

Pre-Contractual Negotiations		
no claim in <b>contract</b> (even if parties agreed to negotiate in good faith ( <i>Walford v Miles</i> )) <u>exceptions</u> : fixed lock-out agreements ( <i>Pitt</i> ); unilateral pre-c. ( <i>Harvela</i> ; <i>Blackpool AC</i> ); collateral pre-contractual warranties ( <i>Esso v Mardon</i> )	usually no claim in <b>tort</b> b/c no general duty to act in good faith ( <i>Walford v Miles</i> ) or inform the other party ( <i>Smith v Hughes</i> ) <u>exception</u> : Misrep [→ see Tut 5]	potential claim in <b>unjust enrichment</b> see <i>British Steel</i> <u>exception</u> : 'subject to contract' clause

## Formation of a Contract

### (1) Offer & Acceptance

<p><b>offer</b> or invitation to treat?</p> <ul style="list-style-type: none"> <li>– <u>advertisements</u>: <i>prima facie</i> only invitation to treat (<i>Fisher v Bell</i>; <i>Partridge v Crittenden</i>) exception: <b>unilateral contracts</b> (<i>Carbolic Smoke Ball</i>)</li> <li>– <u>displays in shops</u>: <i>prima facie</i> only invitation to treat (<i>Pharmaceutical Society GB v Boots</i>)</li> <li>– <u>correspondences</u>: no <i>prima facie</i> rule (see <i>Gibson</i>)</li> <li>– <u>tenders</u>: <i>prima facie</i> only invitation to treat but: offer for a unilateral 'process' contract (see <i>Harvela</i> (expectation dmg); <i>Blackpool Aero Club</i> (reliance dmg))</li> </ul> <p>↔ <b>termination</b> of an offer</p> <ul style="list-style-type: none"> <li>– offeror can terminate it <u>at any point</u> before acceptance, by any act inconsistent with the offer (<i>Dickinson v Dodds</i>) ↔ in unilat'l c. not after perfor'ce started (<i>Errington</i>; <i>Daulia</i>) but <u>requires comm'n</u> (no postal rule (<i>Byrne v VT</i>; <i>Henth. v Fr.</i>); must only reach offeree's sphere of control (<i>The Brimnes</i>))</li> <li>– offeree can terminate offer by <u>counter-offer</u> (<i>Hyde v Wrench</i>: counter-offer 'kills the original offer'; but not every enquiry is counter-offer (see <i>Stevenson v McLean</i>))</li> <li>→ particular (P): <b>battle of the forms</b> (see <i>Butler</i>) – solutions: <ul style="list-style-type: none"> <li>– classic o.-acc. analysis (L./Br. LJ in <i>Butler</i>; also <i>Gibson (HL)</i>)</li> <li>– 'last shot' doctrine / – 'knock-out' rule</li> <li>– 'global approach' (Lord Denning in <i>Butler</i>; arguably <i>RTS</i>)</li> </ul> </li> </ul>	<p><b>acceptance</b> must be communicated (<i>Entores</i>; <i>Felth. v Bindley</i>: silence insufficient)</p> <p>↔ exceptions:</p> <ol style="list-style-type: none"> <li>a) <b>postal rule</b> (<i>Adams v Lindsell</i>) (see, eg, <i>Household Fire Insurance v Grant</i>) ↔ does not apply <ul style="list-style-type: none"> <li>&gt; to offers under condition of <u>notice</u> (<i>Holwell Securities</i>)</li> <li>&gt; if use of post <u>cannot be expected</u> (cf <i>Henthorn v Fraser</i>)</li> <li>&gt; to means of '<u>instantaneous</u>' comm. (<i>Entores</i>; <i>Brinkibon</i>)</li> <li>&gt; to termination of offer [see left]</li> </ul> </li> <li>b) if requirement is waived (esp in unilat. c. b/c perfor'ce = accept'ce, see <i>Carb. Sm.ball</i>)</li> <li>c) if offeror is at fault (<i>Entores</i> (obiter))</li> </ol> <ul style="list-style-type: none"> <li>– possible <u>by conduct</u> (<i>Brogden v Metro Ry</i>)</li> <li>– can be done in <u>another way</u> than the one prescribed in the offer (<i>Manchester DC</i>)</li> <li>– <u>requires knowledge</u> of the offer (possible exc'n: unilateral c. (see <i>Gibbons v Proctor</i>))</li> </ul>
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### (2) Certainty

no (enforceable) contract if the terms are too uncertain  
see *May & Butcher* (price to be agreed upon 'from time to time'); *British Steel* (buyer refused certain terms; but seller had a claim in restitution); *Walford v Miles* (agreement to negotiate in good faith/'to agree')

↔ generally, the courts will try to make an agreement work [→ see also Tutorial 4]  
see *Hillas v Arcos*: words are to be so understood that the content is preserved, not destroyed (Wright LJ)

### (3) Intention to Create Legal Relations

<p><u>no contract if the parties had no intention to create legal relations</u> <i>Balfour v Balfour</i>: 'Agreements such as these are outside the realm of contracts altogether.' (Atkin LJ)</p>	
<p><u>domestic and social agreements</u> absence of intention is presumed (see <i>Jones v Padav.</i>) ↔ can be rebutted (see <i>Merrit v Merrit</i>; <i>Radmacher</i>)</p>	<p><u>commercial contracts</u> intention is presumed (see <i>Esso v Customs &amp; Excise</i>) ↔ can be rebutted (see <i>Kleinw. B. v Malaysia M.</i>; <i>RTS</i>)</p>

### Consideration

*Currie v Misa*: 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other.' (Lush J)

consideration must be sufficient, not adequate; there must be a bargain

*Chappell v Nestlé*: consideration must be 'something of value'

– 'past consideration is not good consideration' (see *Eastwood v Kenyon*)

↔ exceptions are possible (see *Lamplegh v Braithwait*; *Pao On* – requirements: (1) an act done at the promisor's request; (2) understood to be remunerated; (3) would've been enforceable if promised in advance)

– performance of pre-existing duties can be consideration:

**1) duty imposed by law**

→ **no** sufficient consideration

↔ exception: promisee does more than their legal duty requires them to do (see *Glasbrook Bros*; *Ward v Byham*; *Williams v Williams*)

**2) contractual duty owed to 3rd party**

→ sufficient consideration

(see *Shadwell v Shadwell*; *The Eury-medon*; *Pao On*)

**3) contractual duty owed to promisor**

→ traditionally, **no** sufficient consideration (*Stilk v Myrick*)

↔ but a practical benefit has meanwhile been recognised to constitute sufficient consideration (*Williams v Roffey*)

requirements: (1) promise made before completion of other party's performance; (2) promisor gains a practical benefit; (3) promise not given under duress)

→ particular problem: **part-payment of debts**

– traditionally, **no** sufficient consid'n (*Pinnel's Case*; *Foakes v Beer*)

– confirmed in *Re Selectmove*, regardless of *Williams v Roffey*

(consequence: a creditor can accept anything in satisfaction of their debt except a smaller amount of money)

↔ two possible ways around it:

– find a practical benefit *beyond* receiving the part-payment in time (see *MWB*) ↔ problem: there arguably was one in *Re Selectmove*

– promissory estoppel may prevent the promisor from enforcing the initial obligation (see *High Trees*; *Collier v Wright*; and below)

↔ problem: was not considered in *Foakes* despite *Hughes v Metro*.

criticisms of the doctrine: (1) anti-commercial ('form over substance'); (2) creates difficulties in practice; (3) not internally consistent (eg part-payment of debts); (4) does not exist in other systems, DCFR, PECL, etc  
↔ re-affirmed in *Prime Sight v Lavarello* (Lord Toulson: 'c. remains a fund'l principle of the law of contract.')

### Equitable/Promissory Estoppel

may give effect to a promise to give up a legal right that is unsupported by consideration

origin: *Hughes v Metropolitan Ry*; rediscovered by Lord Denning (obiter!) in *High Trees*: no breach of contract if def. can rely on a promise 'intended to be binding, intended to be acted on, and in fact acted on'

↔ estoppel by representation

(representation of *fact* upon which the other party has acted)

↔ estoppel by convention

(statement of *facts* agreed between the parties)

↔ proprietary estoppel

(representation of *fact or promise* relating to an interest in property)

requirements: (1) clear & unequivocal promise to give up a legal right (*Woodhouse AC*)

(2) promisee has altered their position (*MWB*; not necessarily to their detriment (*The Post Chaser*))

(3) it would be inequitable for the promisor to go back on their promise (*Hughes*; cf *D & C Builders*)

effects: the promisor's right is suspended but can be revived (see *Tool Metal*; unclear in *High Trees*)

↔ but: **it only works as a shield** (see *Combe v Combe*; *Amalgamated Investment*; *Baird Textile Holdings*)

(↔ estoppel as sword: proprietary estoppel (*Crabb v Arun*); in HCA (*Walton Stores v Maher*; *Verwayen*))

### Contracts for the Benefit of a Third Party

#### Principle

traditionally, no claim of a third party, even if the contract is stipulated on their behalf

*Tweddle v Atkinson*: 'It would be a monstrous proposition to say that a person was a party to a contract for the purpose of suing upon it for his own advantage but not for the purpose of being sued.' (Crompton J)

original justification: dctr. of consideration  
(the third party did not provide consideration)

*Tweddle v Atkinson*: no stranger to the consideration can take advantage of a contract, although made for his benefit (Wightman J)

additional justification: **doctrine of privity**

(the third party is not privy to the contract)

*Dunlop v Selfridge*: 'Independently of the d. of cons'n, it is a fund'l principle of English law that only a person who is a party to the c. can sue on it' (Visc't Haldane)

↔ the principle came under criticism (see, in particular, Lord Denning in *Smith & Snipes Hall Farm*) but was expressly upheld by the House of Lords (see *Scruttons v Midland Silicones*; *Beswick v Beswick*)

#### Remedies of the (Original) Promisee

(unaffected by the CRTPA 1999, see CRTPA s 4)

- > bring an action for specific performance (see *Beswick v Beswick*)
- > ask the court to stay proceedings (*Gore v Van der Lann*; in case of a promise not to sue the 3<sup>rd</sup> party)
- > claim own damages (but there regularly are none)
- > claim damages on behalf of the 3<sup>rd</sup> party
  - proposed by Lord Denning in *Jackson v Horizon* (but rejected, w/o changing the result, by James LJ)
  - rejected in *Woodar Investment v Wimpey* (but see Lord Wilberforce: '[Jackson] may be supported [...] as an example of a type of contract, examples of which are persons contracting for family holidays, ordering meals in restaurants for a party, hiring a taxi for a group, calling for special treatment) and *Alfred McAlpine v Panatown*
  - accepted exceptions:
    - > agency or trust (see *Woodar Investment*)
    - > **transferred loss** (if a transfer of property or assignment is already foreseeable at the moment of conclusion of the contract; first admitted in *The Albazero*; confirmed in *Linden Gardens* and extended to assignments in *Darlington BC*)
- ↔ limited in *Alfred McAlpine v Panatown*: there is only room for the 'Albazero exception' if the 3<sup>rd</sup> has no own course of action [→ see 'Exceptions']

#### Exceptions

##### Remedies of the 3<sup>rd</sup> party under the CRTPA

- s 1(1)**: the 3<sup>rd</sup> party may enforce the contract if
- (a) this is expressly provided for in the contract or
  - (b) the contract purports to confer a benefit on them
- (2)** ... unless the parties did not intend the term to be enforceable by the 3<sup>rd</sup> party → presumption of enforceability (*Nisshin Shipping; The Laemthong Glory (No 2)*; cf *Dolphin Maritime*)
- (3)**: 3<sup>rd</sup> p. must be expressly identified **(4)–(7)**: ...
- s 2**: limited right to rescind or vary 3<sup>rd</sup> party rights
- s 3**: promisor has defences vs promisee and 3<sup>rd</sup> party
- s 5**: no double liability **s 6**: excepted contracts

##### Other Exceptions (preserved by CRTPA s 7)

- (> collateral contracts)
- > agency > assignment
- > trust of promise (*Les Affréteurs Réunis*; rare!)
- > tort of negligence (*Donoghue; J Bks; White v Jones*)
- > enforcement of exclusion/'Himalaya' clauses (**vicarious immunity**) [now CRTPA s 1(6)]
  - originally rejected (*Scruttons v Midland Silicones*)
  - but possible exception (Lord Reid): if (1) the c. made clear that the 3<sup>rd</sup> party should be included and (2) that the promisee also contracted for the 3<sup>rd</sup> party; (3) the promisee had authority from the 3<sup>rd</sup> party to do so; (4) consideration (see *Shadwell (T 2)*)
  - acc'd in *The Eurymedon; NY Star* (cf *The Mahkutai*)

### Contracts Imposing a Burden on a Third Party

principle: a party cannot be subjected to a burden by a contract to which they are not a party

↔ exceptions: agency; statutory exceptions; bailment (see *Morris; The Pioneer Container*); tortious interference w/ c. (see *Lumley v Gye*); restrictive covenants concerning land; c.'l burdens running w/ land/goods (see *De Mattos; The Strathcona; Port Line; Swiss Bank*: requires actual knowledge; remedy: injunction)

**Interpretation of Expressed Terms**

starting point: Lord Hoffmann's **re-statement** in *ICS* (following Lord Wilberforce in *Prenn v Simmonds*) – 5 principles: (1) interpretation is the ascertainment of the meaning which the doc. would convey to a reasonable person having all the backgr. knowledge reas'ly avai'ble to the parties → obj., context'l interpr'n (2) the matrix of fact includes abs'ly anything that affects how the doc. is understood (if relevant, *BCCI v Ali*) (3) but previous negotiations are excluded (see *Chartbrook; Wood v Capita*) – 2 safety devices: rectification; est'l by conv. + 1 excptn: negot'ns which are part of the 'matrix of fact' & known to both parties (*Oceanbulk*) (4) the meaning a doc. conveys to a reasonable man is not the same thing as the meaning of its words (5) (only) if sth 'has gone wrong with the language', the doc. will not be given a meaning that the parties could not have intended (see *Chartbrook; Oceanbulk*) / that defies comm. common sense (*Rainy Sky*) → recent limits: only if intended mean'g is clear (cf *Arnold v Br.*); unlikely if expertly drafted (*Wood v Cap.*)

↑ *Belize* (Hoffmann); *Trump* (Mance): iterative approach ↔ *M & S* (Neub.); *Trump* (Hodge): sequential appr. ↓

**Implied Terms**

terms can be implied by statute (eg SGA 1979, ss 12–15), custom, and common law – two groups:

Terms Implied in Fact = ex-post adjustment of the allocation of risk, based on the presumed intention of the parties

**The Moorcock**: test of necessity (term must be necessary 'to give business efficacy to the transaction') / **Shirlaw**: officials bystander test (parties would have replied 'Of course!')

↔ in *Belize*, Lord Hoffmann advocated a single test of 'reasonable understanding'; dismissed in *M & S* and *Nazir Ali*

Terms Implied in Law = default rules implied into all c.'s of a certain type

in *Liverpool CC v Irwin*, HL disagreed with Lord Denning's test of reasonableness; instead: test of 'reasonable necessity' (Atiyah) → slightly lower threshold than for terms implied in fact (see also *Scally*)

duty of **good faith**: – negotiation: only as an express term (see *Knachtbull-Hugessen*; cf *Walford v Miles*) – performance: express term ✓ (*Compass Group*); implied in law ✓ (*Johnstone*); implied in fact ✓ (*Yam Seng*)

**Exemption Clauses**

**Incorporation**

by signature

even if terms have not been read (*L'Estrange v Graucob*; the '**signature rule**') as long as they haven't been misrep'ted (*Curtis v Chemical Cleaning*)

by reasonable notice

def must have taken reasonable steps (*Parker*; cf *Chapelton* (notice on receipt); *Olley* (in hotel bedroom)) esp if terms are particularly onerous or unusual (*Thornton; Interfoto*)

by course of dealing

– previous dealings have to be consistent (cf *McCutcheon; Hollier*) – lower threshold for commercial contracts, esp between parties in same trade (see *British Crane Hire*)

**Interpretation**

→ *contra proferentem*

excluding liability for negligence

*Canada Steamship*: has to be express or not cover any other dmg (see *Hollier*; cf *Alderslade*) → put into question in *ICS; BCCI v Ali; Mir Steel*

fundamental breach

excludes reliance on cl. (Lord D. in *Harbutt's*, invoking *Suisse Atl'que*) → overruled in *Photo Production*

limitation clauses

are interpreted less restrictively than exclusion cl. (*Ailsa Cr.*)

**Statutory Control**

**UCTA 1977** – only applies to exemption clauses; does not apply to cl. that only *define* obligations (cf *Phillips; Smith v EB*; see *Thompson*)  
**s 2**: negligence <sup>(2)</sup> ↓ | **s 3**: breach of contract ↓ | **s 6**: sale of goods <sup>(1A)</sup> ↓  
**s 11**: test of **reasonableness** → discretion of trial judge (see *Phillips*)

**Consumer Contracts**

**CRA 2015, Part 2** (defined in **s 61**)  
– **s 65, 66**: negligence liability  
– **s 62–64**: t. of **fairn's** (see *Park'gE*)

Representation or Contractual Promise?	
<p><u>promise</u>: statement by which the maker accepts or appears to accept an obligation (not) to do sth. → appropriate remedy: dmg for expectation int.</p> <p>decisive: intentions of the parties (<i>Heilbut, Symons</i>) / important factor: <u>special knowledge</u> see <i>Dick Bentley</i>: defendant was a car dealer</p>	<p><u>representation</u>: stmt which asserts the truth of a given state/fact → appropriate remedy: dmg for reliance int. (may be combined w/ a <u>collateral warranty</u> (see <i>Esso</i>))</p> <p>see <i>Oscar Chess</i>: def had no special knowledge</p>

Misrepresentation		
Requirements		
<p><b>1)</b> an unambiguous false statement of fact or law by the other party (cf <i>Taberna Europe</i>) ≠ a <u>stmt of opinion/belief</u> (<i>Bisset</i>) unless def has superior knowledge (<i>Smith v Land</i>) or special skill (<i>Esso</i>) ≠ <u>silence</u>, unless misrep by conduct (see <i>R v Barnard; Spice G.</i>).. ≠ a <u>stmt of intention</u> (cf <i>Edgington v Fm.</i>) ..or <b>duty of disclosure</b> (only in c. 'of utmost good faith' or if earlier repr'n has become false (<i>With v O'Fl.</i>))</p> <p><b>2)</b> addressed to the party misled (directly (<i>Taberna</i>) or indirectly through 3<sup>rd</sup> party (<i>Comm B of Sydney</i>), which <b>(3)</b> is material (see <i>Bisset; Redgrave; Edgington</i>) and <b>4)</b> induced them to enter into the contract – requires '<u>but for</u>' causation (not nec'y that cl. believed it (<i>Hayward</i>); that it was the only inducem't (<i>Edg.</i>)) – <u>presumed</u> if the representation would have induced a reasonable person – an <u>opportunity</u> to find out the truth does not, in itself, rebut the presumpt'n (<i>Redgrave v Hurd</i>; cf <i>Peekave</i>)</p>		
Remedies		
fraudulent misrepresentation	negligent misrepresentation	innocent m.
<p><u>rescission</u> (= setting aside the c. for past &amp; future) – available for all types of misrep (<i>Redgrave v Hurd</i>) – needs to be <u>notified</u> by the cl (but, at least in fraud cases, not necessarily to the def (<i>Car &amp; Univ'l Fin'ce</i>)) – bars contractual damages but may give rise to a claim for a <u>restitutionary indemnity</u> (see <i>Whittington v Seale-Hayne</i>)</p>	<p>↔ <b>bars to rescission:</b> • <u>affirmation</u> of the contract • <u>lapse of time</u> (see <i>Leaf v Int'l Galleries</i>; but only if r. would now be inequitable (see <i>Salt v Stratstone</i>)) • <u>impossibility</u> to restore the parties to their pre-c.'l position (but money may be suffic't, see <i>Stratstone</i>) • rights of a <u>bona fide 3<sup>rd</sup> party</u> (see <i>Shogun</i>, Tut 6) • <b>s 2(2)</b> Misrep Act (below)</p>	
<p><u>damages for tort of deceit</u> <i>Derry v Peek</i>: 'there must be <u>proof of fraud</u>, and nothing short of that', ie 'a false represent'n [that] has been made (1) knowingly, or (2) w/o belief in its truth, or (3) recklessly, careless whether it be true or false' (see also <i>Hayward</i>) → dmg for <u>reliance interest regardless of foreseeability</u> (<i>Doyle v Olby; Smith New Court; Yam Seng</i>; limit: causation) including the <u>loss of chance</u> (<i>East v M.</i>), even if more profitable (<i>Clef Aquitaine</i>))</p>	<p><u>damages</u>: (1) for <b>tort of negligence</b> – <i>Hedley Byrne</i>: requires a <u>special relationship</u> – <i>Ewatt</i>: requires <u>special knowledge</u> (majority) – <i>Esso; Howard Marine</i>: lower threshold (obiter) → dmg for <u>reliance interest</u> if foreseeable</p> <p>(2) under <b>s 2(1)</b> Misrep Act (does not require special rel'ship; liability presumed) → dmg as for the <u>tort of deceit</u> (<i>Royscot</i>; criticised!)</p> <p>(3) under <b>s 2(2)</b> in lieu of rescission (if cl can rescind (<i>Stratstone</i>)) → court may award dmg (only) for <u>expect'n interest</u> (see <i>Sindall</i>)</p> <p>↔ <b>s 2(4): no dmg 4 consumers</b> w/ right 2 redr. (P. 4A CPU TR '08)</p>	
<p><u>exclusion clauses</u>: not valid (<i>HIH Casualty</i>; but left open for fraudulent misrep by employees or agents)</p>	<p><u>exclusion clauses</u>: have to be <u>fair and reasonable</u> as per <b>s 11</b> UCTA 1977 (see <b>s 2(2)</b> UCTA; <b>s 3</b> Misrep Act) incl (some) '<b>non-reliance</b>'/'<b>entire agreement</b>' cl. (see <i>Walker; AXA Sun Life; Lloyd v Br.ng; JP M</i>; but see <i>Watford E</i> (Tut 4; if negotia'd))</p>	

Mistake		
<b>Mistake at Common Law</b> → renders the c. void		
Unilateral Mistake	Common Mistake	
<p>&gt; <u>as to the terms</u> do not matter if the mistaken party behaved objectively in a way that the other party reasonably believed that there was an agreement (<b>Smith v Hughes</b> – <i>caveat emptor!</i>)</p> <p>↔ <u>exceptions</u>: – no identifiable agreement (<b>Raffles v Wichelhaus</b>)</p> <p>– if other p. knew (<b>Cundy v L’Y</b>) / should have known (<b>Hartog v C.</b>)</p> <p>– if other party was at fault/induced the mistake (<b>Scriven v Hindley</b>)</p> <p>&gt; <u>as to the identity of the other party</u></p> <p>– <u>oral c.</u>: rebuttable presumption that the parties wanted to deal w/ each other (<b>Phillips v Brooks</b>; <b>Lewis v Averay</b>; cf <b>Ingram v Little</b>)</p> <p>– <u>written c.</u>: void if offer did not reach the actual offeree (<b>Cundy v Lindsay</b>; cf <b>King’s Norton</b>; conf’d by majority in <b>Shogun Finance</b>)</p> <p>&gt; <u>as to the subj.-m.</u> do not affect consent if unilat’l (<b>Smith v Hugh’s</b>)</p> <p>↔ alt. defence: <b>non est factum</b> – only if (1) def was unable through no own fault to understand what they signed and (2) there was a real diff’ce to what they thought they signed (cf <b>Saunders v Anglia</b>)</p>	<p>&gt; not if the parties have <u>allocated the risk</u> in the c. (see <b>W. Sindall</b>; <b>McRae</b>)</p> <p>&gt; must be <u>to the subject-matter</u> and <u>fundamental</u> → for example:</p> <p>– <i>res extincta</i> (<b>Couturier v Hastie</b>; <b>Assoc Jap Bank</b>; but see <b>McRae</b> (above))</p> <p>– impossibility (<b>Brennan v Bolt</b>)</p> <p>– mistake as to title (<b>Cooper v Phipps</b>)</p> <p>– mistake as to the quality: must be shared and so serious that it makes the thing essentially different (cf <b>Bell v Lever Bros</b>; <b>The Great Peace</b>)</p> <p>↔ alt. remedy: <b>rectification</b> – only if p’s were in ‘agr’t on the terms [...] but by an error wrote them down wrongly’ (<b>Rose v Pim</b>; see also <b>Daventry DC</b>)</p>	
<b>Mistake in Equity</b> → renders the c. voidable		
developed by Lord Denning in <b>Solle v Butcher</b> ; <b>Rose v Pim</b> ↔ put to an end in <b>The Great Peace</b> (see <b>Statoil</b> )		
<p>↑ distinction common mistake vs frustration: <u>time of the occurrence of the unforeseen event</u> ↓</p> <p>(before vs after conclusion of the c.; see <b>Amalgamated Inv</b>; see also <b>Griffith v Brymer</b> vs <b>Krell v Henry</b>)</p>		
Frustration		
<b>Requirements</b>		
<p>principle of <b>absolute liability</b> (<b>Paradine v Jane</b>)</p> <p>↔ no exception for <u>commercial impracticability</u> (<b>Davis Contr’rs</b>)</p>	<p>↗ <u>exceptions</u>:</p> <ul style="list-style-type: none"> <li>▪ <u>impossibility</u> (<b>Taylor v Caldwell</b>; <b>Jackson v U. Marine</b>; <b>The Nema</b>)</li> <li>▪ <u>illegality</u> (<b>Fibrosa</b>)</li> <li>▪ <u>frustration of purpose</u> (<b>Krell v Henry</b>: the commercial venture has become impossible; cf <b>Herne Bay Stbt</b>; see also <b>Metro. Water Board v Dick, Kerr</b>: the supervening event made it ‘a different contract’)</li> </ul> <p>NB: if <u>temporary</u>, must be significant (<b>Nema</b>; <b>Fibrosa</b>; cf <b>Panalpina</b>)</p>	
<b>Factors Excluding Frustration</b>		
<u>Foreseeability</u>	<u>Express Provisions</u>	<u>self-induced frustration</u>
excludes frustration, at least if the parties could have been expected to take precautions ( <b>The Eugenia</b> )	exclude frustration insofar as they cover the supervening event (cf <b>Metro Water Bd v Dick, Kerr</b> )	excludes frustration if supervening event is not entirely outside the p’s control ( <b>Mar Nat Fish</b> ; <b>Super Serv II</b> )
<b>Effects</b>		
<p>→ the contract is <u>automatically discharged</u>; originally, the loss lied where it fell (<b>Chandler v Webster</b>)</p> <p>→ <u>money paid prior to frustration</u> could only be recovered (<b>Fibrosa</b>) upon total failure of considerat’n</p> <p>↔ <b>s 1(2)</b> LRFCA: generally recoverable but def can keep comp’n for expenses if proved (see <b>Gamerco</b>)</p>		<p>→ <u>payment due ‘upon completion’</u> could not be claimed (<b>Appleby v Myers</b>)</p> <p>↔ <b>s 1(3)</b> LRFCA: can be claimed if ‘valuable benefit’ has been conferred (see <b>BP v Hunt (No 2)</b>)</p>

### Duress

#### Duress to the Person

is sufficient even if it was not the sole reason (*Barton v Armstrong*)

↑ very similar regime ↓

#### Duress to Goods

was originally not recognised (*Skeate v Beale*) but is now (see *The Evia Luck*)

#### Economic Duress

2 requirements (see, in particular, *R v AG for England & Wales*):

(1) compulsion of the will of the victim

– originally required a ‘coercion of the will’ that ‘vitiates the victim’s consent (cf *Pao On*; see *The Universe Sentinel*; *Atlas Express*)

– now that compulsion was a ‘significant cause’ (*The Evia Luck*; *Huyton*)

(2) illegitimacy of the pressure

– if the threat is unlawful, it is generally illegitimate (cf *Pao On*; *Atlas Express* (both: threat to breach a contract))

– if it is lawful, it may be illegitimate (see *The Univ. Sentinel*; cf *R v AG*) esp if pressure is applied in bad faith (cf *CTN Cash*; see *Akai Holdings*)

→ consequence: right to rescission (but see *Barton*: c. void) + potentially dmg for tort of intimidation

### Undue Influence

#### Actual Undue Influence

‘the equitable counterpart to common law duress’ (Mck) but potentially wider  
→ only requirement: influence existed and has been exercised (see *Williams v Bayley*; *Cheese v Thomas*; *Credit Lyonnais*)

#### Presumed Undue Influence

3 requirements (*Allcard v Skinner*; *RBS v Ertridge (No 2)*):

(1) def placed trust & confidence in cl in relation to the man’ment of their affairs (irrebuttably presumed for parent & child; solicitor & client; relig. advisor & disciple (*Allcard*); etc ↔ not: husb. & wife (*RBS v Ertridge*))

(2) the transaction ‘calls for explanation’ (see *Allcard*; *RBS v Ertridge*)

(3) the cl did not rebut the presumption that undue infl was exercised by showing that transaction was ‘the **free exercise of independent will**’ (eg b/c the defendant had independent advice (*Allcard*; *RBS v Ertridge*))

three-party situations: (*Barcl. v O’Brien*; *RBS v Ertr. (No 2)*; cf *CIBC v Pitt*)

3 req.: (1) def entitled to set transact’n aside against 3<sup>rd</sup> p. (eg for misrep; UI)

(2) cl ‘put on notice’ of 3<sup>rd</sup> p. behav.; (3) cl hasn’t taken appropriate steps

→ consequence: right to rescission

### Unconscionability

3 requirements: (1) flaw in the victim’s bargaining power (in particular if ‘poor & ignorant’; no independent advice) see *Aylesford v Morris* (agreement w/ an expectant heir in anticipation of the heritage); *Cresswell v Potter* (agreement between husband and wife in the course of divorce) cf **Alec Lobb: unequal bargaining power** is insufficient (contra L. Denning in *Llyods B. v Bundy*; also *NatW. v Morgan*)

(2) fault of the other party

see *Boustany v Pigott* (defendant had clearly taken advantage of the claimant)

cf *Hart v O’Connor* (bad bargain of insane pers. but insanity was unknown by other p.); *Portman Bdg Soc.* (bad bargain but no fault)

(3) overreaching and oppressive transaction (see *Alec Lobb*; cf *Portman Bdg Soc.*); eg ‘undervalue so gross to amount of itself to evidence of fraud’ (*Fry v Lane*); not if ‘fair, just & reasonable’ (*Cresswell v Potter*)

→ consequence: court exercises its discretion to protect the victim

+ statutory remedies: Consumer Protection from Unfair Trading Regulations 2008, Part 4A (↔ for the protection of consumers from unfair contract terms see Tut 4)

← claimant-sided/direct pressure | defendant-sided/indirect pressure →  
← about procedural fairness | about substantive fairness →

### Termination for Breach

requires **repudiatory breach** (depends on what's breached: warranty: only dmgs / innominate term (= default, *Grand China*); depends on seriousness of br. (see **HK Fir**; cf *Schuler*) / condition: termination (see *The Hansa N*; *Bunge v Tr'x*)) – possible before date of performance ('**anticipatory br.**'; *Hochster v De La Tour*)

NB: innocent p. can elect (see *Geys*): accept the breach & terminate the c. (see *The Mihalis Angelos*) or affirm the c. & claim dmgs (doesn't bar term'n for further repud. acts (*Johnson v Agnew*)) or claim 'agreed s.' (below)

→ consequences: the contract is set aside prospectively ('rescission for breach')

(rights accrued remain intact (*Photo Production*); some terms (eg arbitration clauses) may survive)

### Damages

#### Expectation-Based Damages

– as if the contract had been performed (*Robinson v Harman*)  
– difference in value or cost of cure (*Radford*: only if 'genuine loss'; **Ruxley**: if reasonable/ 'loss truly suffered by cl.');

– pure performance int. (unclear; see 'loss of amenity' award in *Ruxley*, esp. L. Mustill ↔ but see *Panatown*, esp. L. Clyde)  
– doesn't normally include non-pecuniary losses (*Addis v Gr*)  
→ exc.: contracts for mental satisfaction (see *Jarvis*; *Jackson*; sufficient that it is an imp't term (*Farley*; also *Hamilton J.*)); physical/sensory inconvenience (*Watts v Morrow*; *Farley*)

↔ limits: (1) remoteness: **Hadley v B.**: dmg only recov'ble if it 'flowed nat'ly from the br.' (see *Vict. L.*) or 'was in the contempl'n of the p.s.' (see *The H. II*) / **The Ach.**: asmp'tn of resp.  
(2) mitigation: cl. must not unreasonably increase loss and take reasonable steps to minimize it (*Br. Westingh.*; but see *Globalia*)  
(3) contributory negligence: limits dmg only if br. of c. also was br. of a duty of care in tort ↔ not in case of strict c.'l duty (*Barclays v Fairclough*); purely c.'l duty of care (*Vesta*)

#### Reliance-Based Damages

– can be claimed as an alternative (see *Omak*)  
– but only if caused by the breach, not to escape bad bargain (*C&P Haulage*; *Omak*)  
– relevant if cl. cannot prove amount of their exp. dmg. (*McRae*) or has incurred pre-contractual expenditure (see *Anglia TV v Reed*)

#### Restitutionary Damages

(a) if the claimant has conferred a benefit to the def on a basis that has disappeared (c. set aside + total failure of consideration)  
(b) if the defendant has obtained an unjust benefit through the breach (*One Step*)  
– usually, sum that the def. *would have paid* for the right to make the profits (*Wrotham Park*; *Experience Hendrix*; *Vercoe*; *One Step*)  
– exceptionally *full profits* if cl. has legit. int. to prevent def. from mak'g 'em (*AG v Blake*)

→ damages aim to compensate the cl., not punish the def (**no punitive damages** (*Addis v Gramophone*))

→ they're assessed at the date of the breach (*Johnson v Agnew*) limited to gains under the c. (*The Golden V*)

↔ exception: agreed dmgs → not enforceable if **penalty clause** (ie 'a secondary obligation imposing a detriment on the other p. out of proportion to the int. in the primary obligation' (**El Makdessi**; see also *Dunlop*; high threshold b/c interference); otherwise **liquidated dmg clause** (ie genuine pre-estimate of loss)

### Action for the Agreed Sum

cl. may ignore the (anticipatory) breach, continue to perform and claim the debt (see **White & Carter**)

↔ not possible if other party needs to co-operate or if innocent party has no legitimate interest (see *Clea*)

### Specific Performance

= an equitable remedy, originally only available if other remedies are inadequate

↔ expanded in **Beswick v Beswick**: available if it is the adequate remedy (see *Sky Petroleum*; but see *Co-op v Argyll*: not if defendant would be forced to run a business)

### Injunctions

= an equitable remedy, the availability of which is within the discretion of the courts

esp to prevent breach (*Lumley*; *Warner Bros*) but not if it would amount to specific performance (*Warren*)