (with exceptions);

Failure of an express/implied **condition** (*Financings v Stimson*) offer to buy car lapsed when car was damaged – implied condition that car would be in same state as when offer was made.

Where a series of counter offers are **exchanged** and finally, some form of relevant consideration is performed without express agreement, what terms govern the transaction? The court uses the **last shot** rule – the last contract received before performance prevails as it was implicitly accepted.
Even limitation clauses may not work.
See: *Butler Machine Tool*

Withdrawal

An offer to keep an offer open can be withdrawn if it was **not supported by consideration**: *Routledge v Grant*.

Withdrawal must be **communicated** to the offeree: *Byrne v Van Tienhoven*.

The revocation need not be communicated by the offeror personally, it is sufficient if it is done through a **reliable third party**: *Dickinson v Dodds*.

Where an offer is made to the whole world, it may be revoked by taking **reasonable steps**: *Shuey v United States*.

Once the offeree has commenced performance of a unilateral offer, the offeror may not revoke the offer: *Errington v Errington*. There, performance was of a continuous type, not one-off – contrasting *Luxor v Cooper*.

Death

The offeree cannot accept an offer after notice of the offeror's death. However, if the offeree does not know of the offeror's death, and there is no personal element involved, then he may accept the offer: *Bradbury v Morgan*.

Finality, Completeness

If the contract sought to be enforced is too **vague** or **lacks essential terms**, the courts cannot enforce it.

May v Butcher:	A contract may be defeated if there is uncertainty in a fundamental term (price), and no means of resolving it.
Scammell v Ouston:	A contract may be defeated if there is profound uncertainty in its terms.

Completing the Terms

Courts often save commercial contracts if the terms can be implied.

Hillas v Arcos [HL]:	**Price** was not given but since it was **common to all**, it could be implied.
Sudbrook v Eggleton [HL]:	Price "to be fixed by valuers" taken to mean 'reasonable price' by the court. The valuers were implied to be a non-essential term. Liberation of the law in progress.
British Bank v Novinex [CA]:	Consideration performed by other party – contract should be saved.
Foley v Classique Coaches:	**Performance underway**… contract saved despite lack of complete certainty in the terms.
Goodman Corp:	Reliance on statutory provision (s10 SOGO) to save contract..

Limitations

The court will not imply terms if parties wanted the **possibility of backing out**.

HK Advanced Knitwear: Door was left open for either party to exit.

Court will not imply terms if there was no machinery for completing the terms.

Chu Yu Tin v Lo: There was no machinery for objective calculation of compensation. No certainty. No contract.

Date of Completion

The date of completion is an essential term in contracts for **sale of land**.

Kwan v Yaacov [CFA]: Date must be in contract – else void. HK property market is volatile and the UK principle cannot apply as it was developed in a period of stable economy.

Negotiation

An agreement to negotiate **does not constitute a contract**:

Walford v Miles [PC]: A lock-out agreement with specified time is enforceable with consideration, see: *Pitt v PHHH Asset Management*;
A lock-in (agr. to negotiate) agreement is never enforceable

Contract Law Week 4

"Subject to Contract"

This phrase or equivalent renders an agreement **unenforceable** as it is conditional on the completion of a later formal contract.

AG v Humphreys Estate

Darton v HKID

Provisional Agreements

A PA refers to the standard agreement prepared by the estate agent and signed by the vendor, purchaser and estate agent after negotiation of the main terms of the sale and purchase. If entered with intention that it binds the parties until replaced by subsequent agreement, the PA will be enforced.

Yiu Yau Ping v Fong

Intention to create legal relations

Domestic and Commercial Agreements

Domestic/Social Agreements

Presumption of no-intent.

Balfour v Balfour **[CA]**	*Merritt v Merritt*
Husband backed off promise to support wife. They were living in amity **at the time of the agreement. Floodgates of litigation, no cause to interfere with private things. No consideration and** presumption affirmed**.**	**Husband and wife** not living in amity**,** presumption rebutted**.**

Coward v Motor Insurers [CA]:	Co-workers travelled together on motorcycle. As regards to future journeys, the parties were not contractually bound as there was no legal intent. Undertaken trips do consist of legal intent, however. **Presumption rebutted** by **reliance** on agreement.
Parker v Clark:	Drastic action by plaintiff. Degree of **reliance** on agreement high, **presumption rebutted**.
Simpkins v Pays:	**Non-family third party** rebuts presumption. The mutual arrangement was a joint enterprise to which cash was contributed in the expectation of sharing any prize.
Jones v Padavatton:	**Vague** terms of contract cannot allow a contract.
Snelling v Snelling:	Business arrangement rebuts presumption of no-intent.

Husband and wife living in harmony (or not). *Balfour, Merritt.*

Degree of reliance on the agreement. *Coward, Parker.*

Non-family third parties. *Simpkins.*

Vague terms of contract. *Jones.*

Business arrangement: *Snelling.*

Commercial Agreements

Presumption of intent to be legally bound.

Edwards v Skyways: The defendant did not pay so the pilot sued. The defendant argued that the use of the words 'ex gratia' (gift) showed that there was no intention to create legal relations.

It was held that this **agreement related to business matters and was presumed to be binding**. The defendants had failed to rebut this presumption. The court also stated that the words used simply indicated that the defendants did not admit any pre-existing liability on his part; the legal enforceability of the settlement itself remained positive.

The presumption can be rebutted by the inclusion of an express statement:

Rose and Frank Co v Crompton Bros Ltd [HL]

Where an **honour pledge was expressly stated**, the presumption of intent was rebutted. Individual orders that had been placed did, however, constitute valid contracts.

Contract Law Week 5

Consideration

Definition:

1) Some right or **benefit** given to one party; or
2) Some forbearance or **detriment** suffered by the other.

See *Currie v Misa*

Generally, there must be a legal benefit or detriment. A **receipt of something one is not already entitled to** or an **undertaking of something one was not previously obliged to**.

A benefit to one party or a detriment to another.

Consideration is a necessary prerequisite of a contract unless it is a deed; signed, sealed and delivered.

CN is important as it is provides a "badge of enforceability".

CN cannot be illegal, nor is it usually allowed where the action is contrary to public policy.

Types of Consideration

Executory Consideration

An exchange of promises to perform acts in the future, e.g. a bilateral contract for the supply of goods whereby A promises to deliver goods to B at a future date and B promises to pay on delivery. If A does not deliver them, this is a breach of contract and B can sue. If A delivers the goods his consideration then becomes executed.

Executed Consideration

If one party makes a promise in exchange for an act by the other party, when that act is completed, it is executed consideration, e.g. in a unilateral contract where A offers £50 reward for the return of her lost handbag, if B finds the bag and returns it, B's consideration is executed.

Motive

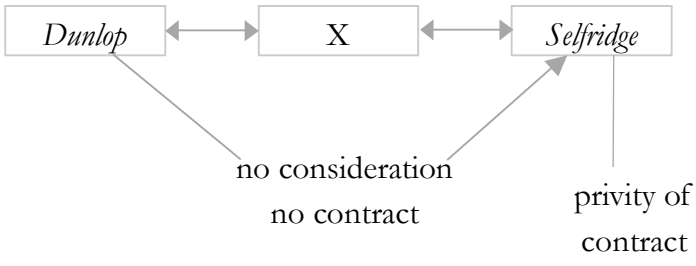
The **motive might not be recognised as consideration**. The **actual value** of the consideration is not something the courts can refer to.

Thomas v Thomas: T wished W to live in his house after his death (not consideration). Executors agreed to let her stay at £1 annual rent (consideration recognised).

Consideration must move from the promisee

The person who wishes to enforce the contract must show that he provided consideration; it is not enough to show that someone else provided consideration. The promisee must show that consideration moved from him. The consideration does not have to move to the promisor. See:

Dunlop Tyres v Selfridge [HL]



Past Consideration

Where A voluntarily performs an act, and B then makes a promise, the consideration for the promise is 'in the past'.
The rule is that **past consideration is no consideration**.

Re McArdle: House repairs were completed and then someone promised a reimbursement. That reimbursement cannot be enforced because the consideration (repairs) are past.

Roscorla v Thomas: Promise of quality after sale agreement cannot be enforced as consideration paid for the sale agreement is unrelated past consideration.

Exceptions

Lampleigh v Braithwait: L got pardon from king to free B who then promised to pay, but failed. The courts said that the undertaking was based on an **assumption of consideration** (an *assumpsit*) so the pardon and the payment should be coupled together. Consideration not past.

Re Casey's Patents: If something is done in a business context and it is clearly understood by both sides that it will be paid for, then past consideration will be valid.

Pao On [PC]:
- Act done at **promisor's request**.
- **Assumpsit** can be implied.
- **Payment legal**ly enforceable.

Adequacy and Sufficiency

Providing consideration has **some value**, the courts will not investigate its adequacy. Where consideration is recognised by the law as having some value, it is described as 'real' or 'sufficient' consideration. The courts will not investigate contracts to see if the parties have attained a good bargain. See:

Chappell v Nestle [HL]: Chocolate wrappers considered valuable.

Forbearance

Whether forbearance constitutes consideration depends on its sufficiency.

White v Bluett: Promise not to complain – not CN.

Hamer v Sidway: Promise not to drink, gamble or use tobacco – valid CN (forfeiture of legal rights).

Thorne v Motor Trade Association: Promise not to put trade association on stop-list – valid CN

Wade v Simeon	*Cook v Wright*
Promise to forego knowingly invalid right **to sue**	**Promise to forego invalid right to claim but with** honest belief **in right**

– no CN | – valid CN.

Performance of Legal Duty

If someone is under a public duty to do a particular task, then agreeing to do that task is not sufficient consideration for a contract (remember "doing what one was not obliged to do"), see:

Collins v Godefroy

If someone **exceeds his public duty**, this may be valid consideration. See:

Glassbrooke v Glamorgan

Harris v Sheffield United Football

Existing Contractual Duty

If someone promises to do something he is already bound to do under a contract, that is not valid consideration.

Stilk v Myrick	*Hartley v Ponsonby*
Captain gave extra money for extra work. – no CN **because** work was contractual.	**Captain gave extra money for extra work.** – valid CN **because work** significantly altered the nature of contract **and a new contract was formed.**

The principle set out in *Stilk v Myrick* was amended by the following case. Now, if a party to an existing contract later agrees to pay an **extra bonus** in order to ensure that the other party performs his obligations under the contract, then that agreement is binding if the party agreeing to pay the bonus has thereby **obtained some new practical advantage or avoided a disadvantage**…

This seems to abolish the requirement that any variation to an existing contract needs to be supported by fresh consideration. See:

Williams v Roffey [CA]: There were benefits to Roffey including:
(a) making sure Williams continued his work;
(b) avoiding payment under a damages clause;
(c) avoiding the expense and trouble of getting someone else.
Therefore, Williams was entitled to payment.

This case cannot be extended to debt cases, see: *Foakes v Beer* [HL] and *Re Selectmove Ltd [CA].*

Accordingly... the present state of the law on this subject can be expressed in the following proposition:

(i) if A has **entered into a contract** with B to do work for, or to **supply goods/services** to B in return **for payment** by B and

(ii) at some stage before A has completely performed his obligations under the contract B has **reason to doubt** whether A will, or will be able to, **complete his side of the bargain** and

(iii) B thereupon promises A an **additional payment** in return for A's promise to perform his contractual obligations on time and

(iv) as a result of giving his promise, B **obtains in practice a benefit**, or **obviates a disbenefit**, and

(v) B's promise is not given as a result of **economic duress** or fraud on the part of A, then

(vi) The benefit to B is **capable of being consideration** for B's promise, so that the promise will be legally binding.

Existing Contractual Duty Owed to a Third Party

If A promises to do something for B but is already bound by a contract to do this for X, it **remains good consideration**. See:

Scotson v Pegg:

A agreed to deliver coal to X who sold the coal to B and told A to deliver to B who said he would unload it. B's promise was enforceable by A as A's delivery of coal was good consideration although he was already bound to do so by contract for X.

Scotson contracted to deliver coal to X. X sold the coal to Pegg and ordered Scotson to deliver the coal to Pegg. Then Pegg promised Scotson that he would unload it at a fixed rate but reneged.

In an action by Scotson to enforce Pegg's promise, Pegg argued that the promise was not binding because Scotson was bound by his contract with X (a third party) to deliver the coal anyway and had not provided consideration.

It was held that Scotson's delivery of coal (the performance of an existing contractual duty to a third party, X) was a benefit to Pegg and was valid consideration. It could also been seen as a

detriment to Scotson, as they could have broken their contract with X and paid damages.

Shadwell v Shadwell: Uncle promised to pay nephew money after his marriage (already due on contract with the woman). The fact of marriage was consideration despite being a contract with a third party.

Part Payment of a Debt

Payment of a smaller sum **does not discharge duty** to pay a higher sum.

This is because the agreement to receive a lower amount was **not supported by consideration**. The agreement is void.

Foakes v Beer [HL]: no CN to support lower-amount payment agreement.

Exceptions

Where promise to accept lower sum in full settlement is made **under consideration** or under **deed**.

Where original claim was **not for a fixed sum**.

Where debtor did **something extra**, e.g. earlier time, different place or different payment method, **at the creditor's request**.

Where payment is accompanied with **some other benefit**.

Where payment is made by a **third party**.

Contract Law Week 6

Promissory Estoppel – Equitable Remedy

When one party promises to **waive his rights** under an **existing contract** and the other party has **acted in reliance** on that promise, it will **bind** the promisor even though there was **no consideration**.

Central London Property v High Trees [CA]:

> In 1937 P granted a lease on flats to D at £2500. Because of the outbreak of war in 1939, D could not get enough tenants and in 1940 P agreed in writing to reduce the rent to £1250. After the war in 1945 all the flats were occupied and P sued to recover the arrears of rent.
>
> The promise to accept only half was intended to apply during war conditions. Obiter: if P sued for the arrears from 1940-45, the 1940 agreement would have

defeated their claim. Even though D did not provide consideration for P's promise to accept half rent, this promise was intended to be binding and was acted on by the Ds. Therefore P was estopped from going back on their promise and could not claim the full rent for 1940-45 but they could give notice to raise rent to previous levels.

Limitations

The doctrine can only operate as a **defence** to a claim and cannot be used as the basis for a case, see: *Combe v Combe* :: shield, not a sword.

Reliance on promise does not necessarily mean a detriment. Some action done differently than otherwise is sufficient, see: *WJ Alan v El Nasr*.

Equity: If the promisor's promise has been extracted by **improper pressure** it will not be inequitable for him to go back on his promise. See: *D&C Builders v Rees*.

The promisee may **revert** to their strict contractual rights either upon giving **reasonable notice**, or where the circumstances which gave rise to the promise have changed as in *High Trees*. See: *Tool Metal Mfg*. As can be seen, past obligations are extinguished and future obligations, already suspended, may be resumed. This contradicts *Foakes v Beer* but if the all obligations were suspended and revivable, the doctrine would be deprived of its usefulness. Note the significance with regard to single payments.

Privity of Contract

Only parties to a contract may sue or be sued. See: *Tweddle v Atkinson*.

For example, if a lecturer breaches his contract with the university and fails to teach, the students cannot sue him. Only the university can. Privity ties in with consideration, looking at the relationships from a third party's point of view.

Privity and Consideration

Some view privity as part of the doctrine that *consideration must move from the promisee* (page 20). Others do not, requiring that both privity and consideration issues to be satisfied for an enforceable contract.

Dunlop Tyres v Selfridge :: see page 36.

Criticisms of Privity

A and B enter a contract whereby C derives benefit. A breaches the contract causing damage to C yet C cannot sue. He might get B to sue on behalf of him. B may not have suffered damage due to A's breach and can only claim for nominal damages. C has no claim to those damages unless he had a relevant contract with B.

Specific performance would work but it is a remedy in equity and is discretionary.

Beswick v Beswick: N promised to H that he would pay support to W upon H's death. When H did die, N reneged. W sued and failed personally, but succeeded as executor of the H's estate and on his behalf (H, of course, having been a party to the contract).

Avoiding the Doctrine of Privity

Sometimes, contracts can be drafted to include the third party as party to the contract.

A and X can be one side and B can be on the other.

This can be done for a limited set of cases.

Where Privity Ceases to Apply

Collateral Contracts

A transaction between two parties may be of particular concern or affect to the performance of a third party. A collateral contract may be entered into between the third party and one of the original parties. This may be a useful device for avoiding privity of contract.

Law of Tort

If the parties are not in privity, they can sue in tort. See *Donoghue v Stevenson*.

Agency

If A enters into contract with B who is acting as agent for C then C is a party to the contract and may sue or be sued.

Trusts

If A enters into contract with B who promises to do something for C, if it can be shown that A was a trustee for C (meaning A holds C's contractual rights in trust) then C can enforce B's obligations in equity.

Assignment

Where A enters into contract with B, A can assign rights to C who can sue on them.

Contract Law Week 7

Representations and Terms of Contract

Definitions

Misrepresentation: false statement of fact made by a party to contract that induces the other to contract.

Puff: statement/sales talk with no legal force.

Statement / opinion: binding depending on the circumstances.

Representation v Term

Representation → misrepresentation

Representation ↛ breach of contract *unless* found to be a term.

Breach of contract remedies > misrepresentation remedies.

Types of Terms

Condition **Termination + damages**

Warranty: **Damages** only

Innominate: Remedies **variable** depending on effect of breach.

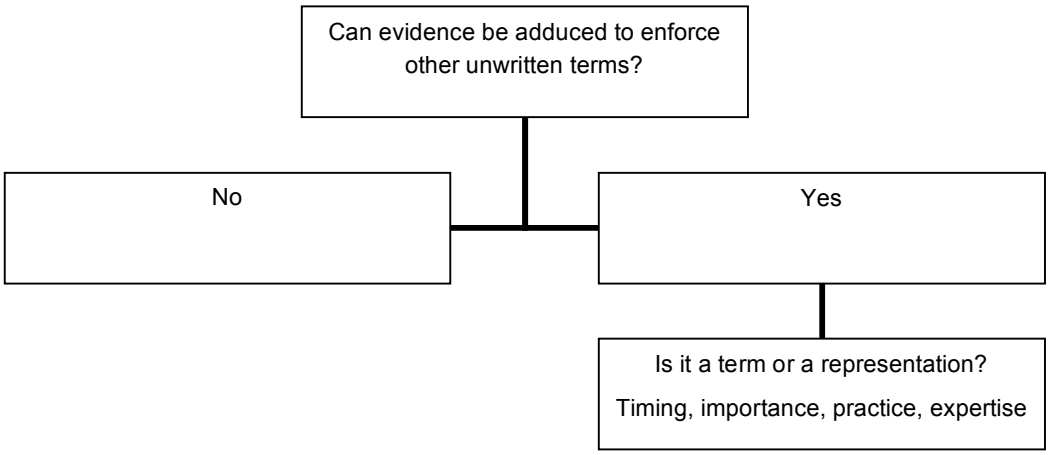
Express and **implied**: Implied terms are implied from facts, custom or law. Both have the same effect but differ in the way they are proved.

From Representation to Term

Courts to objectively ascertain **parties' intentions**. Each case will be different.

External evidence: Conduct, words and behaviour of parties taken into account.

If an intelligent bystander would reasonably infer that a term was intended, that will suffice.



Factors affecting objectivity

The closer a rep is made to the **date of contract**, the more likely it will be a term.

Routledge v McKay [CA]: Rep made 7 days before contract not a term.

If a rep is emphasized to be **crucial to a party's decision** to enter a contract, the more likely it will be a term

Bannerman v White: False rep of "sulphur not used" held term because party would not have contracted if sulphur was used.

If the rep is a **warranty normally given** for a class of transactions, the rep will normally be held to be a term.

Hopkins v Tanqueray: Statement said 1 day before contract held not term as warranties were not usually given.

A rep made by one who has significantly more **expertise** in that area will be more likely to be held as a term.

Oscar Chess v Williams

Dick Bentley v Harold Smith

If the parties took time to record the agreement **in writing** and the terms were not included in the written contract, the rep will be more likely to be held as a term.

Routledge v McKay [CA]

On 'expertise'

Oscar Chess v Williams	*Dick Bentley v Harold Smith*

Seller had *less* expertise **than buyer did. Seller's representation** was not a term**.**	Seller had *more* expertise **than buyer. Seller's representation** was a term**.**

Animal Cases

Schawel v Reade:	"Sound horse" held to be a term because seller's **special expertise** suggested not to check the horse.
Couchman v Hill:	"Heifer unserved" held to be a term despite the fact that no warranty was given in the auction. In the alternative, the Court of Appeal found that the statement was a collateral contract.
Harling v Eddy:	"Nothing wrong with her" held to be a term because seller's **special knowledge** suggested not to check the horse.

The Parol Evidence Rule

Where a contract is made in writing, all terms stated there are final. Any external evidence to make a representation a term is ignored unless…

Exceptions to the rule

The evidence to be admitted would show that a **collateral contract/warranty** was made before or at the time of the written contract.

It is of **custom** and usage to imply or explain a term from a representation.

The language of the contract is **ambiguous** and the factual background can help the courts interpret the document.

The **contract is not in operation**. E.g. conditional contracts where the parties orally agreed that the contract would not come into effect until a certain event occurred, see: *Pym v Campbell*.

The evidence is relevant to the **legality** of the contract. E.g. misrepresentation, duress or alleged non est factum.

The evidence is relevant to the **identity** or **capacity** of the parties.

There is very clear proof that **there was an error** in recording the parties' actual agreement/contract.

Defining 'collateral'

A collateral promise is useful to circumvent the Parol Evidence Rule (PER) to add or lessen any terms from the main contract.

> HKU offers me a job. I am reluctant to sign because of the salary reduction clause. HKU learns of this and calls to promise that the salary reduction

> clause will never apply if I sign today. If I accept and sign today then there are 2 contracts: the main employment contract and an oral collateral contract.

A collateral (subordinate) term is a warranty, i.e. an unimportant term of the contract.

Proving a Collateral Warranty

This is quite difficult in theory as CWs are only to be used where **clear evidence** shows representations were to be terms / have contractual force.

Heilbut Symons v Buckleton [HL]:

> there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract, I will give you £100," is in every sense of the word a complete legal contract collateral to that main contract.

City & Westminster Properties v Mudd:

> The defendant, who had been a tenant, resided at the shop. When the lease fell for renewal, the plaintiffs inserted a clause for use of the premises to be for business purposes only. The defendant asked if he could sleep there, was told that he could and he signed the lease. Even though this assurance contradicted the lease, evidence of it was held admissible to prove a collateral contract which the tenant could plead in answer to a claim for breach of contract.

Esso Petroleum v Mardon:

> Prediction of petrol sales were deemed as a contractual warranty because it was a factual statement on an **important matter** made by a party who claimed to have **special skill** and knowledge.

Third Parties

Shanklin Pier v Detel: P employed X to paint a pier.
X bought paint from D who told them that the paint would last for seven years. It only lasted for three months.
The courts found a collateral contract between P and D.

P had provided consideration by entering into an agreement with X with instructions to purchase D's paint.

Conclusions

Collateral contracts are useful to evade…

(a) the parol evidence rule (e.g. *City & Westminster Properties v Mudd*);

(b) the formerly limited remedies for misrepresentation (e.g. *Esso Petroleum v Mardon*) since breach of contract can be invoked; and

(c) privity of contract (e.g. *Shanklin Pier v Detel*).

Implied Terms

Tests Used by the Courts

Implied by Custom

First the terms must not be expressed in the contract.

The custom must be **well established**.

The terms to be implied **must not contradict** express terms.

Hutton v Warren

Implied by Business Efficacy

Where term is necessary for contract to be **workable**.

The Moorcock: Ship owner contracted with dock to moor. Tide lowered and ship struck bottom sustaining damage. Argued implied term that bottom was safe since jetty operates under such conditions.

HELD: implied term.

Implied by the 'Officious Bystander'

The implied term should be **so obvious** to **both parties** so it goes without saying if it were mentioned to them, see:

Shirlaw v South Foundries

Combination of Tests

Both tests were used in: *Reigate v Union MFG*.

Trollope v NWHB:

The courts do not make or improve contracts but interpret them.

If **express terms** are **unambiguous**, they shall be applied even if the court thinks they are disadvantageous.

Terms will be implied only if the courts think that the parties intended to do so.

BP Refinery v Shire of Hastings:

Reasonable and Equitable

Necessary to give **business efficacy** (*Moorcock*)

So **obvious** that it goes without saying (*Shirlaw*)

Able to be expressed in **clear** terms

Do not **contradict** express terms, see: *Lynch v Thorne*.

Courts will apply the tests **strictly**. Fairness and reasonableness are not factors taken into account. Major terms argued to be implied will likely not be implied because they are not 'obvious' to *both* the parties. Additionally, missing major terms counter the necessary certainty and completeness of contracts.

Implied by the Law

Terms implied by law are often subject to certain categories of contractual relationships, e.g. landlord/tenant, employer/employee.

Liverpool CC v Irwin: Tenancy agreement omitted obligations of landlord. Common facilities failed – plaintiffs argued that landlord has an implied term to maintain. Held and accepted.

It was not agreed that terms should be implied because it was just, fair and reasonable to do so.

Andayani v Chan: Term of minimum wage payment implied into contract.

Malik v BCCI: Employer has implied term not to conduct corrupt or dishonest business.

Sale of Goods Ordinance SOGO, Cap26

S14: seller has right to sell goods.

S15: if sale by description, goods shall correspond with description.

S16: goods shall be fit for use or requested purpose. Unless defect could have been found on reasonable examination.

S17: goods shall correspond with sample.

Supply of Services (Implied Terms) Ordinance SOSO, Cap457

S5: service to be done with reasonable care and skill

Provided that no term is expressed…

S6: completion within reasonable time

S7: purchaser shall pay a reasonable charge

Nature and Effect of Terms

Contingent Conditions

Condition Precedent: Contract does not start until condition is satisfied, see:
Pym v Campbell

Condition Subsequent: Contract ends when condition is satisfied.

Classifying Terms

Labelling of Terms

Labelling of terms as 'warranty' or 'condition' is **not conclusive**, see:

Schuler v Wickman Machine Tools:

> Schuler stated that it was a condition that Wickman should do 1,500 visits during the length of the contract. Wickman failed this and Schuler terminated the agreement claiming that they were entitled to do so under the 'condition' label.
>
> The House of Lords held that the parties could not have intended that Schuler should have the right to terminate the agreement if Wickman failed to make one of the obliged number of visits, which in total amounted to nearly 1,500. The contract gave Schuler the right to determine the agreement if Wickman committed a material breach of the obligations, and failed to remedy it within 60 days of being required to do so in writing.
>
> The House had regard to the fact that **the relevant clause was the only one referred to as a condition**. The use of such a word was a strong indication of intention but it was not conclusive. Lord Reid felt that it would have been **unreasonable** for Schuler to be entitled to terminate the agreement for Wickman's failure to make even one visit because of the later clause. The word 'condition' made any breach of the clause a 'material breach', entitling Schuler to give notice requiring the breach to be remedied. But not, as Schuler sought, to terminate the contract forthwith without notice.

Sale of Goods Ordinance, Cap26

S12: Unless a different intention appears from the terms of the contract, conditions as to **time of payment** are not the essence of a contract of sale.

S13: Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition.

> Whether a stipulation in a contract of sale is a condition or a warranty depends on the construction of the contract
>
> Where the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty unless there is a term of the contract, express or implied, to that effect.

Condition

A very important term where a breach gives you rights to **cease your own performance** and claim damages.

Warranty

A less important term whose breach allows you to claim **damages**.

Innominate Terms

Depending on the effect of breach, the term may give rights under condition or warranty.

Hong Kong Fir Shipping:

> The defendants claimed that the term as to seaworthiness was a condition of the contract, any breach of which entitled them to repudiate. The plaintiffs claimed damages for wrongful repudiation.
>
> Diplock, LJ: There are many **complex contracts** which cannot be categorised as being conditions or warranties. Remedies do not follow automatically from a prior classification of the undertaking as a condition or warranty. Breaches that will **deprive the innocent party of substantially the whole benefit** of the contract will allow repudiation.

Despite the above case's stance, courts realise a need for certainty and will try to use classifications of condition and warranty.

The Mihalis Angelos:	Denning: The fact that a contracting party gives a bad reason for ending a contract does not prevent him from relying on a good reason when he discovers it afterwards. Megaw LJ: A party can validly repudiate without having to establish that the breach has produced serious consequences which go to the root of the contract.
Bunge Corp v Tradax:	The House of Lords held that the term of 'notice' was a condition. The House of Lords thought that **in mercantile contracts time would usually be of the essence** and not an innominate term.

The sellers could not, as a practical matter, perform their own obligation until the buyers had given them notice of the ship's readiness to load.

The classification promoted certainty, for it enabled the sellers to tell, immediately on receipt of the notice of the ship's readiness to load, whether they were bound to deliver.

Misrepresentation

Prevents **unfair methods** precedent to forming a contract.

Intended to uphold the 'common intention' and 'contracts as bargains' principle.

Non-intention to misrepresent is not a defence.

The onus is on the claimant to show a misrepresentation was made and relied upon in him entering into the contract.

There is **no duty to disclose anything** about the object the contract concerns. See caveat emptor / buyer beware and *Smith v Hughes*.

Pre-contract		Post-contract	
Puffs	*Representations*	*Terms*	
Invitations to treat	**Non-contractual statements**	**Express warranties**	**implied conditions**
		Innominate / intermediate	

Elements for Actionable Misrepresentation

Definition: A false statement (positive action by the representor (clear and unambiguous)) of material fact that induces a party to enter into contract.
This statement **must not have been incorporated as a term** of the contract otherwise it would be an action for a breach of contract.

False **statement**: Unambiguous positive **communication** by representor – not necessarily a promise. Thus **silence** is not misrepresentation (*Smith v Hughes*), but **half-truths** are. In *Nottingham Patent Brick v Butler* [1887], a solicitor stated that he was unaware of any covenants in a deed. This was correct, but only because he had not read the deeds. Also, in *Dimmock v Hallett*, a vendor stated that his farms were already let but did not state that the tenants had given notice to quit.

In *Thomson v Christie's Fine Art Security Services* [2004] C the seller was liable to T for describing two vases as 'Louis XV' when this was only 70 per cent certain. In view of their special relationship, C did not have reasonable grounds for expressing this as an unqualified opinion. T was entitled to the difference between the price (nearly £2 million) and what they were actually worth. You may either hide all the information or show all the information to get your best bargain.

Deliberate concealment though silent may constitute misrepresentation, see: *Gordon v Sellico* [1986] where estate agents concealed dry rot to make a flat more saleable and *Horsfall v Thomas* where a vendor concealed a gun's defects..

Fact:

Opinion is not fact, see: *Bisset v Wilkinson* unless given by an 'expert', see: *Smith v Land & House* where it was held that "a most desirable tenant" though really an opinion really a statement of fact and *Esso Petroleum v Mardon*. In *Economides v Commercial Union Assurance*, an ignorant student's estimate of his flat's contents' value was held to be an opinion.

A false statement by a person as to future action is not a misrepresentation and will not be binding on a person unless the statement is incorporated into a contract.

However, if a person knows that his **promised action**, which has induced another to enter into a contract, will not in fact be carried out then he will be liable. See: *Edgington v Fitzmaurice*.

A statement of **law** is not actionable because everyone is presumed to know the law **BUT** *Kleinwort Benson v MMC* and *Pankhania v Hackney* [2002] suggests otherwise.

In **contracts uberrimae fidei** (contracts of utmost good faith) a duty of disclosure of all material facts is imposed because one party is in a strong position to know the truth. Examples would include contracts of insurance and family settlements. A material fact is something which would influence a reasonable person in making the contract. If one party fails to do this, the contract may be avoided. See: *Lambert v Co-Operative Insurance Society* [1975]. Where there is a fiduciary relationship between the parties to a contract, a duty of disclosure will arise, e.g. solicitor and client, bank

manager and client, trustee and beneficiary, and inter-family agreements.

Material: Statement would **affect the mind of a reasonable person** in deciding whether to contract. Reliance on a statement, however, need not be reasonable, see: *Museprime Properties v Adhill Properties*.

Inducement: Takes priority over materiality because once inducement is proved, materiality is proved (or overlooked). This is a question of proof and will be easier if the statement is held to be material.

Inducement **need not be the only reason** for contracting, see: *Edgington* above.

There can be no inducement if the misrepresentee was **unaware** of the misrepresentation. See: *Horsfall v Thomas*.

There will be no inducement if the representee does not rely on the misrepresentation but on his **own judgment** or investigations. See: *Attwood v Small*. This rule does not apply where the misrepresentee was **given an opportunity to discover the truth** but does not take the offer up. The misrepresentation will still be considered as an inducement. See: *Redgrave v Hurd*. Also applies where the misrepresentation was fraudulent: *Pearson v Dublin Corp*.

If the statement is material and there is proof that the representee entered into contract, the law will presume that the statement was a misrepresentation.

Change of circumstances after statement of a fact warrants disclosure – see: *With v O'Flanagan*. Similarly, a change of intention would make a previous representation of that false, see: *Ray v Sempers*.

Types of Misrepresentation

Fraudulent Misrepresentation

Derry v Peek: A false statement made knowingly; without belief in its truth; or recklessly as to its truth. Reckless in this sense means that the representor was aware of his ignorance but still makes it.

Failure to act reasonably is not fraud, gross carelessness is required to justify an inference to fraud – Angus v Clifford [1891]. Fraud is difficult to prove so a statutory method is better.

Negligent Misrepresentation

Hedley Byrne: Statement made without the reasonable standard of care. This depends on the special relationship between the parties.

Innocent Misrepresentation

Where misrepresentor had reasonable grounds for believing in its truth.

Remedies

Primarily rescission then damages.

Rescission available to all types of misrepresentation.

Common law remedies for fraudulent misrep > negligent misrep (*Hedley Byrne*). Fraudulent where the misrepresentation was made without belief in its truth or recklessly as to its validity, see: *Derry v Peek*. Heavy onus on the misled.

Common law negligence under *Hedley Byrne* offers separate route to damages.

Damages for statutory negligence similar to those under tort of deceit.

Damages in addition to rescission can be claimed if there was consequential loss.

Rescission

Setting aside the vitiated contract and **restoring as far as possible**, the parties to their original positions. This differs from *termination* of a contract due to its breach.

If the parties cannot be returned to their original positions, the contract cannot be rescinded. Also, since rescission is an equitable remedy, there are discretionary bars to it.

Fairness and Justice

Cheese v Thomas [1993]:

> A house, which had been jointly bought, had to be sold afterwards at considerable loss. The agreement between the two parties for the purchase was rescinded.
>
> HELD: Court to **look at all circumstances** in granting suitable restoration. It was not necessary for the guilty party to bear the whole loss and it was fair that the proceeds should be divided according to the parties' respective contributions.

Process

Rescission has to be activated by a claimant as a misrepresentation only makes a contract *voidable* – not void. The injured party may rescind the contract by giving

notice to the representor. However, any act indicating repudiation, e.g. notifying the authorities, may suffice. See: *Car v Caldwell*.

Bars to Rescission

Affirmation of the Contract

The injured party affirms the contract if, with **full knowledge of the misrepresentation** and of their **right to rescind**, they expressly state that they intend to continue with the contract, or if they do an act from which the intention may be implied. See: *Long v Lloyd*.

Note that in *Peyman v Lanjani*, the CA held that: unless the plaintiff knew of the right to rescind, he could keep his right to rescind despite proceeding with the contract with knowledge of the misrepresentation. The plaintiff here did not know he had such right. As he did not know he had such right, he could not be said to have elected to affirm the contract.

Lapse of Time

If the misrepresentation was not fraudulent and the injured party does not take action to rescind within a **reasonable time**, the right will be lost.

The time runs from the date of the contract, not the date of discovery of the misrepresentation. See: *Leaf v International Galleries*.

Restitution in Integrum Impossible

The injured party will lose the right to rescind if **substantial restoration** is impossible, i.e. if the parties cannot be restored to their original position. See: *Vigers v Pike* and *Clarke v Dickson*.

Precise restoration is not required and the remedy is still available if substantial restoration is possible. Thus, **deterioration in the value or condition** of property is not a bar to rescission: *Armstrong v Jackson* where:

> a broker purported to buy shares for a client, but in fact sold his own shares to the client. Five years later, when the shares had fallen in value from nearly £3 to 5 shillings, it was held that the client could rescind on account of the broker's breach of duty. He still had the identical shares and was able to return them, together with the dividends he had received.
>
> McCardie J: "It is only … where the plaintiff has sustained loss by the inferiority of the subject-matter or a substantial fall in its value that he will desire to exert his power of rescission… If mere deterioration of the subject-matter negatived the right to rescind, the doctrine of rescission would become a vain thing."

Third Party Acquires Rights

If a third party acquires rights in property, in good faith and for value (for value without notice), the misrepresentee will lose their right to rescind. See: *Phillips v Brooks*.

Thus, if A obtains goods from B by misrepresentation and sells them to C, who takes in good faith, B cannot later rescind when he discovers the misrepresentation in order to recover the goods from C.

Note:

The right to rescind the contract will also be lost if the court exercises its discretion to award damages in lieu of rescission under s3(2) Misrepresentation Ordinance: In a **non-fraudulent misrepresentation** (negligent and innocent misrep) which entitles rescission, if rescission is indeed claimed, the court may declare the contract subsisting and **award damages in lieu of rescission**.
For innocent misrepresentation two previous bars to rescission were removed by the MO:

s2(a): The misrepresentee can rescind despite the misrepresentation becoming a term of the contract.

s2(b): The misrepresentee can rescind even if the contract has been executed.

Damages

Fraudulent Misrepresentation

The aim is restitution in integrum.

All direct losses whether foreseeable or not are recoverable, see:

Doyle v Olby; and
SNC Securities v Scrimgeour Vickers [HoL].

HELD: In cases of fraud, the representee may even claim in respect of falls in the value of the property after the time of the contract was made if: 'either

(a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset; or

(b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, *locked into the property*'.

FACTS: The fraudulent misrepresentation induced the plaintiff to buy shares in a company for £23 million. The loss directly attributable to the fraud was £1.2 million (i.e. the market price at the time was £21.8 million). However,

the House of Lords also allowed the plaintiff to claim losses attributable to two other events:

- First, loss due to 'newly discovered flaws' in the property; the subsequent discovery of another unconnected and unknown fraud in the company meant that the actual value of the shares at the time of the contract (if the fraud had been known) was only £12.25 million. The House of Lords saw this loss as analogous to the loss of someone fraudulently induced to buy an already diseased racehorse, which later dies; he can recover the entire price paid.
- Second, loss due to being 'locked into' the property, since it was not commercially feasible for the plaintiff to resell the shares immediately on discovering the fraud, it suffered further losses when the value of the shares in the general market.

Moreover, damages may include **lost opportunity costs**, e.g. loss of profits, see: *East v Maurer*.

In *Archer v Brown*, the court held that the plaintiff was entitled to aggravated damages in deceit for the distress he had suffered. **Punitive and exemplary damages** also recoverable: *Kuddus*.

The claimant will not be entitled to recover damages after the date he discovered the misrepresentation and had an **opportunity to avoid further loss**: *Downs v Chappell*.

Even if the contract **generated a profit**, damages can still be awarded on the basis that a proper contract would have generated even more profits: *Clef Aquataine*.

Limitation period is 6 years from discovery of the fraud.

Negligent Misrepresentation

The injured party may recover for only reasonably foreseeable loss, see: *Esso Petroleum v Mardon* and the *Wagon Mound*.

There are no exemplary damages.

Limitation period is 6 years from the making of the statement.

Innocent Misrepresentation

Damages in lieu of rescission only. Cannot be claimed as it is a power of the court.

Indemnity will also be granted alongside rescission.

Statutory Damages

The starting point is that the representee can recover for:

1. Loss in property value at the time of contracting: Where the representee is induced to buy some property he is entitled to the difference between the

price paid and the market value of the property at the time the contract was entered; and

2. Consequential losses: The representee can recover damages for other 'out of pocket' losses such as for personal injury, loss of or damage to property, and wasted expenses.

The fiction of fraud in the MO means that damages for all misrepresentations, if they cannot be proven to have honest and reasonable grounds, will be calculated by the fraud measure as per above.

Indemnity

An order of rescission may be accompanied by the court ordering an indemnity. This is a monetary payment by the misrepresentor for expenses created in complying with the terms of the contract and is different from damages – *Whittington v Seale-Hayne* [1900]:

> The plaintiffs bred poultry and were induced to enter into a lease of property by an oral representation that the premises were sanitary. In fact the water supply was poisoned, injuring the stock.
> The terms of the lease required the plaintiffs to pay rent to the defendants and rates to the local authority and they were also obliged to make certain repairs ordered by the local council.
>
> HELD, Farwell J: Lease rescinded with indemnity following the judgment of Bowen LJ in *Newbigging v Adam* (1886). The plaintiffs could recover the rents, rates and repairs under the covenants in the lease but nothing more. They could not recover removal expenses and consequential loss (i.e. loss of profits, value of lost stock and medical expenses) as these did not arise from obligations imposed by the lease (the contract did not require the farm to be used as a poultry farm). Had they been awarded, they would have amounted to an award of damages (i.e. expenses resulting from the running of the poultry farm).

The Misrepresentation Ordinance -MO-

S3(1): Unless the misrepresentor can prove that he had reasonable grounds to believe that the facts he stated were true, he will be liable for damages calculated by the **fraud measure**.
This is advantageous as it shifts the **burden of proof**.

S3(2): If the misrepresentation is not fraudulent, the courts can award damages instead of rescission taking into account the losses of both parties (equity).

This is subject to three matters exemplified by *William Sindall v Cambridgeshire CC*, i.e. the nature of the misrepresentation, loss to the misrepresentee should the contract be upheld and the hardship caused to the misrepresentor if the contract was rescinded.

Where there is a bar to rescission, two events may occur. These cases are persuasive only.

Thomas Witter v TBP	*Zanzibar v British Aerospace*
Courts can still award damages	**Courts have** no power

Exclusion of liability for Misrepresentation

S4 MO: No exclusion possible unless term passes reasonableness test under s3(1) CECO and burden of proof lies on the one seeking to rely on the clause.

Duress and Undue Influence

Duress

Pao On: Duress is a coercion of the will so as to vitiate consent.

Contracts entered into as a result of duress are **voidable**.

Distinguish duress from undue influence.

Duress of the Person

Actual and threats to violence towards claimant or family members

Barton v Armstrong [1975]:

Death threat held to be duress of the person

Threat **need not be decisive reason** for entering into contract.

Once act of duress is proved, **onus shifts** to defendant to show that it did not have any effect on the plaintiff's decision.

Duress of Goods

Where a person, unlawfully detained, or threatened to detain, another's goods, this was not considered to be sufficient duress to enable a contract to be avoided. See: *Skeate v Beale*.

A restitutionary rule to the effect that money paid (not a contract) to obtain the release of goods wrongfully retained, or to avoid their seizure, may be recovered. See: *Maskell v Horner*.

The decision in *Skeate v Beale* was strongly criticised in obiter by Kerr J in: *Sibeon and Sibotre*. This view was endorsed by Mocatta J in *The Atlantic Baron* [1979] QB 705, and by Lord Scarman in *Pao On v Lau Yiu Long* (below). In the light of the modern developments of duress, it would seem that ***Skeate v Beale*** **is no longer good law**. See 1992 judgement of *The Evia Luck*.

Economic Duress

Where A uses superior bargaining power in an improper or illegitimate manner to induce B to contract. Where B would feel his economic interests would be harmed if he did not. See:

Sibeon and Sibotre (old).

> The court asks 2 questions:
>
> (1) did the victim protest at the time of the demand; and
>
> (2) did the victim regard the transaction as closed or did he intend to repudiate the new agreement?
>
> Kerr, J considered that the owners would have been entitled to set aside the renegotiated rates on the ground of economic duress, but that on the present facts their will and **consent had not been 'overborne'** by what was ordinary commercial pressure.

Confirmed by:

North Ocean Shipping v Hyundai Construction (The Atlantic Baron).

> Economic duress through illegitimate pressure exerted by D in their threat to break the construction contract. **Where a threat to break a contract had led to a further contract, that contract, even though it was made for good consideration, is voidable** by reason of economic duress.
>
> However, the right to have the contract set aside could be **lost by affirmation**. The plaintiffs had delayed in reclaiming the extra 10% until 8 months later, after the delivery of a second ship. This delay defeated the plaintiff's claim for the rescission.

And added upon by the Privy Council in:

Pao On v Lau Yiu Long.

> In determining whether there was a **coercion**, enquire:
> whether the person alleged to have been coerced did or did not **protest**;
> whether, he had **alternatives** open to him such as an adequate legal remedy;
> whether he was **independently advised**; and

whether after entering the contract he **took steps to avoid it**.
All these are relevant in determining whether he acted voluntarily or not.

The approach was modified in:

Universe Tankships v ITWF (The Universe Sentinel).

Economic duress could be relied upon where a victim's apparent consent was induced by illegitimate pressure exercised on him by the other party with the consequence that **contracts under duress are revocable unless expressly or impliedly condoned after the illegitimate pressure ceased to operate on the victim's mind**.

A significant feature of this judgment is its departure from the previously stringent requirement of The *Sibeon* and *Pao On* that the victim's consent should have been 'overborne' by the pressure. This approach of Lord Scarman was cited and approved by the Court of Appeal in: *B&S Contractors v Victor Green Publications*.

Since *Pao On* (1980) there has been a considerable relaxation of the criteria needed to prove economic duress. All that is now required is a **illegitimate suppression of the victim's voluntary consent**.

Proving Duress

CTN Cash and Carry: Act should be illegitimate but outrageous yet technically lawful threat could amount to duress. Obiter.

Not all threats to breach contracts amount to duress – only where the party has no reasonable option open to him will that be duress.

Duress and Commercial Pressure

Where the bargaining power of both parties is relatively equal, duress is unlikely to be found, see: *Pao On*.

Undue Influence

An **equitable** doctrine

Pressure not amounting to duress in common law where a party is excluded from the exercise of free and independent judgement.

Misuse of relationship (trust, confidence) rendering a contract voidable.

Barclays Bank v O'Brien:

Woman 20 years younger than her husband asked to sign papers connected with the husband's debts. She never read the papers nor questioned her

husband about them. No independent legal advice nor knowledge of potential liability. The matrimonial home was then to be sold by the papers she signed.

She attempted to get off by undue influence.

HELD: Bank failed to take reasonable steps to ensure wife entered into agreement freely. Actual undue influence proved – therefore bank was unable to enforce the surety obligation.
Also held the following 3 classes of undue influence…

Class 1 | Actual Undue Influence

Williams v Bailey:

Father forwarded house as security to bank. Son forged F's signature to present checks to bank. Bank wanted security for the money: "if you accept, nothing will happen otherwise your son will be prosecuted and sent to Australia."

HELD: Bank committed actual undue influence.

It was held that the security given for the debt of the son by the father under such circumstances was not the security of a man who acted with that freedom and power of deliberation that must be considered as necessary to validate a contract to give security for the debt of another.

No previous history of relationship need be established – *BCCI v Aboody*.

Undue influence need not be sole reason for entering onto contract – *UCB Corporate Services v Williams* and *Barton v Armstrong*.

Manifest disadvantage need not be proved after proof of actual undue influence – *CIBC Mortgages v Pitt*.

Class 2A | Presumed (Undue*) Influence

Allcard v Skinner:

An unmarried woman sought a **clergyman** as a confessor. She became an associate of the sisterhood of which he was spiritual director and became a full member, taking vows of poverty, chastity and obedience. Without independent advice, she made gifts of money and stock to the mother superior on behalf of the sisterhood. She left the sisterhood and claimed the return of the stock about 5 years after leaving.

HELD: Undue influence through training.
Where parties enter into contracts seen to be irrational, these will require explanation. However, rescission in this case was not possible because of her conduct and delay.

Certain relationships presumed by law to be undue influence – *O'Brien*. These categories are not closed and common ones include: [doctor patient, parent child, guardian ward, solicitor client, religious leader disciple, trustee beneficiary.]

Etridge (2) has changed the law such that where a relationship is proved, only mere influence (not necessarily undue) is presumed

Class 2B | Presumed (Undue*) Influence

Must prove relationship of **trust and confidence** – *National Westminster Bank v Morgan* and *Lloyd's Bank v Bundy*.

Time giving rise to relationship is relevant in deciding whether relationship is of sufficient degree. It may not be very long, however – *Goldsworthy v Brickell*.

Lloyd's Bank v Bundy:

> A guarantee was given to the bank by an elderly farmer for his son's debts. The guarantee was secured by a mortgage of Bundy's house. An assistant manager of the bank, with the son, later told the father that they would only continue to support the son's company if he increased the guarantee and charge. The father did so, the assistant manager appreciating that the father relied on him implicitly to advise him.
>
> HELD: Undue influence.
> Denning held that the relationship between the bank and the father was one of trust and confidence. The bank knew that the father **relied** on them implicitly to advise him about the transaction. The father **trusted** the bank, giving the bank much **influence** on the father – yet the bank failed in that trust. There was also a **conflict of interest** between the bank and the father, yet the bank did not realise it, nor did they suggest that the father should get **independent advice**. If the father had gone to his solicitor or any man of business there is no doubt that they would have advised him not to enter the transaction as the house was his sole asset and the son's company was in a dangerous state.
> In ordinary circumstances, a bank does not incur the duty consequent upon a special relationship where it obtains a guarantee from a customer. But once it is **possible for a bank to be under that duty**, it is, as in the present case, simply a question for **'meticulous examination' of the particular facts** to see whether that duty has arisen. On the special facts here it did arise and had been broken.

National Westminster Bank v Morgan:

A husband and wife owned a home jointly. The husband was unable to meet his mortgage commitments and the building society threatened to seek possession. The husband made refinancing arrangements with the bank secured by a mortgage in favour of the bank over the matrimonial home. The bank manager called at the home to get the wife to execute the charge. She did not wish the charge to cover her husband's business liabilities. The bank manager assured her, in good faith but incorrectly, that it did not. It was, in fact, unlimited in extent and could, therefore, extend to all the husband's liabilities to the bank, though it was the bank's intention to confine it to the amount needed to refinance the mortgage. The wife had not received independent legal advice before executing the mortgage. The husband and wife fell into arrears with their payments, and the bank obtained an order for possession of the home. Shortly afterwards, the husband died without owing the bank any business debts. The wife argued that the bank manager exercised undue influence over her and that a special relationship existed between her and the bank which required it to ensure that she received independent legal advice before entering into a further mortgage. She also sought to rely upon *Lloyd's Bank v Bundy*.

HELD:

1. A transaction would not be set aside on the grounds of undue influence unless it could be shown that it was **manifestly disadvantageous** to the party alleged to be influenced. As to what constitutes that, see: *BCCI v Aboody* where it was held that it had to be a disadvantage which was obvious as such to any reasonable person who considered the transaction at the time with knowledge of all the relevant facts. BUT the fact that the complaining party had been deprived of the power of choice (e.g. because his will had been overborne through the failure to draw his attention to the risks involved) was not of itself a manifest disadvantage rendering the transaction unconscionable.
2. The basic principle was not a vague public policy (as formulated in *Allcard v Skinner*), but the prevention of victimisation of one party by another.
3. The transaction in the instant **case was not unfair** to the wife.
4. Although the doctrine of undue influence could extend to commercial transactions, including those between banker and customer, it could not be maintained on the present facts that the relationship was one in which the banker had a dominating influence.
5. The bank, therefore, was not under a duty to ensure that the wife had independent advice.

BOC v Wong:

D and X were brothers. X got loan from P (a bank) and as security, D agreed to execute a charge in favour of P. X defaulted and P sued D (guarantor) to recover the loan. D attempted to set aside the charge saying he was induced to act by X's undue influence.

Class 2B?

HELD: In determining whether a person falls into class 2B, besides the nature of the transaction, we must look at the characters of the complainant and the influencer. It must be done particularly on the complainant. If the complainant e.g. is a well-educated or strong willed person **capable of independent thought**, the courts will believe that he made a free, rational choice for himself.

On the other hand, a naïve person would be regarded in a completely different light. In this case, he would be regarded to have such trust in the influencer that it becomes questionable whether he entered the transaction of his own volition.

In this case, the complainant was not ignorant having a university degree and good commercial sense.

Verdict: No relationship of domination. Younger brother entered into mortgage because it was commercially beneficial. "The law has long recognised the need to prevent influence in these relationships of trust despite adverse acts of conduct."

The effect of *Etridge* on existing law.

Before *Etridge*, the moment a recognised relationship of trust and confidence has been shown as in class 2A or proved by evidence (2B), there was a presumption that the influence had been unduly exercised. This conclusion is based on presumed* undue influence. More or less, the burden falls on the influencer that he has not abused that influence.

Etridge has rejected that presumption in relationship to parties in the 2nd class.

There must be something more. In order to reverse the burden of proof, there must be **something in the transaction** to call for explanation. E.g. Were a donor parts with almost all her things; where a gift of small amount is made to a person standing in confidence to the donor, some proof of influence must be given… If the gift is so large that it cannot be reasonably

accounted for on the account of charity or friendship, the burden is upon the donee to support the gift. **Undue influence is inferred from the facts**.

Now presumption of undue influence will only arise if

Case belongs to 2A or 2B;

There is something in the contract calling to explanation.

Overall burden is on the claimant.

Manifest disadvantage

National Westminster Bank v Morgan:

In cases of presumed undue influence, must prove that the transaction was to the manifest disadvantage of the complainant.

CIBC Mortgages v Pitt:

There is no need for this in class 1 cases .

Allcard v Skinner:

All that is needed now…

Belong to class 2A or 2B

Transaction is suspicious e.g. huge gift by donor which cannot reasonable be accounted for by the relationship.

Evidentiary burden turns on dominant party to show that transactions is not a result of undue influence.

Undue Influence and 3rd Parties

Wrongful act of husbands affecting banks' ability to get surety from wives.

Class 2A still valid after *Etridge*. Class 2B is doubtful (presumed undue influence after proven relationship of trust and confidence).

Husband is not a party to the surety agreement. When the husband becomes bankrupt, the bank will try to enforce the surety agreement on the wife – to sell the matrimonial home. The wife will argue that the surety should not be enforced because at that time, the husband exercised undue influence on her.

O'Brien: notice: Where the wife offers to stand as surety using the matrimonial home, the surety will be enforced unless:

It was procured by the **wrongful act** of the husband;

The bank had actual **notice** of the wrongful act or *ought to have known* the wrongful act;

The bank had **not taken reasonable step**s to satisfy itself that the wife consented to act as surety freely with knowledge of the relevant facts.

When a wife stands as surety, the bank will be '**put on inquiry**' when:

The transaction is prima facie **not financial advantageous** of the wife; and

There is a **substantial risk** that in procuring the wife to act as surety, the husband had committed a legal or equitable wrong that entitles the wife to set aside the transaction.

CIBC Mortgages v Pitt S&T669:

Bank had no notice of the husband's wrong. There is nothing suspicious about **joint loans** unless the bank knew it was not for joint purposes.

Etridge:

In this case, the bank could only enforce the mortgage to the extent that was misrepresented by the husband.

Relationships of sexual intimacy expanded. Where the bank **knows of *a* relationship** (married and unmarried), it will be put on inquiry where a party is acting as surety.

Whether the wife is a **director** or **shareholder** in the husband's company is irrelevant because it is difficult to quantify her control.

Once the bank is "Put on Inquiry", a solicitor's written confirmation must be obtained. The bank should:

Directly communicate with the wife to tell her it is for her **own protection**. Purpose is that thereafter she will not be able to dispute the legal binding effect of the documents. The bank must not proceed until the wife has responded to this communication showing willingness to take legal advice.

The wife must be told to take up a **separate solicitor** from the husband and be told that she may elect to have the same one.

Once a solicitor has been nominated, the bank must **provide him with the financial information** to enable him to perform his work. Before that, however, the bank must seek the **consent** of the husband. If he refuses, the bank must not proceed with the transaction.

Should the bank **suspect that the wife has been misled** or has been influenced, such suspicion must be communicated to the wife's solicitor.

Having done the above, a written confirmation that the wife has been explained the nature of the documents and the practical implications of those documents should be obtained. The **content of the solicitor's advice** should be as follows:

In **plain language**.

Reason for solicitor's participation (reliance by bank to enforce transaction).

Nature of the document to be explained. Risks and implications. (loss of assets in repayment, bankruptcy, etc.)

Seriousness of the **risk** to be highlighted (loan, terms might be increased without her knowledge).

The decision to act as guarantor is her **own decision** – financial means of the wife to be considered. Value of the matrimonial home and husband's financial conditions to be considered. Consent to be obtained from husband.

Check whether wife is willing to act as surety.

Why is it acceptable that a **solicitor be shared**?

A solicitor can be concerned only with one party's interests at once. Conflicts of duty will be considered. Expense will fall on husband so financial considerations are important.

What if the solicitor **fails his professional duty**?

→ Negligence and breach of contract

Bank **not liable for incompetence of solicitor** as long as it had performed its duties set out above.

Exceptionally, the bank may be liable if it **suspects** that the wife had not been property advised. It should not sit and look away.

Wives less able to establish they are victims of undue influence. They are not 2A and ordinarily, it is difficult to prove that a gift is irrational etc. Note that the real issue is to prove undue influence.

Remedies for Undue Influence

Successful defence against financial institutions – setting aside mortgage sureties.

Bars to equitable remedies incl. Impossibility of restitution.

> Degree: S&T358 New Sombrero Phosphate Company: accounting for 'usage' of object.

Where the ground for rescission is fraudulent misrepresentation, courts will be more harsh and more likely to grant rescission.

Unconscionable Bargains

Note that duress and undue influence are concepts dealing with procedural fairness – how contracts are brought about.

The doctrine of unconscionable bargains addresses both procedural and **substantive fairness**.

Hart v O'Connor:

> **Careless** bargain made by **ignorant** person acting **without independent advice** which cannot be shown to be a fair and reasonable transaction.

Chitty on Contracts limits:

> **Oppressive** to complainant
>
> It may only apply where the complainant was suffering from types of **bargaining weaknesses** (infirmity, illiteracy…)
>
> Other party must have **acted unconscionably** in knowing having taken advantage of the claimant's weakness/dire need.

Contract must be substantively **unfair**;

Unreasonableness is not enough – *Alec Lobb v Total Oil*. One party must have been extortionate, oppressive or coercive.

Any **unfairness in negotiations** will also attract this doctrine;

Weakness/disability of claimant is relevant;

Wrongdoing of person seeking to enforce contract will be considered.

Lack of independent legal advice.

Unconscionable Contracts Ordinance | CAP 458:

S5: Remedies include: changing the part of the contract which is unconscionable; not enforcing the unconscionable part; and not enforcing the whole contract.

S6: Courts factor the following in determining whether a contract is unconscionable or not:

Bargaining power;

Unreasonable contract conditions;

Whether claimant understood documents;

Whether any undue influence;

Compare with other alternatives available; and

Conduct since contract.

Certainty of commercial transactions, protecting promises but protecting weaker parties against exploitation. Filling the gap left out by other doctrines for procedural fairness.

Work in progress.

Last resort.

Mistake

Introduction

For a mistake to affect the validity of a contract, it must be an "operative mistake", i.e. a mistake which operates to make the contract void from the beginning.

The effect of a mistake is:

> At common law, when the mistake is operative, the contract is usually void ab initio (from the beginning). Therefore, no property can pass under it and no obligations can arise under it.
>
> Even if the contract is valid at common law, equity may void the contract on the ground of mistake. Property will pass and obligations will arise unless or until the contract is avoided. However, the right to rescission may be lost.

Common Mistake

When both parties make the same error relating to a fundamental fact.
E.g. A contracts to buy a car from B. Both parties genuinely believe the car is parked in Central but the car has been stolen.

(A) Res Extincta

A contract will be **void** at common law if the subject matter of the agreement is **non-existent**. Whether a contract is void or not depends on the construction of the contract. The contract will be **valid notwithstanding the non-existence** of the subject matter if:

Performance was guaranteed; or
it was a purchased chance.

Couturier v Hastie (1856):

> A buyer bought a cargo of corn which both parties believed to be at sea. The cargo had, however, already been disposed of.
>
> HELD: Contract void. Subject matter was the corn and it did not exist as the contract required.
>
> That case was interpreted differently by the High Court of Australia in: *McRae v The Commonwealth Disposals Commission* (1950) where it decided that *Couturier* involved a total failure of consideration. Mistake cannot stand where it was caused by the claimant's own culpable conduct. Distinguished from statute (below) since there was never a tanker and thus nothing 'perished'.

Galloway v Galloway (1914):

Parties believing they were married, entered into a separation agreement. They later discovered that they were not validly married.

HELD: The separation agreement was void for a common mistake.

S8 SOGO or S6, Sale of Goods Act 1979:

Where there is a contract for the sale of specific goods, and the goods without the knowledge of the sellers have perished at the time when the contract was made, the contract is void.

Impossibility of performing contract:

Griffith v Brymer (1903)

At 11am on 24 June, the plaintiff had entered into an oral agreement for the hire of a room to view a coronation procession on 26 June. The procession had been cancelled earlier that day without either of them knowing so there was no procession.

HELD: Wright J held the contract void. The agreement was made on a common mistake of facts which went to the whole **root of the matter** so the plaintiff was entitled to recover his £100.

Sheik Bros v Ochsner [1957]:

Contracted to give crops in return for license to grow crops. Unknown to both parties, the land could not grow any crop.

HELD: Contract void. **Inferred *basis* of contract** that land *could* grow crop.

(B) Res Sua

Where a person makes a contract to purchase something which, in fact, **belongs to him**, the contract is void.

Cooper v Phibbs (1867):

Cooper agreed to lease a fishery from Phibbs not knowing it was actually his.

HELD: The contract is void. This has connotations with legal mistake.

(C) Mistake as to Quality

Bell v Lever Bros Ltd [1931]:

A mistake as to the quality of the subject matter of a contract has been confined to very narrow limits. According to Lord Atkin: "A mistake will not affect assent unless it is the mistake of **both parties**, and is as to the existence of some quality which makes the thing without the quality **essentially different** from the thing as it was believed to be".

Since *Bell v Lever Bros*, the courts have been reluctant to find a mistake as to quality to be operative. One could ask: "what is the substance of the contract?". If the quality of the thing is not the substance of the contract, then it is good.

Solle v Butcher [1949]

Leaf v International Galleries [1950]:

> The painting's painter was held to be part of the quality of the painting. The contract concerned a painting and the painting was bought though with a different painter.

Harrison & Jones Ltd v Bunten & Lancaster Ltd [1953]

Associated Japanese Bank Ltd v Credit du Nord [1988]

BCCI v Ali and others [1999]

Remedies

Exercising equitable jurisdiction, courts can

> Refuse specific performance;
>
> Rescind any contractual document between the parties;
>
> Impose terms between the parties in order to do justice.

Relevant cases include:

> *Cooper v Phibbs* (1867) LR 2 HL 149
>
> *Solle v Butcher* [1949] 2 All ER 1107
>
> *Grist v Bailey* [1966] 2 All ER 875
>
> *Magee v Pennine Insurance* [1969] 2 All ER 891

Rescission for mistake is subject to the same bars as rescission for misrepresentation.

Mutual Mistake

A mutual mistake is one where both parties fail to understand each other.
E.g. A contracts to buy a car from B thinking the car is a BMW. B thinks A is offering to buy his Toyota. What they want is different.

Where Parties are at Cross Purposes (meant different things)

The court will apply an objective test and consider whether a **'reasonable man'** would take the agreement to mean what one party understood it to mean or what the other party understood it to mean…

> If the test leads to the conclusion that the contract could be **understood in one sense only**, both parties will be bound by the contract in this sense.

If the transaction is **totally ambiguous** under this objective test then there will be no consensus ad idem (agreement as to the same thing) and the contract will be void at law:

Wood v Scarth (1858)

Raffles v Wichelhaus (1864):

> D agreed to buy cargo from P arriving by A-ship from Bombay. There were actually two A-ships sailing from Bombay – one in October, one in December. D meant the one sailing in October and P meant the one sailing in December.
>
> HELD: No contract. Nothing in the contract could point to one or the other A-ship. If there was something in the contract which allocated this 'risk', there would be no case.

Scriven Bros v Hindley & Co [1913]

Remedy

If the contract is void at law on the ground of mistake, equity 'follows the law' and specific performance will be refused and, in appropriate circumstances, the contract will be rescinded.
However, even where the contract is valid at law, specific performance may be refused if performance of it would cause **hardship** – *Wood v Scarth*. See also: *Nutt v Read* (1999)

Unilateral Mistake

Where only one party is mistaken.
E.g. A contracts to buy a Benz from B. B knows that A is mistaken but he accepts the money, telling A where his Honda is then subsequently runs away.

(A) Mistake as to Terms of the Contract

Where one party is mistaken as to the **nature of the contract** and the other party is actually or ought to be **aware** of the mistake, the contract is void.

For the mistake to be operative, the mistake by one party must concern the **terms of the contract** itself – *Hartog v Colin & Shields* [1939]:

> Seller mistakenly offered to sell goods at a given price per pound when they intended to offer them per piece. All the preliminary negotiations had been on a per piece basis.
>
> HELD: Contract is void as the buyers must have realised that the sellers had made a mistake. **Inferred knowledge**.

A mere error of judgement as to the **quality** of the subject matter **will not suffice** to render the contract void for unilateral mistake – *Smith v Hughes* (1871):

> The buyer thought he was buying old oats when in fact they were new oats and the contract was for the sale of oats in general.
>
> HELD: The mistake related to the quality and not identity of the subject matter. Only if the contract was for old oats, would it be void.

Remedy

Equity follows the law and will rescind a contract affected by unilateral mistake or refuse specific performance as in: *Webster v Cecil* (1861).

(B) Mistake as to Identity

Where a party makes a contract with a second party believing him to be someone else. The law makes a distinction between contracts where the parties are inter absentes and where they are inter praesentes.

Contracts made inter absentes

Where parties are **not physically** in each others presence, e.g. deals by correspondence, and one party is **mistaken as to the identity**, not the attributes, of the other and intends instead to deal with some **third party it already knows of**, and **the other knows** this, then the contract will be void for mistake – *Cundy v Lindsay* (1878):

> B ordered goods from Lindsay purporting to be on behalf of a reputable firm known to Lindsay.
>
> HELD: Contract is void as Lindsay had only intended to do business with that reputable firm, not the individual. The mistake concerned the identity of the other party.

Boulton v Jones (1857):

> Defendant sent an order to B unaware that he had sold the business to F. F sent the goods as per the order but D did not pay as he had only intended to do business with B.
>
> HELD: The mistake concerned identity and the contract was void.
>
> :: CF ::

King's Norton Metal v Edridge Merrett (1897):

> W ordered goods purporting to be on behalf of a reputable firm.
>
> HELD: Contract not void because the sellers intended to do business with the individual, not knowing the company well. They were mistaken as to attributes, i.e. his creditworthiness.

Common thread to succeed:

There must be an **identifiable third party** with whom one intended to contract; and

The mistake must be as to **identity** and **not attributes**.

Contract made inter praesentes

Where the parties are inter praesentes (**face to face**) there is a presumption that the mistaken party intends to deal with the other person who is physically present and identifiable by sight and sound, irrespective of the identity which one or other may assume. For such a mistake to be an operative mistake and to make the agreement void the mistaken party must show that:

(i) they intended to deal with someone else;

(ii) the party they dealt with knew of this intention;

(iii) they regarded identity as of crucial importance; and

(iv) they took reasonable steps to check the identity of the other person

Even where the contract is not void, it may be voidable for fraudulent misrepresentation but if the goods which are the subject matter have passed to an innocent third party before the contract is avoided, that third party may acquire a good title. The main cases are as follows:

Phillips v Brooks [1919]:

HELD: The jeweller contracted to sell the ring to the crook in the shop who represented he was Sir George Bullough. The jeweller had heard of Sir George Bullough and checked he lived at the address given. The jeweller gave evidence he had no intention of making any contract with any person other than Sir George Bullough. The court adopted a passage from the judgment of *Edmunds v Merchants' Despatch Transportation*:

"The fact that the seller was induced to sell by fraud of the buyer makes the sale voidable, not void (*misrepresentation)*. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practised any other deceit to induce the vendor to sell."

Ingram v Little [1960] (overruled by *Shogun Finance*)

Lewis v Avery [1971]

Shogun Finance [2003]:

In a face-to-face sale, a misapprehension as to the identity of the person in front of him does not in itself render the contract void for mistake. This type of mistake is one as to the attributes of the person with whom he is dealing – a mistake as to his credit worthiness, which may be voidable for misrepresentation.

The only time a contract becomes void for a mistake as to identity is when the identity of the person contracted with is "of a direct materiality in inducing the vendor to enter into the contract".

CRITICISM: The difference between mistake as to identity and mistake as to attributes was untenable and that the face-to-face presumption should be abolished. A person should be deemed "to intend to contract with the person with whom he is actually dealing, whatever mode of communication" (per Lord Nicholls). On this basis both their Lordships considered that *Cundy v Lindsay* was wrongly decided and should no longer be followed. In some respects the arguments put forward by Lords Nicholls and Millett are attractive propositions since here the vendor will bear the loss. This is considered to be fair since, given that the vendor and third party are both innocent, the vendor is not only usually better to bear the loss but also it is the vendor who has taken the risk of parting with the goods without recovering payment for them.

The exception to the above rule is that if a party **intended to contract only with the person so identified**, such a mistake will render the contract void:

Lake v Simmons [1927]

Citibank v Brown Shipley [1991]

(C) Mistake as to Documents | Non est factum:

As a general rule, a person is bound by their signature to a document, whether or not they have read or understood the document – *L'Estrange v Graucob* [1934]. However, where a person has been induced to sign a contractual document by fraud or misrepresentation, the transaction will be voidable.

A successful plea of non est factum makes a document void. The plea was originally used to protect illiterate persons who were tricked into putting their mark on documents. It eventually became available to literate persons who had signed a document believing it to be something totally different from what it actually was. See: *Foster v Mackinnon* [1869].

The use of the rule today is restricted. For a successful plea of non est factum, two factors have to be established:

(i) the signer was not careless in signing; and

(ii) there is a radical difference between the document which was signed and what the signer thought he was signing.

Gallie v Lee [HoL] [1970]:

Gallie, a widow aged 78, had made a will leaving her house to her nephew, Parkin. Parkin's friend, Lee, was heavily in debt and discussed with Parkin how to raise money on the house. In Parkin's presence, Lee put before Mrs Gallie a document which he told her was a deed of gift of the house to Parkin. She did not read it because she had broken her spectacles. The deed was in fact a deed of sale of the house to Lee.
Using this deed, Lee mortgaged the house to the Building Society, and borrowed £2,000. Lee defaulted on the payments and the building society brought an action for possession of the house. Mrs Gallie sued for a declaration that the deed was void -non est factum- and for the recovery of the title deeds.

HELD: Gallie was careless and there was no radical difference between what she signed and what she thought she had signed – it was still a sale of the house. Deed not void by non est factum.

See also *Wing Hang Bank v Liu Kam Ying* where the court followed this principle that it will not be sympathetic with people who are careless (sign without reading) and not asking what the implications there are in signing the document.

Note: Because of the strict requirements, it may be better for the innocent party to bring a claim based on undue influence.

When does mistake occur?

Mistake occurs **at the time of contract** creation. Not after.

If the subject matter existed at the time of contract and was **subsequently destroyed**, it is not mistake – *Griffith v Brymer* [1903].

At 11am on 24 June, the plaintiff had entered into an oral agreement for the hire of a room to view a coronation procession on 26 June. The procession had been cancelled earlier that day without either of them knowing.

HELD: Wright J held the contract void. The agreement was made on a common mistake of facts which went to the whole **root of the matter** so the plaintiff was entitled to recover his £100.

Why is 'mistake' a plea of last resort?

Academic discussion. Common law believes that mistake is not something people should rush to plead. It seems to contradict the fundamental principle that contracts are to be performed and the obligation to perform arises from the principle of contract. Consensus ad idem – agreement to be bound by terms. The court does not want to prejudice third parties either.

Judges see themselves as enforcers of bargains. Reluctant to let parties escape through mistake. A plea of mistake is prima facie suspicious and raises uncertainty. Starting point for common law is that parties should be held onto their bargains.

This must be balanced with the notion that the intention of the parties are to be preserved as well.

Deserving situations..?

> Lord Atkin: "A buys B's horse thinking the horse is sound and pays the price of a sound horse. He would not have bought the horse if he had known otherwise. B has made no representation and soundness was not a term. A is bound and cannot recover the price". {Caveat emptor}.
>
> "A buys a picture from B and both believe it is the work of a master and the price is paid. A has no remedy in the absence of terms."

Mistake is a hard plea.

Allocation of Risk

Has the contract allocated risks on its own terms?

Only where the contract has not allocated risks in any way will the law intervene. Where there is guaranteed performance or existence of the subject matter, risks are said to be allocated.

Associated Japanese Bank v Credit du Nord [1988]:

> Steyn J: "one must first determine whether the contract itself by express or implied conditions provides who bears the risk of the relevant mistake. **Only if the contract is silent** on the point is there room for invoking mistake".

Express terms and implied terms and caveat emptor.

E.g. "What if I find a cheaper item in another shop?" If the shopkeeper decides to refund the difference, the risk has been allocated to the shopkeeper.
If the buyer does not mention "what if" then the risk is on her. Caveat emptor covers that.

Equity in Mistake

Equity is used as a method to reduce the harshness of common law.

It renders mistaken contracts voidable. Such contracts only have to be mistaken in a substantial manner and not 'fundamentally' mistaken.

Where the contract is held to be void in common law on the ground of mistake, equity will not intervene. It will only intervene where common law states that the contract was valid.

Associated Japanese Bank v Credit du Nord [1988]:

> OBITER: Common law mistake too narrow and should be supplemented by more flexible doctrines of equity advocated in *Solle v Butcher*. It is entirely **appropriate**.

Solle v Butcher [1949]:

> In 1931 a dwelling house had been converted into five flats. In 1938 Flat No. 1 was let for three years at an annual rent of £140. In 1947, D took a long lease of the building, intending to **repair bomb damage** and do **substantial alterations**. P and D discussed the rents to be charged after the work had been completed. P told D that he could charge £250 for Flat 1. P paid rent at £250 per year for some time and then took proceedings for a declaration that the standard rent was £140. D contended that the flat had become a new and separate dwelling by reason of **change of identity**, and therefore not subject to the Rent Restriction Acts.
>
> HELD [CA]: The structural alterations and improvements **did not destroy the identity** of the flat as let in 1939. The parties' mistake or common misapprehension as to whether the flat had been so altered as to destroy its identity was a mistake of fact, but the landlord was entitled to have the lease set aside in equity on such terms as the court thought fit.

Great Peace [2002]:

> HELD [CA]: Equity has no role to play in mistake (UK only).
>
> Concerned with the purity of the doctrine and that the role of flexible discharge should be handed to legislature.
>
> Comments on equity by writers before Great Peace.

What is the position in Hong Kong as per common law and equity?

Hong Kong would have a choice since *Great Peace* is of persuasive value only.

What are the legal consequences of operative mistake?

Common Law: Renders the contract void from the beginning.

Equity: Renders contract voidable but cannot prejudice 3rd party rights.

All parties to be returned to positions as before contract.

Carr v Universal Finance:

> Inform police, AA of false cheque. Norris → X → Y → Z → plaintiff.
>
> Whether the owner has successfully rescinded the contract. Had it been done before the car passed on to innocent purchaser without notice.
>
> HELD: there was rescission and informed properly.

Fraudulent misrepresentation would mean a **voidable** contract that is at the mercy of speed of rescission. **Mistake would be a better claim** since common law mistake renders a mistake **void** and 3rd party rights are not taken into account..

How does mistake relate to other areas of contract law?

Fraudulent misrepresentation

> Sometimes parties can plead both

Frustration

> A matter of time / initial impossibility.

Fundamental breach

Failure of consideration.

Frustration

Parties have entered into a valid contract, an unforeseen event occurs which destroys the basis upon which they entered into contract. The courts may then intervene on the ground that it is no longer fair and just to hold the parties to their agreement that has been radically changed under unforeseen circumstances.

Discharge by Frustration

The result of the court's intervention is to end the contract but this might lead to hardship and inconvenience. Frustration has thus been narrowly confined –

Davis Contractors v Fareham UDC [1956]:

> "Frustration occurs when … without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would **render a thing radically different from that which was undertaken** in the contract."

The insistence that the supervening event must destroy a fundamental assumption avoids having parties use frustration as a route to escape contract. In *Davis Contractors*, the parties were expected to foresee many possibilities such as an increase in prices, labour disputes, etc. and guard against them in contract.

Force Majeure Clauses

These 'draft out' the doctrine.

> "In the event that this Agreement cannot be performed for any reason beyond the reasonable control of either party as a result of such evens as war, industrial action, floods or acts of God, then such failure to fulfil its obligations by either party shall be deemed not to be a breach of this Agreement."

Well-drafted contracts will have this as provision for the impact of unexpected events.

Hardship Clauses

Define what 'hardship' is and lays down procedures to be followed should such a hardship occur.

Intervener Clauses

Gives a third party authority to resolve a dispute, which may arise through application of the force majeure clause.

Clauses as above provide certainty and flexibility in defining what constitutes a force majeure event.

It is too drastic to terminate a contract despite the parties' wishes.

The Doctrine

National Carriers v Panalpina [1981]:

> Frustration arises when there is a **supervening** event **without default** by either party and for which the **contract makes no provision** which **changes the *nature*** (not merely the expense or onerousness) of the outstanding contractual obligations from what the parties could **reasonably have contemplated** at the time of its execution that it would be **unjust to hold them to the literal sense** in the new circumstances.
>
> Merger of systems that there be an implied term in the contract that the thing, subsequently destroyed should continue to exist until the time required; or that (modern test) there has been a radical change in obligation.

Subject Matter Destroyed

Taylor v Caldwell:

> The contract, after the burning down of a hall needed for concert performance, was held to be frustrated.

The destroyed object must have been intended by both parties to be the **subject of the contract**:

Blackburn Bobbin v Allen:

> Contract was for sale of birch timber which the seller intended to get from Finland.
>
> HELD: Contract not frustrated when it became impossible to get timber from Finland. The agreed subject matter was birch timber, not necessarily from Finland.

Subject Matter Unavailable

The death or incapacity of a person who has undertaken personal/personality obligations, such as an employment contract will also give rise to frustration.

Temporary illness of a professional performer might frustrate a contract on a particular show-day but it would not frustrate a long-term contract – *Condor v The Baron Knights* [1966]:

> Contract between a pop group and a drummer. Drummer became ill and unable to fulfil the terms of contract.

HELD: Contract frustrated.

Shepherd(FC) v Jerrom [1986].

Stated Method of Performance Impossible

Noblee Thorl [1961]:

HELD: No frustration despite increase of expense.

: CF :

Finelvet AG v Vinaja Shipping [1983]:

War between Iraq and Iran made it too dangerous to deliver the goods and the contract was frustrated.

Commercial Purpose Fails

A contract will be frustrated if the supervening event defeats the whole purpose of the contract even though performance might still be possible in some way – *Krell v Henry:*

A contract to hire a room overlooking the coronation path was frustrated when the coronation was postponed. The purpose of the contract was to view the coronation and not merely to hire a room. The judge contrasted with the case where a taxi takes a person to Epsom on Derby Day. It would be a normal contractual transaction for the taxi driver and the cancellation of the event would therefore not frustrate the contract.

Herne Bay Steam Boat v Hutton:

A contract to hire a boat to see the king's fleet being reviewed was held not to be frustrated when the review was cancelled. The fleet was still there and therefore, there was no overall failure of the contract's purpose.

Government Interference

Metropolitan Water Board v Dick Kerr [1918]:

A contract was formed to build a reservoir within six years.
The government stepped in to stop it.

HELD: Contract frustrated.

Supervening Illegality

If the law is altered after a contract is made and performance of it is made illegal, the contract is discharged – *Denny, Mott & Dickson v Fraser* [1944].

Avery v Bowden [1855]:

A contract to supply goods to Russia was frustrated when war broke out and the contract became illegal.

Leases

One to look at the length of intervention compared with the length of the lease – *Cricklewood v Leighton's*, *National Carriers v Panalpina*. Even though no frustration was found on both of these cases, the HoL said that there was no reason to find a lease frustrated given the proper circumstances (perhaps where the period of intervention is a majority term of time in the lease or if the only purpose for which the property was leased was made impossible).

National Carriers v Panalpina [1981]:

> In principle, a lease could be frustrated.
>
> In this case, a street which gave the only access to a warehouse was closed for 18 months. The lease was being held for 120 months and so the lease was not frustrated.

Delay

Jackson v Union Marine [1874]:

> A ship was chartered in November to proceed to Newport. The ship arrived almost 9 months later.
>
> HELD: Contract frustrated because the ship was not available for the voyage for which she was chartered for.
> Where the charter for a ship is expressed to run for a given time, the courts have to balance the temporary unavailability of the vessel caused by the unexpected event and the total length of the charter.
>
> CF

Pioneer Shipping v BTP Tioxide (The Nema) [1982]:

> Charterparty for a number of voyages to be made during a 9-month period. The number of voyages was halved by a strike at the port where the ship was to be loaded.
>
> HELD: Performance actually possible radically different from that which was contracted for.

Inconvenience, Loss of profits / increase in expenses

These reasons alone are *not* adequate for frustration.

Davis Contractors v Fareham:

> Strikes, bad weather and labour/material shortages caused delays but this was not enough to frustrate a contract.

Suez Cases:

Courts refused to hold shipping contracts frustrated as a result of the closing of the Suez Canal unless the contracts specified expressly, a route through the canal.

Limitations on the Doctrine

Express Provisions

Where the parties have **allocated risk** as in force majeure clauses, it may be clear that the **parties intended the risk to lie where it falls**. So if the parties have made express provision in the contract for the unexpected event which arises, the contract will not be frustrated. BUT,

The courts **interpret these clauses narrowly** and may hold that the provision was not of sufficient gravity compared to the event that actually occurred (*Jackson v Union Marine*) and cite frustration. In *Metropolitan Water Board*, a reference to 'delays' was interpreted to include ordinary delays and not delays due to government decree. Force majeure clauses cannot cover trading with enemies.

Self Induced Frustration

Frustration cannot be the act of one of the parties.

A contract is not frustrated if the supervening event was the result of the voluntary conduct of one of the parties – *Maritime National Fish v Ocean Trawlers* [1935].

The Superservant Two[1990]

> One of the two barges owned by the defendant and used to transport oil rigs was sunk. They could not fulfil their contract because their other barge was already allocated to other contracts.
>
> > HELD: No frustration because they *did* have another barge available but chose not to use it in their contract with the plaintiffs.

Negligence in bringing up the event would similarly bar frustration. However, in *Constantine Steamship v Imperial Smelting*, a performer who carelessly caught a cold was held not to be self-induced frustration.

The burden of proof is on the person alleging self-induced frustration.

Foreseeable Events

If, by reason of special knowledge, the supervening event was foreseeable by one party, he cannot claim frustration.

Amalgamated Investment v John Walker:

The possibility that a building could be listed was foreseen by the plaintiff who had inquired about the matter beforehand. A failure to get planning permission was also foreseeable and was a normal risk for developers.

HELD: No frustration.

Effect of Frustration (Common Law)

Frustration ends the contract regardless of the parties' wishes – *Hirji Mulji v Cheong*.

Sharp v McMillan [1998]:

A worker was injured and unable to work. The firm kept him on to increase its pension benefits.

HELD: **A contract, once frustrated cannot be kept alive or revived by ratification**.

The common law rule is that only future obligations are terminated. Obligations prior to the frustrating event are not affected. (The loss lies where it falls)This used to be extremely unfair – *Chandler v Webster*:

The hirer had to **pay everything payable for the hire of the room before the frustrating event and got no room**.

In the *Fibrosa* case, the House of Lords moved away from this holding that when there was a **total failure of consideration, everything paid or payable must be returned**. This, of course, could cause hardship the other way when the other party had expended expenses to deal with the contract.

{See cases involving total failure of consideration: Appleby v Myers, Cutter v Powell, Chandler v Webster, Fibrosa, LARCO}

Law Amendment and Reform Ordinance

This ordinance concerns remedies for frustration of contract.

Allows money that has been prepaid to be recovered despite that there had been no total failure of consideration.

States that a party who has done anything in performance of the contract prior to the frustrating event that confers valuable benefit upon the other party is entitled to compensation.

Section 16(2)

(i) All sums paid by that time are recoverable but see (iii);

(ii) All sums to be paid (future obligations) are cancelled;

(iii) The person who was paid or was to be paid may be allowed to retain or recover expenses incurred in performing or for the purpose of performing the contract where it is just and equitable to do so. There is no recovery in excess of incurred expenses or above the value of the pre payment.

(iv) There was stipulation for pre-payment in the contract.

Gamerco v ICM [1995]:

Pop concert promoters agreed to promote a rock concert involving the defendant group at a stadium in Madrid. 3 days before the concert, the authorities banned use of the stadium due to safety concerns. No alternative could be found.
The plaintiff claimants had paid the defendants £412,500 on account and incurred £400,000 in expenses. The defendant's expenses were unsubstantial in comparison.

HELD: The claimants could recover their all their expenses in accordance with the ordinance (since there would be no set off in the defendant's favour) and the counterclaim for breach of contract must fail.

Section 16(3)

There has been no provision for pre-payment under the contract (although a party may claim under 16(2) and (3) if there was stipulation for pre-payment);

There has been partial performance of the contract.

Either party may claim compensation for any **valuable benefit** conferred on the other party under contract.

Defining 'valuable benefit'

**BP Exploration v Hunt* (No. 2):

Lord Goff: the court shall identify and value the benefit obtained and assess the just sum which it is to award.
s16(3) is only to prevent unjust enrichment and not to apportion loss or place the parties as if the contract had or had not been performed.

In assessing the valuable benefit, **cost of performance is irrelevant**. It requires **a reference to the end benefit HAVING taken into account the effect of the frustrating event**.

In assessing the 'just sum', the cost of performance may be considered.

BP was to do the exploration on an oil license owned by Mr. Hunt in Libya. BP was to get reimbursements and concessions. Oil was discovered and subsequently, the Libyan government nationalised the field.

HELD: the valuable benefit to Hunt was the net amount of oil received and the compensation payable by the Libyan government which amounted to £85,000,000.
The just sum would cover the work done by BP less the reimbursements already received. This was assessed at £34,000,000. As the valuable benefit exceeded the just sum, BP got their compensation in full.
Their position would differ if there had been no compensation and/or no oil money received.

This ignores the wording of the ordinance which talks in terms of a valuable benefit being obtained *before* the time of the frustrating event.

Note effect on *Appleby*.

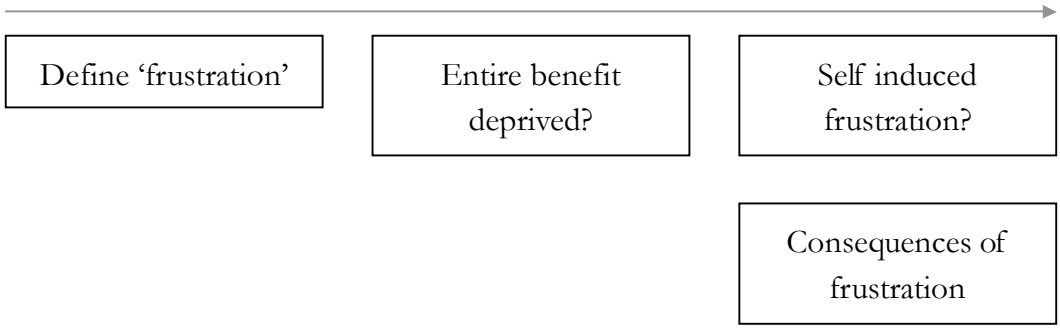
Section 17(4)

Severable contracts

Section 17(5)

Exclusions

Summary



Discharge by Performance

Parties are discharged by performance as soon as they have done their respective obligations in accordance with the contract.

Very usually, formation and performance are simultaneous, e.g. purchasing a drink, buying a newspaper, etc.

What constitutes acceptable performance?

What have the parties agreed?

Does the performance comply with the terms of that agreement?

Performance must be precise and exact

Re Moore v Landauer [1923]:

> Defendants agreed to buy 3,000 tins of canned fruit to be packed in boxes of 30 tins each. The goods were delivered but wrongly packed in boxes of 24 tins. The defendant rejected the consignment.
>
> HELD: the performance was not exact and the buyer was entitled to reject the goods. Goods must correspond with the description according to the HK equivalent of s15 SOGO.

Arcos v Ronaasen [1993]:

> Ordered timber with specific thickness. The seller delivered wrong thickness.
>
> HELD: Contractual obligations must be strictly complied with.

Section 15, SOGO:

> Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond by description and where the sale is by sample, it is not enough that the goods do not correspond to the description.

Union Eagle v Golden Achievement [1997]:

> Sale of property and buyer was late to deliver the money by 15 minutes.
>
> HELD: Any suggestion that relief could be obtained since he was "only 10 minutes late" would extend to argument as to what would be 'too late'. Also the value of the property was changing rapidly.
>
> The court does not want to dwell on the degree of lateness.

Bunge v Tradax:

> **Time is to be considered *of the essence* in mercantile contracts**.

Parties had agreed that 15 days notice must be given by the buyer to the shipper. He did not, giving 14 days only.

It had been suggested that the *Hong Kong Fir Shipping* case should be applied: substantial effect of delay to constitute a term significant enough to allow repudiation. REJECTED.

One may observe in the first place that the test is undesirable and it gives rise to too much argument as to the extent of time needed to constitute a breach. It would remove certainty.

Reardon Smith Line v Hansen Tangen:

Whether charterer was entitled to reject a tanker built in a different yard as stipulated in contract.

HELD: it did not matter where in the yard it was built or what its name was as long as it was possible for the charterers to identify the ship.

The market had risen or fallen and they were looking for a good reason to rid the contract.

RATIONALE: Sometimes, courts may refuse to accept that a particular term is a condition to hold justice.

Amendment of s15 ACT (United Kingdom only)

Breach is so slight that it would be unreasonable for the buyer to reject them. The breach will be treated as a breach of warranty. The burden of proving that the breach is slight lies upon the seller.

Mercantile contracts: practice to imply certain terms as conditions.

Time of performance

Time to perform must be exact and precise. When the time of performance is of the essence, it means it is a condition the breach of which entitles the other party to treat the contract as repudiated. Triviality of the breach or the fact that it caused no inconvenience is irrelevant.

Performance must be within a reasonable time if it is not stipulated.

Is time of the essence?

Union Eagle v Golden Achievement:

Today, both the position of the law and equity is that
time not of the essence *unless*:

- It is **stipulated** that time is of the essence (any reasonable stipulation suffices) – *Lombard v Butterworth* [1987]

- A party has given **reasonable notice** that the contract must take place within a certain time – *Rickards v Oppenheim* [1950]:

  > A car body ordered from the plaintiffs was late. The defendants gave final notice to the plaintiffs that unless it was delivered within three months, they would cancel the order.
  >
  > HELD: Time was made of the essence and three months was reasonable notice – the defendants could cancel the order.

  See also: *Behzadi v Shaftesbury Hotels* .

- The nature of the contract or **surrounding circumstances** show time is of the essence (inferred intent) – *Bentsen v Taylor Sons*. Cited and followed in *Hong Kong Fir Shipping* and *Bunge v Tradax*.

In most mercantile contracts, time will be of the essence.

Order of performance

Requirement to give notice acts as a trigger. If notice is given, the other party then has the obligation to act next. If the buyers were not given notice, it would have been impossible for the sellers to do anything – *Bunge v Tradax*:

> Completion fixed on 17th July 1991. On the 12th, the purchasers reminded the vendors of the completion date and to send documents for checking. The vendors did not send the documents yet still insisted on completion. The purchasers demanded repudiation because time was of the essence.
>
> HELD: The delivery of the papers was a condition precedent and it was necessary for the documents to be delivered in order to complete the contract.

Health Link Investment:

> Parties agreed to sign sale/purchase agreement 14 days after 23rd June 1993 (7 July) when the provisional agreement was signed. Important documents were to be delivered so the purchasers could prepare the contract. The vendors sent only part of the necessary documents.
> On the 2nd of July, the vendors reminded the purchasers that the completion date was 5 days away and finally delivered the documents.
> The purchasers asked for a 3-day extension to deal with the new documents. This was granted but on the term that they should still pay the deposit ($88M) on the agreed date.
> The deposit was not paid and the vendors considered that the contract had been breached.

HELD: The extension of time meant that the extension applied to the deposit as well. The **payment 'was concurrent' with the signing** of the sale/purchase agreement.

Independent promises include a duty to pay freight since it does not depend on the arrival of goods in good condition.

Acceptance of Partial Performance

Where the promisee receives the benefit of partial performance of the contract under such circumstances that he is able to accept or reject the work (where the contract is **divisible**) and he opts to accept the work, then he is obliged to pay a reasonable price for the benefit received. There is also a **court preference** to say that a contract does not require complete performance before payment.

But it must be possible to infer from the circumstances a fresh agreement by the parties that payment shall be made for the goods or services in fact supplied – *Christy v Row* (1808).

Cutter v Powell:

Worker undertook to said a ship from Jamaica to Liverpool but died on voyage.

HELD: Salary could not be paid as the obligation was entire and the worker had not fulfilled it.

Hall & Barker:

If you contract to make and sell a pair of shoes, a **single shoe cannot constitute partial performance**.

Partial performance may be allowed if the promisee accepts but if the promissor has **no other choice**, the other party may have not rely on it – *Sumpter v Hedges*:

In that case, Hedges was left with a half built house and had no other choice but to accept partial performance.

Substantial Performance

Mitigates the partial performance rule regarding entire obligations nearing completion. When the 'performed' contract is subject to such minor defects that he can be said to have substantially performed his promise, it is regarded more just to allow him to recover the contract price reduced by the extent to which his breach of contract lessened the value of what was done, than to leave him with no right of recovery at all.

Dakin v Lee:

Held that there was a distinction between bad performance and failure to perform.

Young v Thames Properties:

Substantiality is of **fact and degree** for trial court to decide.

Hoenig v Issacs:

Plaintiff completed works with **minor defects**.

The defects could be rectified with £50 and in relation to the entire contract of £150, that sum could be deducted so they could be paid £100.

: CF :

Bolton v Mahadeva:

The heating system was **so badly installed** that it resulted in little heating and great inconvenience. The contractor was not permitted to recover any part of the price.

Another way of distinguishing between conditions and warranties?

Whether breach is fundamental or not to be decided like *HK Fir Shipping*?

Prevention of Performance

The **promisee should not prevent** complete performance –
Planché v Colburn:

A writer was allowed payment for pieces already written when the publisher abandoned the series

Tendered/Attempted Performance

Tender of performance is equivalent to performance in the situation where X cannot complete performance without the assistance of Y and X makes an offer to perform which Y refuses – *Startup v M'Donald* (1843).

P agreed to sell goods to D and to deliver it to him 'within the last 14 days of March', payment to be in cash.
Delivery was tendered at 20:00 on 31st March (performance tendered).
D refused to accept or pay for the goods because it was already night.

HELD: The tender was equivalent to performance and P was entitled to recover damages for non-acceptance.

S39, SOGO

The seller is ready to deliver the goods and requests the buyer to take delivery.

The buyer does not take delivery within a reasonable time.

The buyer is liable to the seller for any loss caused by his refusal to take delivery and also for a reasonable charge for the care and custody of the goods.

Nothing in this section affects the rights of the seller where the buyer's refusal to take delivery amounts to a repudiation of the contract.

Summary

The question of whether a party is discharged will depend on the facts of each case and the terms of the contract.

Whether performance was exact is up to the judges to decide. Time and order of performance is important.

Where applicable, the performance might be accepted. Where the parties had a right to reject but did not, it is as if the party had accepted and has no right to treat the contract as discharged.

If the performance was substantial, the party who performed badly may have recourse.

The 'innocent' part should not have prevented performance otherwise a quantum meruit action may exist.

Tendered/attempted performance might constitute actual performance. E.g. where cooperation of Y was required and X offers performance which Y refuses.

Discharge by Breach

A failure to perform the terms of a contract constitutes a breach. A breach which is serious enough to give the innocent party the option of treating the contract as discharged can occur in one of two ways:

- Either one party may show by **express words** or by implications from his conduct at some time before performance is due that he does not intend to observe his obligations under the contract (anticipatory breach); or
- He may in fact breach a condition or otherwise **breach the contract in such a way that it amounts to a substantial failure of consideration**.

Forms of Contract Breaches

Renunciation

Firm intention not to perform. Words: "I shall not perform"

Hochster v De La Tour [1853]:

> Employment contract and subsequent "I do not require your services".

White & Carter v McGregor [1962]:

> D made a contract with P and on the same day, he terminated the contract and the plaintiff refused the termination.
>
> Test: objective. Whether party renouncing the contract had acted in such a way as to lead a **reasonable man to conclude that he did not intend to perform**.

Vaswani v Italian Motors [1996]:

> The vendor of a car claimed in good faith that he was entitled to charge a higher price than that listed at the time of ordering the car. The buyer thought the vendor had renounced the contract, refused to pay and sued him.
>
> HELD: Such was an excessive demand but did not amount to repudiation. {what difficulties does this infer in practice?}

Wong Wui v Peter [2001]:

> Agreement to purchase property. One of the clauses stated that the purchaser was entitled to inspect the property before signing. The vendor refused inspection and asked for more money. The vendor sued for specific performance.
>
> HELD: the vendor's failure to permit inspection was a continuing repudiation of the agreement.

Woodar v Wimpey [1980]:

Self-Induced Impossibility

Self induced frustration?

Joseph Constantine v Imperial Smelting [1942]:

Universal CC v Citati [1957]:

Person who tries his best but is unable to fulfil the contract has no recourse.

Total/substantial failure to perform

A failure of a degree that substantially deprives the innocent party of the whole benefit which he intended he should obtain from the contract – *HK Fir Case*. In that case, the judges were unwilling to decide what thing was breached and called it an innominate term – whose consequences are to be determined from the degree of breach.

Bettini Gye:

> Required by contract to come 6 days before performance began, he arrived 3 days late. The organisers terminated.
>
> HELD: Entitled to damages- 3 days did not go to the root of the contract.

Poussard v Spires:

> P fell ill before the performance. There was no possibility to hire a substitute.
>
> HELD: her absence created a big problem and it was more of a breach of condition. Her illness was of uncertain duration, a replacement was not replacement and her absence went to the root of the contract.

Maple Flock:

> Supply of goods by instalment where one instalment contains defective goods.
>
> HELD: contract to receive 100 tons and 1½ is defective does not deprive substantial benefit.
>
> TEST: 1) in a case where there is a fundamental breach, by looking at the proportion of the defective goods vis a vis the total amount. 2) the degree of probability that the breach would be repeated.

Decro-Wall:

The facts show that there was no question of them not being paid albeit being consistently late. It is not repudiation but a breach that can be remedied by damages.

Does that go against Maple Flock?

Given the nature of the contract, is it unfair to the plaintiff to hold him to the contract and leave him only with damages.

Repudiation before performance | Anticipatory Breach

Occurs before performance with clear declaration that a party will not be performing.

The innocent party is not under any obligation to wait until the date fixed for performance before commencing his action, he may immediately treat the contract as at an end and sue for damages – *Hochster v De la Tour* [1853]:

o See the material

- Frost v Knight [1872]:

o Extended the rule in *Hochster*. D promised to marry on the condition that he would marry her after his father had died. D renounced the engagement and P was entitled to sue. Conditional contracts can be sued upon.

- Innocent party has a right to accept repudiation and sue for damages.

Whether the anticipatory breach amounts to a repudiation depends on the actual circumstances of the case. Lord Selborne stated in *Mersey Steel v Naylor Benzon* [1884]:

> "you must examine what the conduct is to see whether it amounts to a renunciation to an absolute refusal to perform the contract and whether the other party may accept it as a reason for not performing his part."

The difficulty that can arise in determining whether the conduct amounts to a repudiation is illustrated by a comparison of two decisions in the House of Lords:

Federal Commerce v Molena Alpha [1979]:

Clause 9 of a charter provided that the charterers were to sign bills of lading stating the freight had been correctly paid. After a dispute, the ship-owners withdrew this authority contrary to the terms of the charter. The master was instructed not to sign bills of lading. This meant that the charterers were put in an impossible position commercially. The charterers treated the owner's actions as a repudiation of the charter.

HELD: Although the term broken was not a condition, the breach went to the **root of the contract** by depriving the charterers of virtually the whole benefit of the contract because the issue of such bills was essential to the charterers' trade. Therefore, the ship-owner's conduct constituted a wrongful repudiation of the contract.

Woodar v Wimpey [1980].

Wimpey contracted to buy land. The contract allowed the purchaser to rescind the contract if before completion, a statutory authority had 'commenced to acquire the property by compulsory purchase'.
At the date of the contract both parties knew that a draft compulsory purchase order had been made. Wimpey purported to terminate relying on this provision, and Woodar sought damages alleging that this amounted to a wrongful repudiation.

HELD [3:2]: In order to constitute a renunciation of the contract there had to be an **intention to abandon the contract**. Here instead, Wimpey was relying on its terms as justifying their right to termination.

Renunciation = intention to abandon contract ≠ using terms to justify termination.

Accepting the Breach

Brings the contract to an end.

Once repudiation has been communicated to the innocent party, that communicator should be seen to accept the repudiation. The question of whether silence/inaction can amount to acceptance of repudiation was considered in: *Vitol SA v Norelf*:

Sufficient that fact comes to the party's attention. Silence or inaction can amount to acceptance of a wrongful repudiation of a contract.

Reactionary non-performance might constitute acceptance of the breach.

"Think of the case where an employer tells the contractor that he is repudiating the contract and that the contractor need not return the next day. If the contractor does not return the next day then it seems that this may in the absence of any other explanation allow the contract to be treated as ended".

Ramifications with *Dickinson v Dodds*:

If the offeree comes to know in some way that the offer has been withdrawn, the offer cannot be accepted.

Affirming the Breach, Continuance

- The Simona

If, within a reasonable time, the innocent party does not indicate that he accepts the other party's repudiation to discharge the contract, then the **contract remains open** for the benefit of, and the risk of, both parties. The breach was not accepted in: *Avery v Bowden*.

A provided that a ship should proceed to Odessa and there take some cargo from his agent. The ship arrived at Odessa and the master demanded cargo but the agent could not provide one. The ship's master continued to ask for one.
A war broke out and the charterer sued.

HELD, inter alia: If the agent's conduct amounted to an anticipatory repudiation of the contract, the master had elected to keep the contract alive until it was discharged by frustration on the outbreak of war.

White & Carter v McGregor:

The plaintiff advertising contractors contracted with McGregor to display advertisements for his garage. McGregor repudiated the agreement and cancelled on the same day. The plaintiffs refused to cancel and performed their obligations. They sued for the contract price.

HELD [3:2]: Plaintiff can continue to perform and get the contract price. A debt was not subject to the rule of mitigation.
The minority said that the plaintiffs had failed to mitigate his damages.

o The right to elect must present a real choice to the innocent party.

Two Qualifications

1) Where the innocent party **needs the contract-breaker's cooperation** to perform, he is **compelled to accept** the breach and terminate the contract.

2) Mere want for damages in continuing to perform is not good enough. **Reasonable grounds to continue** the contract is required, bearing in mind the interests of the wrongdoer – *Hounslow LBC v Twickenham*.

Where statute is involved e.g. sale of goods, the law will be applied. Where time is of the essence, the courts will use that.

The Innocent Party After Affirmation

Where the innocent party elects to treat the contract as continuing (i.e. **affirming** the contract), the affirmation can be regarded as a species of waiver. The innocent party waives his right to treat the contract as repudiated and **may be estopped from changing his election** –

Panchaud Freres SA:

> Buyers of maize rejected it on a ground which was subsequently found to be inadequate. Three years later, they discovered that the grain had not been shipped within the period stipulated for in the contract. They, therefore, sought to justify their rejection on this ground.
>
> HELD: The buyers were estopped by their conduct from setting up late delivery as a ground for rejection because they had led the sellers to believe they would not do so.

If the innocent party elects to affirm a contract after an anticipatory breach by the other party, he is **not absolved from tendering further performance** of his own obligations under the contract. Consequently, **the repudiating party could escape liability** if the affirming party was subsequently in breach of the contract – *Fercometal Sarl v Mediterranean Shipping [1988]*.

Summary

Renunciation or substantial failure of consideration on the part of B allows A to either accept the breach or affirm it and keep the contract alive.

If A accepts the breach, the contract comes to an end and the parties will have nothing to do with it.

If A affirms the breach, the contract is kept alive and A may continue to perform, to sue upon the contract price afterwards. If A affirms and later tries to treat the contract as repudiated, he may be estopped from doing so or B may escape liability.

Remedies for Breach of Contract

Breach → Causation → Remoteness → Types of Damages → Calculation

Expectation | Reliance | Non-Pecuniary

Causation

The plaintiff must show a direct causal link between his loss and the breach of contract by the defendant. These are basic tort principles. If no loss was suffered, only nominal damages will be awardable.

An act of the defendant in a **sequence of events** leading to a loss might not be held to be the cause of the loss. For example, a shipowner is not liable to a charterer when, as a result of his delay, the ship ran into a typhoon, as such a catastrophe could occur anywhere – *The Monarch Case* [1949].

If there are **two causes** resulting in damage, and both causes have equal effect, one will be sufficient to carry a judgment for damages –
Smith Hogg v Black Sea Insurance [1940]:

> A shipowner was held liable to a charterer in damages for loss of a cargo which had been caused by a combination of perils of the sea and the poor condition of the ship. The latter was sufficient to carry a claim for damages.

An intervening act of a third party (novus actus interveniens) which itself causes or aggravates the loss caused by the defendant's breach, **does not absolve the defendant from liability if the intervening act was reasonably foreseeable** (the *Victoria Laundry* and *The Heron II* principles, below). Compare:

Weld-Blundell v Stephens [1920]; and

> The plaintiff employed an accountant, the defendant, to investigate the affairs of a company he had invested in. The defendant's partner negligently dropped a letter from the plaintiff in the office of the company's manager, which the manager picked up and showed to his directors who sued the plaintiff in libel and won. The plaintiff sued the defendant for breach of contract to recover the damages he paid out in the libel action.
>
> HELD: The claim must be dismissed since (1) the plaintiff's liability for libel existed apart from the contract, and (2) the loss was not caused by breach of contract, but by the act of the company's manager showing the letter to the directors. This was an act the defendant could not have foreseen.

Stansbie v Troman [1948]:

> A painter in breach of contract, left the house unlocked after having completed the decorations, which was later burgled by thieves.

HELD: The defendant was held liable for the value of goods taken as this was exactly the sort of loss he should have guarded against and foreseen.

{it is very clear that a reasonable person will know that an unsecured house is vulnerable to theft}

Remoteness of Damage

Not all damage caused to the plaintiff as a result of the breach of contract will be recoverable. If the loss flowing from the breach of contract is too remote then it cannot be recovered. Losses must have been within the reasonable contemplation of the parties – *Hadley v Baxendale* (1849):

Where it was held that damages are recoverable under 2 limbs:

(i) Damages which may fairly and reasonably be considered as **arising naturally from the breach**; or

(ii) Damages which may reasonably be supposed to have been **in the contemplation of the parties**, as liable to result from the breach, at the time of the contract.

The Court of Appeal reviewed and restated the principles governing the measure of damages in – *Victoria Laundry v Newman Industries* [1949]:

The laundry was able to recover damages for **loss of normal profits** following a delay in the delivery of a boiler but **not for the loss of lucrative profits** offered during that time. Those were not within the reasonable contemplation of the defendant but the normal profits were. Either **imputed or actual knowledge of the lucrative opportunity would be required**.

In *Chen v Lord Energy*, …

The principles relating to remoteness of damage were further considered in the House of Lords and given greater refinement in – *The Heron II* [1969]:

A **higher degree of foreseeability was required in contract than in tort**. The parties in this case must have been aware that the price of sugar in Basra was prone to fluctuate. For a loss not to be too remote, there mist have been: a real danger, **a serious possibility**; or a not-unlikely or liable-to-result loss.

The effect of "the two limbs" in *Hadley v Baxendale* is as follows:

The first limb involves losses which occur "**in the ordinary course of things**" – *Pilkington v Wood* [1953]:

The plaintiff bought a house and his solicitor, in breach of contract, negligently failed to notice that the house had a defective title. The plaintiff shortly afterwards took up work in Lancashire and suffered added loss as the

house was hard to resell. He claimed for the amount by which the house's value had been lessened by the title not being good.

HELD: The solicitor was not liable for the latter loss as he **could not anticipate that the plaintiff would shortly move**.

The second limb requires **both *precise* knowledge and acceptance by the defendant of the purpose and intention of the plaintiff**. Compare:

Horne v Midland Railway (1873); and

The defendant contracted to carry a consignment of shoes by 3 February, but delivered a day late. As a result of the delay, the plaintiff lost an opportunity of selling shoes at an exceptionally high price.

HELD: The defendant was not liable for this loss. Although he knew the plaintiff would have to take the shoes back if they were not delivered by 3 February, **he did not know the plaintiff would lose a lucrative deal**.

::CF:: *Simpson v L&N Railway* [1876]:

The defendant contracted to carry the plaintiff's samples of cattle feed from an agricultural show at Bedford to another at Newcastle. He delivered certain goods to an agent of the defendant at Bedford showground. The goods were marked: 'must be at Newcastle by Monday certain'. No express reference was made in the contract of carriage to the Newcastle show. The samples arrived at Newcastle after the show was over.

HELD: The defendant was to be liable for loss of profits which the plaintiff would have made had the samples reached Newcastle on time. The **plaintiff's purpose and intention could readily be inferred by the defendant** from the circumstances, which clearly indicated that the contract was one to carry samples to the Newcastle *show* and not simply to Newcastle.

Remoteness Affects Entitlement Only

Parsons Livestock v Uttley:

Defendants who had supplied badly ventilated containers of pig feed were liable for the disease of the pigs for although the type of disease itself was unforeseeable, it was enough that they contemplated any illness to beset the pigs.

Remoteness concerns they way damage mught arise but not the severity of damage.

Mitigation of Loss

It is the **duty of every plaintiff to mitigate** his loss, to do his best not to increase the amount of damage done. There are 3 rules:

(1) The plaintiff cannot recover for loss which he could have avoided by **taking reasonable steps**.

(2) The plaintiff **cannot recover for any loss he has actually avoided**, even though he took more steps than were necessary in compliance with the above rule.

(3) The plaintiff may recover for **loss incurred in taking the reasonable steps** to mitigate his loss, even though he did not succeed.

The plaintiff must minimise the loss resulting from the breach by taking all reasonable steps available to him. **If he does not mitigate, he cannot recover for the amount that could have been avoided** – *Payzu v Saunders* [1919]:

> The plaintiff agreed to buy goods from the defendant over a period of nine months with payment within one month of delivery, and deliveries monthly. The plaintiff failed to make prompt payment for the first instalment, and the defendant, in breach of contract, refused to deliver any more instalments under the contract, but offered to deliver the goods at the contract price if the plaintiff paid cash on delivery of the order. The plaintiff refused this and claimed damages being the difference between the contract price and the market price.
>
> HELD: The plaintiff had permitted himself to suffer a loss which, as prudent and reasonable people, they ought to have avoided. He had the cash available to meet the defendant's demands and could have mitigated by purchasing off the defendant at the contract price as the defendant offered, instead of going into the market to purchase at a higher price. He was, therefore, not entitled to damages.

However, the **plaintiff is not expected to take risks** in order to mitigate losses caused by the defendant's breach – *Pilkington v Wood* [1953]:

> A solicitor, in breach of contract, obtained for the plaintiff a house which had a defective title. The plaintiff tried to sue the solicitor, who argued that the plaintiff should have mitigated by suing the vendor under the covenants for title under s76 LPA 1925.
>
> Harman, J: "The so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a **complicated and difficult piece of litigation** against a third party … it is no part of the plaintiff's duty to embark on the proposed litigation in order to protect his solicitor from the consequences of his own carelessness".

Benefits obtained as a result of his mitigation, must be taken into account – *British Westinghouse v Underground Electric Railway of London* [1912]:

> The defendant agreed to supply the plaintiff with turbines of stated efficiency, but supplied less efficient ones, which used more coal. The defendant accepted them and used them for some years before replacing them with turbines which were even more efficient than those specified in the contract with the defendant. After replacement, the plaintiff claimed damages from the defendant.
>
> HELD: The plaintiff was not under any duty to buy new turbines in mitigation, but since he had done so, the financial advantages he had gained from new turbines had to be taken into account. Thus, as the plaintiff's saving in coal exceeded the cost of the new turbines, he was not entitled to damages. However, if the plaintiff had claimed damages before buying the new turbines, the defendant would have had no defence.

Note the case of *White & Carter v McGregor* [1962] as a possible **exception** to the general rule of mitigation.

Purpose of Damages

Damages are meant to **compensate** the injured party for any consequences of the breach of contract. The underlying principle is to put the injured party financially as near as possible, into the position he would have been in had the promise been fulfilled. [$ → $(position after contract)].

Addis v Gramaphone [1909]:

> Lord Atkinson: "I have always understood that damages for breach of contract were in the nature of compensation, not punishment."

It is…

Types of Damages and Calculation

There are several ways in which the plaintiff can be compensated for his loss and the plaintiff is entitled to choose whichever form of compensation he feels is most appropriate to his case.

Loss of Bargain – Expectation Loss – Contract Measure`

Damages for loss of bargain are to put the plaintiff, so far as money can do it, in the same situation **as if the contract had been performed**. For example, in a contract for the sale of goods which are defective, the plaintiff will (under this head)

be entitled to damages reflecting the differences between the price paid under the contract and the actual value of the defective goods.

Reliance Loss – Tort Measure

Damages for reliance loss are designed to put the plaintiff in the position he would have been **if the contract had never been made**, by compensating him for expenses he has incurred in his futile performance. This may be more appropriate where the gains from performance are hard to assess.

McRae v Commonwealth Disposals [1950]:

> The plaintiff recovered £3,000 spent on sending out a salvage expedition to salvage a non-existent wreck, in a specified but non-existent position, which they had purchased from the defendant.

Anglia TV v Reed [1972]:

> The plaintiffs were filming a television play. They subsequently entered into a contract with the defendant to play the leading role. The defendant repudiated. The plaintiffs tried to find a substitute but failed and had to abandon the play. The plaintiffs sued the defendant for pre-contract preparation expenses of £2,750.
>
> HELD: Plaintiffs were held to be entitled to recover the whole of the wasted expenditure. The defendant must have known that much expenditure had already been incurred and would be wasted.

- CF -

Regalian Properties [1995] where expenses incurred while contract was still 'subject to contract' were not recoverable.

Restitution

Where a bargain is made and the price paid, but the defendant fails to deliver the goods, then the plaintiff is entitled to recover the price paid plus interest thereon.

AG v Blake [2000]:

> House of Lords: in certain circumstances, it may be appropriate for the defendant to pay over the profit made as a result of breach of contract. In this case, the former spy had earned money publishing his exploits in Russia.

NOTE: **Incidental losses** are those which the plaintiff incurs after the breach has come to his notice. They include the administrative costs of buying a substitute, sending back defective goods or hiring a replacement for the meantime.

Consequential losses may be loss of profits, for example, reliance loss, or further harm such as personal injury or damage to property.

Where **more than one of the claims is available** to him, the plaintiff can combine the claims – *Millar's Machinery v David Way* [1935]:

> The plaintiff bought some machinery which was installed in his factory and paid for. However, the machinery was not in accordance with the specifications laid down by the contract and the plaintiff rejected it.
>
> HELD: The plaintiff could recover the price (restitution), installation expenses (reliance loss) and the net loss resulting from the breach (loss of bargain).

Time for Assessment of Loss

The general rule is that damages are to be assessed **at the time of the breach**. However, the court **can postpone** the date for assessment of damages to a more appropriate time – *Johnson v Agnew* [1980]:

> The vendors agreed to sell property to the purchaser, but the purchaser failed to complete the transaction on the appointed day. The vendors then obtained an order for specific performance, but it was not drawn up for five months, by which time it had become impossible as the mortgagee had taken possession and sold. The vendors sought discharge of the order for specific performance and to recover damages in its place.
>
> HELD: That the damages were to be assessed at the date when specific performance had become impossible. Lord Wilberforce: "In cases where a breach of contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than to tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost."

Applegate v Moss [1971]:

> The plaintiff could not discover the breach of contract until 8 years later.
>
> HELD: The date from which damages were to be fixed is the date on which the breach was discovered.

Calculation of Damages for Loss of Bargain (Profits)

Where the plaintiff claims for loss of bargain (that he be put in the position as if the contract had been performed), two bases of assessment are available:

cost of cure | **difference in value** (future sale)

Peevyhouse v Garland Coal [1962]:

A coal company took a mining lease of farmland, covenanting to restore the land to its original state at the end of the lease.

Cost for restoration work (cure): $29,000

Reduction in land value (difference): $300.

HELD: Damages to be assessed as reduction in value.

In the majority of cases where there is a discretion, the court will exercise this to use the most appropriate basis of assessment in the case. However, certain rules do exist for working out the appropriate mode of assessment:

(i) **Sale of goods**: cost of cure if reasonable

William Bros v Agius [1914]:

Expectation profits from resale ignored – damages were to be the difference between the contract and market price, which was actually higher than the expected profits.

(ii) **Failure to repair**: difference in value.

(iii) **Construction contracts**: cost of cure, and the builder must put the defects right. However, if the cost of cure is greater than the whole value of the building, then only the difference in value will be awarded. This issue was considered by the House of Lords in:
Ruxley v Forsyth [1995]:

The defendants built a swimming pool for the plaintiffs. The swimming pool was not as deep as specified, yet it was perfectly safe to dive into.

HELD: To award the cost of rebuilding it (cure) simply to add an extra three inches of depth would be unfair and unjust. Instead the House of Lords ordered the payment of a much smaller sum by way of compensation for **loss of amenity**.

Actual and Market Values

Where damages are based on the difference in value principle, then market values may be taken into account to assess the plaintiff's loss. For example, where the defendant fails to deliver goods or render services, the plaintiff can go into the market and obtain these goods or services at the prevailing price. Therefore the plaintiff's damages will be the difference between the market price and the price of the goods or services in the contract. There are 2 rules:

(i) Under s53 SOGO, where a seller wrongfully refuses to deliver the goods, the buyer may take action against the seller for damages, being the **difference** between the market value and the contract value.

(ii) Under s52 SOGO, where the defendant wrongfully refuses to accept and pay for the goods, the damages is also the **difference** between the market value and the contract value. However, the plaintiff can **sue for the loss of profit** on that transaction in **certain circumstances**. Compare:

Thompson v Robinson [1955]; and

> The defendant bought a car from the plaintiff, and later refused to accept and pay for it. The plaintiff's profit would have been £61.
>
> HELD: Where the **supply of cars exceeded the demand**, had the plaintiff found another customer and sold to him as well as the defendant, then there would have been two sales and two profits. Therefore, the defendant was liable for £61 ??????????????

Charter v Sullivan [1957]:

> The defendant bought a car from the plaintiff but refused to accept it. The plaintiff's profit would have been £97. However, only nominal damages were awarded because he could only sell as many cars as he could get from the makers.

(iii) Where there is a breach of warranty, e.g. defective goods, the damages will be the difference in value between the defective goods and their previous value before defect.

Irrecoverable Damages

The plaintiff may be able to recover damages for **injury to feelings** in tort, but such damages are irrecoverable in contract – *Addis v Gramaphone* [1909]:

> The plaintiff was held only to be entitled to the commission and salary he had lost, and not to damages because his dismissal was harsh and humiliating. Lord Atkinson: "I can conceive nothing more objectionable and embarrassing in litigation than trying an action of libel or slander as a matter of aggravation in an action for illegal dismissal".

This principle was reaffirmed by the House of Lords in *Johnson v Unisys* [2001].

Other Types of Damages

Discomfort, Vexation and Disappointment

In *Jarvis v Swan Tours* [1973], the plaintiff solicitor went on a Swan Tour and sued for damages because the hotels and buses fell short of the standards promised. It was held that the plaintiff could recover damages for the disappointment and discomfort he had suffered as a result. See also: *Jackson v Horizon Holidays*.

However, there is a limit to damages for distress for breach of contract. In *Bliss*, Dillon LJ stated that such damages should be confined to cases "where the contract which has been broken was itself a contract to ***provide*** **peace of mind** or **freedom from distress"**.

It is sufficient that a major term of the contract is to provide the above amenity and **not the entire contract** – Farley v Skinner [2001]:

> The plaintiff recovered damages from a surveyor for failure to provide peace of mind when he failed to tell him that his prospective home was on the noisy flight path from Gatwick Airport.

Recently, the Court of Appeal made it clear that they were not prepared to extend the circumstances in which damages for distress or disappointment might be granted: *Alexander v Rolls Royce* [1995]:

> The plaintiff argued that the purchase of a Rolls Royce had been the culmination of a lifelong ambition, and that when the garage concerned had not repaired it properly or quickly enough he had suffered distress and inconvenience.
>
> Court of Appeal: There was a breach of contract to repair but not prepared to award damages for the plaintiff's 'emotional anguish' while his Rolls Royce was being repaired

Inconvenience

In *Bailey v Bullock* [1950], a solicitor failed to take proceedings to recover his client's house and was held liable in damages for the inconvenience caused by reason of the client having to live with his wife's parents for two years.

In *Watts v Morrow* [1991], the plaintiffs recovered damages for living in a house under repair.

Diminution of Future Prospects

In *Dunk v George Waller* [1970], an apprentice was wrongfully dismissed, but had he been allowed to complete his apprenticeship he would have got a certificate entitling him to certain jobs at certain wages. Without this certificate, his chances were lessened and he claimed damages for diminution of future prospects. He was

held to be entitled to damages on this basis as the object of his apprenticeship was to enable him to get better employment.

In *Malik v BCCI* [1997], the House of Lords held that compensation was payable for the bad reputation attached to an employee for having worked in a corrupt organization.

Speculative damages

If the plaintiff's loss is the **chance of doing something** and/or the benefit from doing that, and this contingency is outside the control of the parties, then he is entitled to damages if the defendant's breach of contract denies him this chance. For example, in *Chaplin v Hicks* [1911], the plaintiff recovered damages for loss of the chance to take part in a beauty contest even though it was not certain that he awould win a prize.