**Mistake**

**General Principles**

* Balances the need for certainty in transactions with protection for parties entering fundamentally different agreements than intended(no consensus ad idem).
* Objective approach to agreement
* Remedy:
  + Often limited: contracts typically remain valid and binding.
  + Main remedy: no contract formed (or contract void ab initio)
  + Other (potential) equitable remedies:
    - Contract voidable in equity (contract may be rescinded)
    - Refusal to grant specific performance of contract
    - Rectification of contract
* Factors influencing remedies:
  + Supporting remedy: fairness, need for genuine consensus ad idem
  + Against remedy: objective theory of contract, certainty of transactions

**Types of Mistake**

* **Mutual Mistake**: both parties are mistaken about different things (at cross-purposes)
  + Only operative when objective facts are equivocal (both interpretations reasonable), and objectively not possible to determine that there is correspondence between offer and acceptance.
* **Unilateral Mistake**: only one party mistaken with other party either aware or unaware
  + Additional remedy:
    - When the other party is aware
      * Rectification: "Apparent contract" void but actual contract enforceable on terms as intended by mistaken party(and known to other party) to reflect true intentions.
    - When other party unaware of mistake:
      * Court may deny specific performance if unjust
  + **Mistake as to Terms**
    - Operative if there is a mistaken belief as to a term and the other party knew(or outght to reasonably to have known) of that mistake.
      * Smith v Hughes (1871): terms vs. mere quality: if not a term, contract usually bound, even if its of Def’s knowledge of PL intention.
      * Hartog v Colin & Shields (1939): "Snapping up" offers (price per pound vs. per piece) - not ad idem
  + **Mistake as to Identity**
    - Usually misrepresentation of rogue: contract voidable under misrepresentation but contract being void for unilateral mistake is of pragmatic benefits(Nemo dat quod non habet, as a third party is involved).
    - Face-to-face presumption: contract with the person with person physically present.
      * but can be displaced in special circumstances on the facts of the case, where identity was fundamental to the contract or intended to be a term of the contract.
    - Written transaction presumption: contract with person named in document
* **Common Mistake**: Both parties are under same mistaken belief. Agreement reached but vitiated by shared error
  + Additional remedy of ratification - see below,
  + Prima facie operative when:
    - subject matter does not exist. (Also void under SOGO s.8)
      * Exception: Contract not void if a party expressly or impliedly undertakes responsibility for existence of subject matter
    - Quality mistake renders subject matter essentially different from the thing that the parties believed it to be or renders contractual purpose impossible

**Rectification of Contracts:** Equitable remedy to correct mistakes in written instruments

* + Available within narrow limits
  + Unilateral mistake: available when mistake is one of terms and other party is aware of mistake(lack of good faith by unmistaken party)
  + Common mistake:
    - Elements to be established(Tang Kwai Cheung v Yeung Sze Ting [2024]):
      * 1. Continuing common intention
      * 2. Outward expression of accord
      * 3. Intention continued at time of execution
      * 4. Instrument mistakenly failed to reflect that common intention
  + UK vs. Hong Kong positions on objective/subjective test – Hong Kong adopts objective approach

**Non Est Factum ("It is not my deed"):** contract void

* Available when:
  + Scenario 1: Person did not sign document
  + Scenario 2:
    - Signer under disability preventing understanding the document
    - Fundamental difference between document signed and what signer believed
      * E.g. signing extension of period of option under belief that he was signing a receipt
      * E.g. Not - signing guarantee of existing and future indebtedness, believing guarantee to only cover future indebtedness
      * E.g. not - assigning leasehold to A, believing it was gift to B(B is business partner with A)
* Scenario where insufficient to establish defence :
  + Failure by person of full capacity to read document before signing - *Saunders v Anglia Building Society*
  + Not fully aware of precise legal effect of document - *Saunders v Anglia Building Society*; *Kincheng Banking Corp v Kao Yu Kuei*
* Interaction with unilateral mistake
  + When unmistaken party seeks to enforce contract:
    - Mistaken party does not need to establish absence of carelessness to render contract void - *Petulin v Cullen*
    - Principles of operative unilateral mistake as to terms applies where mistake known by other party.
  + Where case involves rights of third party who acted in good faith in reliance on signed document without notice of mistake
    - Mistaken party not entitled to assert absence of consensus ad idem against third party (i.e. unilateral mistake principles not applied; only basis for setting aside contract is non est factum) - *Saunders v Anglia per Lord Hodson*

**Frustration**

**General Principles**

* Definition: Post-formation event makes performance impossible, illegal, or radically different
* Test: Whether without default of either party, contract has become incapable of being performed because performance would render obligation radically different from what was undertaken (Davis Contractors)
* **Factors bars** frustration:
  + Mere hardship or inconvenience in performance
    - Time difference which is not fundamental - Ocean Tramp Tankers Corporation v V/O Sovfrcht (The Eugenia), *National Carriers Ltd v Panalpina (Northern) Ltd*
    - illegality merely makes performance less beneficial or more onerous
  + Supervening event foreseeable - *Walton Harvey Ltd v Walker & Homfrays Ltd*
  + Contractual terms apply(force majeure clause)
  + Self-induced frustration - J *Lauritzen AS v Wijsmuller BV (Super Servant Two)*
  + One party bears risk or guarantees
  + Purpose is not a common one
  + Mere delay(not significant)
  + Inability being just temporal
* **Effect**:
  + Contract automatically discharged, parties are released from future obligations
  + Contract not rendered void or voidable
  + Accrued rights or liabilities before frustration unaffected by doctrine of frustration under common law, but below may
    - Principles of restitution for unjust enrichment
      * Recoverable for total failure of consideration
      * No recovery for wasted expenditure by a party where the other party did not receive any benefit
    - Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (“LARCO”) s 16
      * s.1 paid sum
      * s.2 sum payable
      * s.3 valuable benefit obtained

**Foreseeability and Contractual Terms**

* Foreseeable events: generally don't constitute frustration
  + Suggested test: whether event had real likelihood of occurring
    - doctrine may still apply if frustrating event exceeds what would be reasonably contemplated by the parties - *Tatem v Gamboa*
* Express provisions: Contract terms apply instead of frustration doctrine(e.g. force majeure clauses)
  + Doctrine still applicable for catastrophic events beyond contemplation - *Metropolitan Water Board v Dick Kerr & Co Ltd*

**Self-induced Frustration**

* Cannot be invoked if resulting from party's act, election, or fault
  + J Lauritzen AS v Wijsmuller BV (Super Servant Two) [1990] 1 Lloyd’s Rep 1

**Types of Frustrating Events**

* Impossibility of Performance:
  + Destruction of essential subject matter (*Taylor v Caldwel*l)
    - Bars: No frustration if one party agreed to bear risk of destruction or guaranteed existence of subject matter - *Goldsborough Mort & Co Ltd v Carter*
  + Death or incapacity in personal service contracts
  + Unavailability of subject matter (depending on duration and nature)
    - Bars: alteration of manner of performance or impossibility by one party will not be frustration - *Blackburn Bobbin Co Ltd v Allen (TW) & Sons Ltd* [1918] 1 KB 540 – Seller cannot acquire timber from their supplier due to the outbreak of war cannot give rise to frustration.
* Supervening Illegality: performance becomes illegal after contract formation
  + Principles:
    - Strong public policy considerations
    - Foreseeability of illegality does not prevent frustration
      * *Fibrosa SA v Fairbairn Lawson Combe Barbour Ltd*
    - Contractual provisions cannot exclude frustration on grounds of illegality
      * *Ertel Bieber Co v Rio Tinto Co Limited*
  + Bars:
    - No frustration where illegality merely makes performance less beneficial or more onerous - *Scanlon’s New Neon Ltd v Tooheys Ltd*
    - Length of time of the illegality, it either may be permanent or unknown (such as an outbreak of war) to amount to illegality ground for frustration.
      * *National Carriers Ltd v Panalpina (Northern) Ltd*
* Frustration of Purpose: Common purpose ceases to exist though performance possible
  + Principles:
    - Courts exercise caution
  + Krell v Henry (1903) – common purpose of viewing coronation, regard as an exceptional case
  + Herne Bay v Hutton (1903) – not a common purpose of both parties
* Other Circumstances: Radically different performance
  + Delays: mere delay not, significant delays can
    - Codelfa Construction v State Rail Authority (1982)
    - Jackson v Union Marine Insurance (1874)
    - Wong Lai-ying v Chinachem (1980)
    - Cheung Kit Lai v Rich Prosper (2014)
  + COVID pandemic:
    - Wilmington Trust v Spicejet (2021)
    - Bank of New York Mellon v Cine-UK (2021)
    - The One Property v Swatch Group (2022)

**Duress, Undue Influence, Unconscionability**

**Duress**

**General Principles**

* Duress may involve coercion or compulsion of the will of a party, but can also arise where the will is not overborne as such - person exercising free will by choosing to submit to pressure instead of taking alternative action
  + *Zebra Industries (Oregenesis Nova) Ltd v Wah Tong Paper Products Group Ltd*, citing *Crescendo Management Pty Ltd v Westpac Corp*
* Elements: - *Times Travel (UK) Ltd v Pakistan International Airline Corp; Re Li Xiaoming*
  + 1. Illegitimate threat or pressure by defendant(crime, torts, threatened breach)
    - “Generally”, a threatened breach of contract may constitute duress, “particularly” if the party making the threat knows that there would be a breach of contract - *Kolmar Group AG v Traxpo Enterprises Pvt Ltd*
    - Bars:
      * Genuine disputes: generally no duress even if a party’s assertion that they need not perform some obligation under original contract was incorrect
  + 2. Pressure caused plaintiff to contract
  + \*3. (for economic duress only) Causal connection (stricter test than other forms)
    - No reasonable alternative - *Pao On v Lau Yiu Long*
    - Pressure must be “significant cause” - *Dimskal Shipping Co SA v International Transport Workers’ Federation (The Evia Luck)*
    - Possibly “but for” test applies - *Kolmar Group AG v Traxpo Enterprises Pty Ltd*
* Bars:
  + Overwhelming pressure per se not sufficient
    - *Zebra Industries; Crescendo Management*
  + Fairness of contract not critical
    - *The Law Debenture Trust Corpn plc v Ukraine*
* Remedy: Contract voidable when illegitimate pressure procures consent

**Types of Duress**

* **Duress to Person**
  + Illegitimate pressure: threats to life, health, or liberty - *Re Li Xiaoming*
  + Principles:
    - Threats need not be sole cause. Not necessary to establish “but for” causation - *Barton v Armstrong*
    - Onus of proof on def to prove that pressure had no effect - *Barton v Armstrong*
    - Threats need not target contracting party - *Law Debenture v Ukraine*
      * Threats to a state’s citizens or to safety of members of its armed forces can constitute duress against a state.
* **Duress to Goods:** actual or threatened unlawful taking/damage to goods
  + *Dimskal Shipping v International Transport Workers*(1992)
    - Actual or threats of unlawful taking of or damage to goods can constitute illegitimate pressure
  + *Law Debenture v Ukraine*: Invasion threats constitute duress to goods
    - Threats of invasion can also involve duress to goods
    - Use of force to invade = threat to destroy or damage property
* **Economic Duress:** threats affecting economic well-being
  + **Principles**:
    - Elements:
      * Pressure must be illegitimate (crimes, torts, threatened breach)
      * No reasonable alternative
      * Causal connection (stricter test than other forms)
        + no reasonable alternative - *Pao On v Lau Yiu Long (1980)*
        + Pressure must be “significant cause” - *Dimskal Shipping Co SA v International Transport Workers’ Federation (The Evia Luck)*
        + Possibly “but for” test applies - *Kolmar Group AG v Traxpo Enterprises Pty Ltd*
  + North Ocean Shipping v Hyundai Construction (1979): Demand for 10% price increase – unlawful conduct of threatening of breach
  + Threats of trade restrictions, sanctions and embargoes
    - Majority of UKSC in *Law Debenture Trust Corpn plc v Ukraine* held: such threats not illegitimate pressure under English law. Also not a basis for duress under English law if threats are unlawful under international law(international law not applicable in UK unless incorporated by domestic law)

**Lawful act duress**

* Principles:
  + Lawful act may constitute duress but has a narrow scope - *Times Travel v Pakistan Airlines*
  + Focus on nature of demand (being sought) and not nature of (lawful) threat of what def would do if demand not met - *Times Travel v Pakistan Airlines*
  + Demands motivated by commercial self-interest not illegitimate per se. Lawful act duress requires more than just hard-nosed commercial negotiation or exploiting a monopoly position; it typically involves reprehensible means or bad faith maneuvering to create vulnerability. - *Times Travel v Pakistan Airlines*
  + Existing categories(not exhaustive)：
    - Def uses knowledge of criminal activity of pl to obtain personal benefit by threats to report crime
    - Def who is civilly liable to pl, deliberately maneuvers pl into position of vulnerability by illegitimate means(highly reprehensible; unconscionable) to force pl to waive claim
  + *Fine Vision Opportunity III Ltd v Xinyuan Real Estate Co Ltd – Times Travel* reflects HK law
  + *Progress Bulk Carriers v Tube City* (2012): Bad faith exploitation

**Undue Influence**

**General Principles**

* Equitable doctrine
* Applies to both gifts and contracts
* Remedy: Contract voidable by weaker party
* Available when: - *Nature Resorts Ltd v First Citizens Bank Ltd*
  + Influence by another person
  + Weaker party placed trust in influencer
  + Weaker party unable to exercise free independent judgment in entering into transactions.

**Categories**

* **Actual Undue Influence**: relies on direct proof of influence - *Nature Resorts v First Citizens Bank*
  + No need to prove transaction disadvantageous
* **Presumed Undue Influence**: Relies on evidential presumption (two elements) - *Nature Resorts v First Citizens Bank*
  + 1. Relationship of influence (trust and confidence reposed by one party to another)
    - Established categories: trustee-beneficiary, solicitor-client, doctor-patient, etc. see below.
    - Fact-based relationships – raised by *Barclays Bank plc v O’Brien* and rejection of utility by *Etridge and Li Sau Ying v Bank of China (HK) Ltd.* Focus should be on proving actual undue influence
  + 2. Transaction not readily explicable by ordinary motives
    - Preferred test: whether transaction calls for explanation - *Etridge* and *Nature Resorts*
  + Presumption effect: Burden shifts to stronger party
  + Rebutting presumption: Weaker party exercised free and independent judgment
    - Receiving independent legal advice
      * But not always conclusive, nor always necessary - *Inche Noriah v Shaik Allie Bin Omar*
    - Stronger evidence needed where weight of presumption strong on facts
* **Third-Party Exercising Undue Influence:** A contracts with B because of undue influence of C(over A)
  + Elements (anyone is sufficient): - *Bainbridge v Brown*
    - B has (actual or constructive) notice of undue influence
      * Constructive notice
        + B has notice of risk of undue influence; and B fails to take reasonable steps to bring home to A the implications (including risks) of the transaction.
        + B is put on notice of the risk where:

B has knowledge of facts indicative of impropriety -*Bank of New South Wales v Rogers*

B is aware that relationship between A and C is a non-commercial one (in circumstances where A is providing security for benefit of C) - Etridge

* + - C acting as B's agent
    - B is volunteer (provided no consideration)

**Basis of doctrine of undue influence**

* See below

**Unconscionability**

**General Principles**

* + Equitable doctrine accepted in Australia and Hong Kong
  + Compared to undue influence: (not mutually exclusive)- *Commonwealth Bank v Amadio*
    - Undue influence focuses on plaintiff (quality of consent)
    - Unconscionability focuses on defendant (taking advantage of vulnerability)
  + Remedies: voidable
  + **Elements**: - *Commonwealth Bank of Australia Ltd v Amadio; Ming Shiu Chung v Ming Shiu Sum*
    - Special disability or in a special position of disadvantage of plaintiff
      * Poverty, illness, age, infirmity of body or mind, drunkenness, illiteracy, lack of education, inexperience/ignorance;
    - Defendant's knowledge of disability/disadvantage
      * Actual or constructive knowledge
        + Sufficient if def aware of possibility that pl occupies a situation of disadvantage or is aware of facts that would raise that possibility in the mind of any reasonable person
    - Unconscionable exploitation by defendant
      * Whether transaction explained, independent legal advice arranged, benefits to plaintiff
  + Bars:
    - Unfair terms or inequality of bargaining power alone insufficient
  + **Legislation**:
    - Unconscionable Contracts Ordinance (Cap 458)
      * Elements
        + Contract for sale of goods or supply of services
        + One party deals as consumer (and see s 3)
        + Contract (or part of contract) unconscionable in the circumstances relating to contract at time it was made
      * Court’s power
        + Refuse to enforce contract
        + Enforce contract without unconscionable part
        + Limit application of, or revise or alter, any unconscionable part
      * Matters to be considered in determining whether unconscionable include: (not to be applied mechanically - *Chang Pui Yin v Bank of Singapore Ltd* )
        + Parties’ respective bargaining power
        + Whether terms not reasonably necessary for protection of legitimate interests of other party
        + Whether consumer could understand documents
        + Whether undue influence/pressure exerted or unfair tactics used
        + Amount which consumer could acquire equivalent goods/services from another
    - Trade Descriptions Ordinance (Cap 362) s13f, s36

**Termination**

**Breach of Contract**

* Definition: Failure or refusal to perform contractual obligation without lawful excuse
* Types:
  + Actual breach: Failure to perform when time expired
    - Non-compliance with contractual representation/warranty
    - Non-performance of obligation
    - Late performance of obligation
    - Defective/unsatisfactory performance
  + Anticipatory breach: Repudiation before performance time

**Standards of contractual duty**

* Strict liability: Liability regardless of fault/intent - *Grant v Australian Knitting Mills Ltd*
  + Strict liability usually applies for contractual obligations
  + Obligation to perform may depend on a contingency
* Absolute liability: Technical distinction from strict liability, absolute liability is not contingent on the other party’s performance.
  + E.g. Buyer’s liability to pay is strict liability but not absolute liability
  + Any failure to perform constitutes breach
* Reasonable care: Breach only if reasonable care not exercised

**Remedies for Breach**

* Damages: Available for any breach
* Termination: Available only if the innocent party has the right to terminate

**Discharge of contracts**: contract comes to an end

* Discharge by frustration
* Discharge by performance
* Discharge by agreement
* Discharge by termination

**Termination:** parties discharged from obligations for further performance

* **Sources of Termination Rights**
  + Contractual Provisions
    - General principles:
      * Prima facie, parties entitled to provide for contractual right of termination for any breach of contract
        + But there are risks of termination clause being read down - *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council*

Where terms flies in the face of commercial common sense

Reading down as “terms only applies to repudiatory breaches (including cumulative breaches which are sufficiently serious)”

* + - * + How to avoid being read down?

McKendrick: right to terminate for “any breach (whether or not that breach is repudiatory)”

Termination clause to cover specified conditions only (considered by party to be important) and not breach of any term of contract

Can provide for wider right of termination than under common law

Possible to distinguish *Rice* case: see *Secretary for Justice v Yu's Tin Sing Enterprises Co Ltd* (unreported, CFI, HCA 398/2006, 9 Sep 2008)

Hong Kong law is almost always harsher, favouring commercial certainty over considerations of fairness.

* + - E.g. contractual right to terminate upon notice, contractual right to terminate for breach..
    - Clear drafting: expressly provide for consequences of breach: express contractual right to terminate for breach of specified terms in contract
  + Common Law for breach of contract
    - Termination rights arise from:
      * Breach of condition
      * Serious breach of intermediate term
    - No termination rights for:
      * Breach of warranty - *Bettini v Gye*
      * Non-serious breach of intermediate term

**Classification of Contractual Terms**

* Conditions
  + Termination right regardless of breach gravity - *Lombard North Central plc v Butterworthd*
* Warranties
  + No termination right for breach
* Intermediate Terms
  + Termination right depends on actual breach effect (whether consequences sufficiently serious) - *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*
    - Look at adequacy of damages remedy and whether the innocent part has been deprived the whole benefit.
* **Classification Factors**
  + Default position: Intermediate term unless clear intention otherwise - *Grand China Logistics Holdings (Group) Co Ltd v Spar Shipping AS*
  + **General test:**
    - Importance of term to promisee - *Bannerman v White*
      * Would promisee have entered into contract if no assurance of strict or substantial performance of promise
    - Whether term goes to contract root; Likely effect of a breach(as opposed to effects of actual breach) - *Bensen v Taylor Sons & CO (No 2);*
  + Express designation (not decisive)
    - Wording adopted by parties (e.g. “condition”, “warranty”) would give rise to presumption, but not necessarily decisive – *L Schuler AG v Wickman Machine Tool Sales Ltd*
  + Time of the essence (if time stipulation is intended as condition) - *Union Eagle Ltd v Golden Achievement Ltd*
  + Business practice (previous classifications) - *Bunge Corporation New York v Tradax Export SA*
    - parties presumed to contract on basis of accepted interpretation
  + Adequacy of damages remedy - *Bettini v Gye; Bunge Corporation New York v Tradax Export SA*
  + Reasonableness of construing term as a condition - *L Schuler AG v Wickman Machine Tool Sales Ltd*

**Termination or Affirmation (Innocent Party's Choice)**

* Termination: clear and unequivocal communication that contract ended - *Vitol SA v Norelf Ltd*
* Affirmation: choosing to continue contract loses termination right - *Cheung Ching Ping Stephen v Allcom Ltd*
* Affirmation requirements:
  + Repudiatory or anticipatory breaches
  + Can only occur with knowledge of breach facts - *Peyman v Lanjani*
  + Reasonable time passed or unequivocal affirmation act - *Kosmar Villa Holidays Inc v Trustees of Syndicate*
    - Bars:
      * where delay in termination, there is no implicit affirmation of contract unless the delay is consistent only with affirmation - *Cheung Ching Ping Stephen v Allcom Ltd*
  + Requesting performance not necessarily affirmation - *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia*

**Repudiation**

* Occurs when
  + Party indicates unwillingness/inability to perform all of the party’s obligations or the proposed breach, when it occurs would give rise to a right to terminate.
* Effect: Innocent party entitled to accept repudiation and terminate contract immediately(without waiting for time for performance to arrive for actual breach) - *Hochster v De La Tour*
* Wrongful termination constitutes repudiation - *Kensland Realty Ltd v Whale View Investment Ltd*
* **Principles**: - *Chao Keh Lung v Don Xia*
  + Words/conduct evincing an intention not to perform or express declaration that party is or will be unable to perform their obligations under the contract in some essential respect
  + In case where short of an express refusal or declaration: actions leading reasonable person to conclude intention to abandon contract
  + One party by their own act or default, disable themselves from essential performance

**Acceptance**

* Innocent party may terminate immediately
* Cause of action for anticipatory breach requires election to terminate
  + Election to terminate is required to complete cause of action for anticipatory breach.
    - if contract not terminated but is frustrated in interim, there is no breach by repudiating party(thus no damages for breach): Avery v Bowden (1855) 5 E & B 714

**Affirmation**: Not accepting repudiation, contract remains on foot.

* **General rule**:
  + Innocent party may continue performance- *White and Carter (Councils) Ltd v McGregor*
    - Retraction: Repudiating party may retract and perform when time arrives
  + If contract remains on foot, then the innocent party may have action in debt:
    - Action in debt vs. Action for damages for breach.
      * Duty of pl to mitigate losses in latter but not former
      * Debt usually easier to recover.
* **Exceptions**:
  + 1. Performance dependent on breaching party's cooperation - *Hounslow London Borough Council v Twickenham Garden Developments Ltd*
  + 2. No legitimate interest in completion (damages adequate and continuation of contract is unreasonable) - *Isabella Shipowner Ltd v Shagang Shipping Co Ltd, Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)*

**Remedies**

**Damages**

**General Principles:**

* Common law remedy for breach
* Effect: Financial compensation for plaintiff's loss
* Purpose: Place plaintiff in position as if the contract had been performed - *Victoria Laundry v Newman Industries, Richly Bright v De Monsa*
* **Types of Damages**
  + Ordinary damages: Compensate for actual loss
  + Nominal damages: Where no loss proven

**Measure of Damages**

* **Expectation Damages**: Protects performance/expectation interest
  + **Two basis**:
    - “Cost of cure” basis, or cost of reinstatement: how much will it cost the innocent party to rectify the breach of the defendant, either by paying someone else or the defendant.
      * Bars:
        + Claimant does not intend to rectify the issues with the damages - *Tito v Waddell (No 2)*
        + Reasonableness taken into account, if the cost of cure is wholly disproportionate to the value the cure will add to the end product(or the difference in value basis) - *Ruxley Electronics and Construction Ltd v Forsyth*
    - “Difference in value” basis: determine loss on basis of difference between value received by pl and value which pl ought to have received under contract
      * E.g. Sale of goods where non-delivery: Market vs. contract price difference
  + Defective performance: Value difference. Also stipulated by SOGO s 55(3)
  + Loss of profit: PL can prove, on balance of probabilities, expectation of receipt of benefit had a likelihood of attainment. - *Commonwealth v Amann Aviation Pty Ltd*
  + Loss of chance: measurement based on value of chance and not the lost value as such. - *Howe v Teefy*
* **Reliance Damages**: Compensates for losses reasonably incurred in performance
  + Covers wasted expenditure or out-of-pocket expenses
  + Protection of reliance interest: pl’s reliance on promise of def
  + Pre-contractual expenditure recoverable if wasting foreseeable or ought reasonably to have contemplated
    - *McRae v Commonwealth Disposals Commission*
    - *Bars:* 
      * Damages cannot put def in better position than if contract not   
        breached *- C & P Haulage v Middleton*
  + Usually covered by expectation damage, because calculation of profit takes into account expenses incurred, but reliance damages would be specifically claimed if pl cannot prove loss of profits.
* **Restitution Damages:** Claims value of benefits conferred on defendant in course of pl’s performance of contract
  + Requires total failure of consideration
  + Alternative: Restitution for unjust enrichment

**Non-Pecuniary Losses**

* General: Injured feelings or distress: not recoverable - *Addis v Gramophone Co Ltd*
* **Exceptions**: - *Farley v Skinner*
  + Pain, suffering, and loss of amenities
    - Compensation for pain and suffering in connection with personal injury caused by breach of contract (where injury not too remote) - *Grant v Australian Knitting Mills Ltd*
  + Contracts for pleasure, relaxation, peace of mind
  + Physical inconvenience

**Assessment Timing**

* Normally assessed at breach time- *Johnson v Agnew*
* Anticipatory breaches: When performance should have occurred -*Millet v Van Heck & Co*

**Causation**

* Loss must be caused by breach - *C & P Haulage v Middleton*
* Multiple causes: Whether breach was effective cause - *County Ltd v Girozentrale Securities*
* "But for" test may apply - *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd*
* Common sense approach - *March v E & M H Stramare Pty Ltd; Galoo v Bright Grahame Murray*
  + “but for” test was not a definitive test of causation in tort
  + Question of causation is one of fact. The court decides whether the breach of duty was the cause of loss or merely the occasion for the loss by the application of common sense,

**Remoteness of Loss**

* Damages exclude losses too remote
* Liability for damages is based on (objective) intentions of parties at time of contracting
* Recoverable only for assumed responsibility for type of loss - *Transfield Shipping Inc v Mercator Shipping Inc (The Archilleas); Richly Bright International Ltd v De Monsa Investments Ltd*
  + Reasonable foreseeability of loss not sufficient for loss to be recoverable; party must (objectively) have undertaken responsibility for loss - *Transfield Shipping Inc v Mercator Shipping Inc (The Archilleas)*
* **Hadley v Baxendale (1854) rule**:
  + General damages: loss fairly and reasonably considered to arise naturally from breach (imputed knowledge)
  + Special damages: Losses reasonably supposed to be in contemplation at contracting (actual knowledge)

**Mitigation**

* Plaintiff must reasonably mitigate losses otherwise pl not entitled to recover loss that would not be suffered if there was mitigation.
* Unreasonable failure to mitigate: Cannot recover avoidable losses - *Brace v Calder*

**Recovery of Contract-Fixed Sums**

* **Action for Liquidated Sum**
  + Cause of action in debt, not damages
  + Elements: Sum fixed by contract, sum is now due
* **Agreed Damages Clauses**
  + Contract term specifying liquidated damages amount
  + When applicable: - *Polyset Ltd v Panhandat Ltd*
    - Plaintiff can claim sum without proving loss
    - Defendant liable regardless of actual loss amount
  + Unenforceable if penalty - *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*
    - Test:
      * Whether genuine pre-estimate of loss
      * Reformulated as: *Cavendish Square Holding BV v Makdeshi*
        + Provision is penal if it is a secondary obligation imposing detriment on contract-breaker out of all proportion to any legitimate interest of innocent party in enforcement of primary obligation
        + Innocent party potentially has legitimate interest extending beyond recovery of compensation for loss
    - Penalty if Amount extravagant/unconscionable compared to greatest possible loss
* **Deposits:** Upfront deposit payments, Paid as guarantee for performance
  + Applied toward contract price
  + Forfeited if payor breaches
  + Distinguished from agreed damage clauses (deposits not intended as pre-estimate of loss on breach)
  + **Exceptions**: Recoverable if:
    - Deposit constitutes penalty
      * Test: whether amount of deposit is reasonable as earnest money - *Workers Trust and Merchant Bank Ltd v Dojap* Investments Ltd
        + Test as to whether deposit is a penalty not the same as test applied for agreed damages clauses
        + Even if higher deposit intended to compensate for loss on P’s breach: deposit not necessarily valid
    - Equitable relief against forfeiture
    - Deposit invalid and deemed part payment
  + **Deposits vs. Part payments:**
    - Part payments recoverable if contract not completed(even if payor may be in breach)
    - Question of construction whether payment is deposit or part payment

**Specific Performance**

* **General Principles**
  + Equitable remedy compelling performance
  + Discretionary remedy
  + Principle:
  + Granted only if damages inadequate - *Beswick v Beswick*
  + Specific performance usually not granted to compel party to carry on business - *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*
  + Land sales: Usually available against vendor (land unique)
  + Goods sales: Usually unavailable unless goods unique
* **Factors Against Specific Performance**
  + Personal service contracts
    - Reasons: Inappropriate forced cooperation, slavery form, enforcement difficulties - *De Francesco v Barnum*
    - Contracts requiring constant court supervision
  + Lack of mutuality
    - Specific performance generally only granted against defendant if plaintiff is able to perform plaintiff’s own obligations - *Price v Strange*
  + Vague contracts - *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*
  + Undue hardship on defendant - *Patel v Ali*
  + Mistake by defendant in contracting - *Tamplin v James*
  + Potential unjust enrichment of plaintiff

**Injunctions:** equitable discretionary remedy

* Prohibitory Injunctions(refrain from doing some act)
  + Usually granted unless hardship to defendant
  + Elements:
    - Breach of negative contractual obligation
    - Damages inadequate
* Mandatory Injunctions(do an act)
  + Test: balance of convenience
  + Elements:
    - Breach of negative  contractual obligation
    - Positive action needed to remedy
  + Rarely granted: Easier for breaching party to pay damages
  + Relevant to look at whether damages adequate remedy: *QBE Management Services (UK) Ltd v Dymoke*

**Mistake**

**General**

* The law relating to mistake must balance the need for certainty in transactions (requiring a narrow doctrine) with protecting parties who enter agreements radically different from what they intended (suggesting a more liberal doctrine).
* The law adopts an objective rather than subjective approach to agreement.
* Is there a remedy for the mistaken party (or parties)?
* Often no: the contract stands and is binding.
* Why?
  + Objective theory of contract
  + Certainty of contracts
* But factors favoring a remedy:
  + Fairness
  + Need for “integrity” of actual agreement: consensus ad idem

**Categories of mistake**

**General**

* **Mutual mistake**
  + Occurs when both parties are mistaken but about different things (at cross-purposes)
  + This terminology is problematic in legal context (not always used consistently) and often avoided due to confusion.
  + Can prevent contract formation entirely when parties fundamentally misunderstand each other – i.e. Offer and acceptance do not coincide (no consensus ad idem)
  + Possible that parties not ad idem even if there is literal correspondence between offer and acceptance
  + Prima facie presumption in face-to-face contracts is: a person intends to contract with the person in front of them
* **Unilateral mistake**
  + Only one party has made a mistake
  + The other party is either aware or unaware of this mistake
  + Face-to-face presumption applies that a person intends to contract with the person physically present
    - This presumption can only be displaced on 'special facts'
* **Common mistake**
  + Both parties under the same mistake
  + Agreement is reached but vitiated by the shared error.
  + May set aside contracts when relating to:
  + Existence or identity of subject matter (more likely to invalidate)
  + Quality of subject matter (rarely sufficient except in extreme cases)
  + Courts are reluctant to allow this as an escape from bad bargains
* **Legal consequences of mistake**
  + Main remedy: no contract formed (or contract void ab initio)
  + Other (potential) equitable remedies:
    - Contract voidable in equity (contract may be rescinded)
    - Refusal to grant specific performance of contract
    - Rectification of contract

**Mutual mistake and absence of contract**

* Prevents formation of contracts as parties are at cross-purposes
* No consensus ad idem (meeting of minds)
* Mutual mistake operative only if the objective facts are equivocal (as to which interpretation is correct.
* *Raffles v Wichelhaus* (1864) 2 H & C 906
  + Issue: Mistake preventing contract formation; Latent ambiguity(either interpretation of   
    words is reasonable).
  + Facts: Parties agreed to a contract for cotton "ex Peerless from Bombay". There were two ships named Peerless sailing from Bombay at different times. One party intended the October ship, the other the December ship.
  + Holding/Principle: The court accepted that parol evidence could show which ship was intended. If the parties meant different ships, the necessary agreement for a binding contract would be absent. The case suggests that latent ambiguity in terms can prevent contract formation if parties are at cross-purposes.
  + Commentary: The textbook describes Raffles as an "obscure case" primarily dealing with a point of pleading rather than a full decision on the contract's validity. Its fame stems from academic use in debates about objective versus subjective theories of contract. The textbook notes its limited practical application due to the sparseness of facts compared to modern cases.
* *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564
  + Issue: Mistake known or induced by the other party.
  + Facts: Pl selling hemp and tow by auction Auction catalogue: described 2 sets of goods with same shipping mark (S.L. Lots 63–67 (47 bales) and S.L. Lots 68–79 (176 bales)). Samples of both Lots available for inspection at pl’s showroom – Lot numbers shown. Def buyer inspected first sample (hemp) but did not inspect second sample (tow), believing it was also hemp. Def made bids for both Lots at auction; goods knocked down to def. After discovering that second set of Lots was tow, def refused to pay
  + Holding/Principle: A party at fault (e.g., by inducing a mistake in the other party or failing to notice the other party's mistake) may not be entitled to enforce the contract based on the mistaken terms.
* *Goldsborough Mort & Co Ltd v Quinn* (1910) 10 CLR 674
  + Facts: Contract for sale of land – price of £1, 10s per acre “calculated on a freehold basis”Was price simply £1, 10s per acre (vendor’s view) or did price payable require deduction for conversion from leasehold to freehold (purchaser’s view)?
  + Held:Purchaser’s interpretation correct. Wording clear and unambiguous in meaning. Unilateral mistake on part of vendor and not mutual mistake

**Unilateral mistake**

* Mistake about some matter relating to the contract is not sufficient on its own to give rise to operative mistake. Even if the other party to contract knows that mistaken party is contracting under the mistake: *Smith v Hughes* (1871) LR 6 QB 597.
* Caveat emptor – let the buyer beware
* **Remedy** where unilateral mistake operative:
  + 1. No contract (or contract void)
    - *Smith*; *Hartog*
    - Consistent with objective theory of contract?
      * View1: this is an exception to the objective theory (since subjective intention of mistaken party protected)
        + but exception justified and does not conflict with rationale of objective theory
      * View2: This is an application of the objective theory
      * E.g. *Hartog*:
        + Objectively possible to ascertain that real agreement was price per piece
        + No reasonable person could form the view that there was agreement on the literal terms
        + Objectively, not reasonable for P to believe that there was consensus ad idem for sale at price per pound
        + True intentions, objectively ascertained, do not correspond to the literal agreement
  + 2. “Apparent contract” void
    - But actual contract enforceable on terms as intended by mistaken party (and known to other party) – to reflect true intentions:
    - Ulster Bank Ltd v Lambe [2012] NIQB 31
      * The plaintiff’s offer of settlement of debts mistakenly used euros as the currency instead of sterling. The court held that defendant must have known of the mistake, and ordered that the contract should be interpreted as by sterling or rectified to be by sterling

**Where unilateral mistake not known by unmistaken party**

* Court may deny specific performance if unjust to impose burden on mistaken party due to hardship:
  + Burrow v Scammell (1881) 19 Ch D 175 at 182 – Burden not contemplated
    - Principle Cited: Bacon VC states: “It cannot be disputed that Courts of Equity have at all times relieved against honest mistakes in contracts, where the literal effect and the specific performance of them would be to impose a burden not contemplated, and which it would be against all reason and justice to fix, upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also where not to correct the mistake would be to give an unconscionable advantage to either party. But **no case** has been referred to, nor, as I believe, can be found, in which the mistaking party has sought for, or could derive, any advantage beyond the mere relief from the burden.”
  + Tamplin v James (1880) 15 Ch D 215 at 221 – 房产不带花园
    - Principle: James LJ held that the defence to specific performance for mistake could not generally be sustained where the vendor did nothing to mislead the purchaser and the mistake arose because of the purchaser's lack of reasonable care (here, the failure to inspect the plans)
* But mistaken party still liable for damages for breach of contract if party does not perform:
  + Webster v Cecil (1861) 30 Beav 62 at 64
    - Facts/Principle: The defendant, having refused to sell some property to the plaintiff for £2,000, wrote a letter in which, as the result of a mistaken calculation, he offered to sell it for £1,250. The plaintiff accepted but the defendant refused to complete.
    - Held: Romilly MR refused a decree of specific performance but said the plaintiff might bring such action at law as he might be advised.

**Mistake as to terms of contract**

* *Smith v Hughes* (1871) LR 6 QB 597 - 燕麦 - Terms vs. Quality
  + Issue: Mistake as to terms vs. mistake as to quality; Objective test of agreement.
  + Holding/Principle: A contract may not be formed if one party knows(or ought reasonably to   
    have known) the other is mistaken as to the terms of the agreement and fails to correct the mistake. This is distinguished from a mistake merely as to the quality of the subject matter, where the mistaken party is generally bound unless there was a warranty or misrepresentation regarding the terms.
  + Context: Also cited in *Great Peace Shipping* as one of the cases Lord Atkin referred to in *Bell v Lever* *Bros* when discussing mistake as to quality, although *Great Peace* viewed these cases as an "insubstantial basis" for that part of Lord Atkin's formulation.
* *Hartog v Colin & Shields* [1939] 3 All ER 566– Snapping up – Hare skins – not ad idem
  + Issue: Mistake known to the other party; "Snapping up" an offer.
  + Facts: Sale of hare skins stated at a price “per pound”. Seller intended to sell at price “per piece”. Buyer snapped up offer, as price per pound would be a bargain (3 pieces correspond to 1 pound)
  + Holding/Principle: No contract as parties not ad idem. A party cannot accept an offer they know was made by mistake (e.g., pricing per pound instead of per piece)

**Mistake as to identity of contracting party:** A purports to contract with B, believing B to be C because of B’s misrepresentation. B often regarded as rouge.

* **Presumption** for face-to-face transactions: you contract with person physically present
* **Presumption** for parties dealing at a distance in writing: contract with persons named in written agreement
* **Remedy**: Contract can be voidable for misrepresentation, can be void under law of mistake, can be rectified under law of equity.
* **Mistake as to identity of contracting party – face-to-face**
* Phillips v Brooks Ltd [1919] 2 KB 243
  + Issue: Mistake as to identity in face-to-face contracts.
  + Facts: A rogue visited a jeweller's shop, claimed to be Sir George Bullough, and bought a ring with a worthless cheque. He then pledged the ring to the defendant pawnbroker.
  + Holding/Principle: The contract between the jeweller and the rogue was voidable, not void. There is a strong presumption in face-to-face dealings that a party intends to contract with the person physically present. The mistake related to the person's attributes (creditworthiness), not their identity as the physical person present. The defendant acquired good title.
  + Relation: Cited with approval in *Lewis v Averay* and by the majority in *Shogun Finance*. Contrasted with *Cundy* by the *Shogun minority*.
* Ingram v Little [1961] 1 QB 31
  + Issue: Mistake as to identity in face-to-face contracts (rebutting the presumption).
  + Facts: Sisters selling a car dealt face-to-face with a rogue claiming to be PGM Hutchinson. They only accepted his cheque after verifying the existence of a PGM Hutchinson in the phone directory at the address given. The rogue sold the car to the defendant.
  + Holding/Principle: The Court of Appeal (majority) held the contract was void for mistake, finding the presumption of intention to deal with the person present had been rebutted because identity was crucial.
  + Commentary/Status: Described as controversial. Distinguished by Lewis v Averay. Lords Millett and Walker in Shogun thought it wrongly decided. The textbook highlights Devlin LJ's dissenting judgment and the difficulty in rebutting the face-to-face presumption.
* Lewis v Averay [1972] 1 QB 198
  + Issue: Mistake as to identity in face-to-face contracts.
  + Facts: Plaintiff selling a car dealt face-to-face with a rogue claiming to be the actor Richard Greene. The plaintiff accepted a cheque after the rogue produced a fake studio pass as identification. The rogue sold the car to the defendant.
  + Holding/Principle: The Court of Appeal held the contract was voidable, not void, following Phillips v Brooks. The plaintiff intended to contract with the person present, despite the deception regarding identity/attributes. The presumption was not rebutted.
  + Relation: Distinguished Ingram v Little. Cited with approval by the majority in Shogun Finance. Contrasted with Cundy by the Shogun minority.
* **Mistake as to identity of contracting party - parties dealing at a distance in writing**
  + General principle:
    - Presumption that parties intend to contract with persons named in written agreement
    - Written agreement with named party tends to indicate that identity intended to be a term of the contract [condition precedent to formation of contract]
    - Presumption rebuttable though
* Cundy v Lindsay (1878) 3 App Cas 459
  + Issue: Mistake as to identity in written contracts; Void vs. Voidable.
  + Facts: A rogue (Blenkarn) ordered goods by mail, imitating the name of a known, reputable firm (Blenkiron & Co). The plaintiffs sent goods, intending to deal with Blenkiron & Co. The rogue sold the goods to innocent third parties (Cundy).
  + Holding/Principle: The contract between the plaintiff and the rogue was void for mistake because the plaintiff intended to deal only with the identifiable third party (Blenkiron & Co), not the rogue. Therefore, the rogue acquired no title and could pass none to the defendant.
  + Distinction/Relation: Distinguished from King's Norton Metal Co. Affirmed by the majority in Shogun Finance for written contracts where identity is crucial. The minority in Shogun argued it was irreconcilable with face-to-face cases like Phillips and Lewis.
* **Shogun Finance Ltd v Hudson [2004] 1 AC 919**
  + Issue: Mistake as to identity; written vs. face-to-face contracts; Effect on third parties; Hire Purchase Act 1964 s.27.
  + Facts: A rogue obtained a car on hire-purchase using a stolen driving licence (of Mr. Patel). The transaction involved documentation faxed between the dealer and finance company. The finance company checked Mr. Patel's creditworthiness. The rogue sold the car to the innocent defendant.
  + Holding/Principle (Majority): The contract was void for mistake.
    - The contract was treated as being in writing between Shogun and Mr. Patel.
    - Shogun intended to contract only with Mr. Patel (whose identity and creditworthiness were verified).
    - Following Cundy, as it was a written contract where identity was fundamental, no contract was formed with the rogue.
    - Extrinsic evidence (that the rogue was physically present with the dealer) was inadmissible to contradict the written terms identifying Mr. Patel as the hirer.
    - The rogue was not the 'debtor' under the Hire Purchase Act, so the defendant was not protected by s.27.
    - Affirmed the distinction between written contracts (Cundy) and face-to-face contracts (Phillips, Lewis).
      * In concluding that the cases could not be reconciled, the minority chose to focus upon the nature of the mistake made and they pointed out that the mistake made in cases such as Cundy v. Lindsay and Phillips v. Brooks was the same, in the sense that in both cases the seller entered into the transaction under the misapprehension that the person with whom he was corresponding (or, in the case of the oral contract, the person with whom he was talking) was one person, of whose name he was aware, when in fact he was a third party.
  + Holding (Minority - Lords Nicholls & Millett): Argued the contract should be voidable. Criticized the written/face-to-face distinction as unprincipled and favouring form over substance. Argued Cundy should be overruled to protect innocent third-party purchasers consistently. Emphasized the seller's interest is primarily in creditworthiness, not identity per se.
* King’s Norton Metal Co v Edridge Merrett & Co Ltd (1897) 14 TLR 98
  + Issue: Mistake as to identity (attributes vs. identity) in written contracts.
  + Facts: A rogue (Wallis) used a fictitious company name (Hallam & Co) in written correspondence to obtain goods on credit from the plaintiff, then sold them to the defendant.
  + Holding/Principle: The contract between the plaintiff and the rogue was voidable, not void. The plaintiff intended to contract with the writer of the letters, whoever they were, but was mistaken about their attributes (thinking they were a company called Hallam & Co). Since Hallam & Co didn't exist as a separate entity the plaintiff could have intended to deal with, the plaintiff intended to deal with the correspondent (the rogue).
  + Distinction: Contrasted with Cundy, where the plaintiffs intended to deal with a specific, existing firm different from the rogue.

**Common mistake**

* Contract void under common law where common mistake means that performance of the contract would be impossible, or would essentially be fundamentally different to what was contemplated by the parties
* Scenario 1: Subject matter does not exist at time of contract
  + Contract prima facie void: *Bell v Lever Bros; Great Peace Shipping*
  + Contract not void if a party **expressly** or **impliedly** undertakes responsibility for existence of subject matter:
    - *McRae v Commonwealth Disposals Commission* *(1951) 84 CLR 377:* Public tender for purchase of oil tanker said to be wrecked on Jourmaund Reef, Contract not void as Commission impliedly warranted existence of tanker
* Scenario 2: Mistake as to quality of subject matter
  + Test (OR):
    - 1. Whether absence of that quality as to subject matter renders the subject matter (thing) essentially different from the thing that the parties believed it to be. (*Bell v Lever Bros* per Lord Atkins)
    - 2. Whether the mistake renders the contractual venture impossible (*Great Peace Shipping; Tony Investments v Fung*)
* **\*Bell v Lever Bros Ltd [1932] AC 161**
  + Facts: Lever Bros paid compensation to terminate employment contracts, unaware they could have been terminated without compensation due to the employees' prior breaches of duty.
  + Holding/Principle: The House of Lords (majority) held the compensation agreements were not void for common mistake. A mistake as to quality only voids a contract if it makes the subject matter "essentially different" from what it was believed to be. Here, the mistake about the terminability of the service agreements was deemed a mistake as to quality that did not meet this high threshold. The subject matter (the employment contracts) existed and were terminated as agreed.
  + Commentary:
    - Established a very narrow doctrine of common mistake at common law. Professor MacMillan discusses the difficulty in reconciling the result with the apparent fundamental nature of the mistake and suggests other context (primarily failed fraud claim, sanctity of contract) influenced the decision and summed up in the following passage:  
      ” [T]he reason that the mistake was not considered sufficiently fundamental in this case was because of the peculiar and exceptional circumstances that gave rise to the termination agreements. Hard cases really do make bad law.”
    - It's noted as a leading case significantly interpreted (and inconsistent with *Solle*) and later affirmed by Great Peace.
* **\*Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679**
  + Issue: Common mistake (common law and equity); Relationship between Bell and Solle; Test for common mistake.
  + Facts: Salvors hired the 'Great Peace', believing it was much closer (35 miles) to a distressed vessel than it actually was (410 miles). They cancelled upon finding a nearer vessel.
  + Holding/Principle:
    - The contract was not void in common law and there was no equitable jurisdiction to rescind it.
    - Affirmed the narrow common law test from *Bell*: mistake must render contractual performance impossible or make it "essentially different" from what was contemplated. The distance mistake did not meet this test; performance was still possible, just less satisfactory.
    - Disapproved *Solle v Butcher*, holding there is no separate equitable jurisdiction to rescind for common mistake where the contract is valid at law. *Solle* was deemed inconsistent with *Bell*.
    - Outlined elements for common mistake at common law: (i) common assumption about a state of affairs; (ii) no warranty by either party that subject matter exists; (iii) non-existence not attributable to fault; (iv) non-existence must render performance impossible; (v) state of affairs relates to existence/vital attribute of consideration or essential circumstances.
* Tony Investments Ltd v Fung Sun Kwan [2006] 1 HKLRD 835
  + Facts: Sale of land agreement in 2004, including a former slipway. Vendor did not have title due to reclamation initiated in 1990 and extinguishing of title under statute
  + Holding: Contract is not void for common mistake. Contract not impossible to perform – vendor had right to seek re-grant from government for nominal premium. Also implied warranty that vendor has good title.
* McRae v Commonwealth Disposals Commission (1951) 84 CLR 377
  + Issue: Common mistake as to existence of subject matter; Implied warranty; Fault.
  + Facts: The Commission sold salvage rights to a supposed oil tanker on a reef, which turned out not to exist. The buyer incurred significant expense attempting salvage.
  + Holding/Principle: The High Court of Australia held the contract was not void for mistake. Reasons included: (1) On proper construction, the Commission had warranted the existence of the tanker; (2) A party cannot rely on a mutual mistake it induced recklessly or without reasonable grounds.
  + Relation: Approved by *Great Peace*, which viewed it as reconcilable with English law based on construction (allocation of risk/warranty) or fault, distinguishing it from cases where goods merely 'perish'.
* Solle v Butcher [1950] 1 KB 671 (overruled in UK)
  + Issue: Common mistake; Mistake in equity; Voidable contracts; Rescission on terms.
  + Facts: Landlord and tenant agreed on a rent for a flat, both mistakenly believing it wasn't subject to rent restrictions under the Rent Restriction Acts, when it was. The agreed rent (£250) was significantly higher than the restricted rent (£140).
  + Holding/Principle (Majority - Denning LJ): While the lease was not void in common law (following *Bell*), it was voidable in equity due to a "fundamental" common mistake (misapprehension). Equity offered a wider scope for mistake, rendering contracts voidable and allowing courts to grant rescission on terms (e.g., allowing the tenant to choose between staying at the legally permissible rent or leaving).
  + Status: Effectively overruled by *Great Peace*, which held it was inconsistent with Bell and that there is no separate, wider doctrine of mistake in equity that makes contracts voidable when they are valid at common law.
  + HK position not settled See *Lo Shing Kin v Sy Chin Mong Stephen* (unreported, CACV 148/2012, 8 May 2013).

**Rectification of contracts: Equitable remedy to correct mistakes in written instruments**

* Available when mistake made in recording the agreement
* Only available within narrow limits
* Must show the document doesn't reflect actual agreement made.
* **Unilateral mistake as to terms** and the other party is aware.
  + Kowloon Development Finance Ltd v Pendex Industries Ltd (2013) 16 HKCFAR 336
    - Rectification possible because of lack of good faith by unmistaken party.
* **Common mistake**
  + Elements to be established for rectification of instrument (*Tang Kwai Cheung v Yeung Sze Ting* [2024] 2 HKLRD 1324, HKCA):
    - The parties had a continuing common intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
    - There was an outward expression of accord;
    - The intention continued at the time of the execution of the instrument sought to be rectified; and
    - by mistake, the instrument did not reflect that common intention.
* Objective intention or subjective intention for common mistake rectification?
  + UK position
    - *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 per Lord Hoffmann (obiter):
      * Objective intentions
    - FSHC Group Holdings Ltd v Glas Trust Corporation Ltd [2020] Ch 365
      * Holding/Principle:
      * If the mistake is that the document fails to reflect a prior concluded contract, the terms of that prior contract are determined objectively.
      * If the mistake is that the document fails to reflect a common continuing intention (not amounting to a binding contract), i.e. contract is formed at the same time as when the written document was executed; the test is subjective.
      * Context: Disagreed with obiter dicta in *Chartbrook Ltd v Persimmon Homes Ltd* which had suggested an objective test applied even in the 'common continuing intention' scenario’.
    - Tyne and Wear Passenger Transport Executive (trading as Nexus) v National Union of Rail, Maritime and Transport Workers [2024] UKSC 37; [2024] 3 WLR 909
      * Agreed with FSHC that focus is on subjective intentions (rejecting Chartbrook)
  + HK position
    - Objective intentions critical in all cases
    - *Kowloon Development Finance Ltd v Pendex Industries Ltd* (2013) 16 HKCFAR 336
      * Consent orders allowing further time for repayment of arrears owed by borrower to moneylender
      * Vague as to whether outstanding debt released aside from the specified payments
      * Prior negotiations: clear that debt not intended to be released
      * Holding:
        + On common mistake, for the purpose of establishing what the actual agreement between the parties is, the common law applies an objective test.

As part of the relevant background facts (also known as the "factual matrix") the court may take account of pre-contractual negotiations or draft heads of agreement.

* + - * + On unilateral mistake, rectification possible because of lack of good faith by unmistaken party.
    - See above for Elements in *Tang Kwai Cheung v Yeung Sze Ting* [2024] 2 HKLRD 1324
* **Non est factum(it is not my deed)**
* Scenario:
  + 1. Person did not sign document;
  + 2. (AND)
    - Signer was under disability that prevents them from being able to read or understand document;
    - Fundamental or radical difference between document signed and what signer believed they were signing.
    - Signer was not careless
* **\*Saunders v Anglia Building Society [1971] AC 1004 (also referred to as Gallie v Lee)**
  + Facts: An elderly widow signed a document assigning her house to her nephew's associate, believing it was a deed of gift to her nephew. The associate mortgaged the house to the defendant building society.
  + Holding/Principle: The plea of non est factum failed. The defence is available only within narrow limits:
  + The signer must belong to a class of persons who, through no fault of their own (e.g., blindness, illiteracy, incapacity), are unable to understand the purport of the document without explanation. Carelessness negates the defence.
  + The document actually signed must be "radically," "fundamentally," or "essentially" different from the document the signer believed they were signing. The old distinction between 'character' and 'contents' was rejected.
  + In this case, the difference between transferring the house to facilitate raising money via a gift versus via a sale was not deemed sufficiently radical. (i.e. Mistake as to legal effect of document is insufficient to establish non est factum) The signer's underlying intention (to help nephew raise money on the house) was arguably achieved, albeit differently.
* *Kincheng Banking Corp v Kao Yu Kuei* [1986] HKC 212
  + Guarantor (could not read Chinese) is aware that the document signed involved him taking up some obligation re borrower’s liability but not fully aware of precise legal effect.
  + Non est factum not established
* Radical difference
  + *Petulin v Cullen* (1975) 132 CLR 355
    - Radical difference: signing extension of period of option under belief that he was signing a receipt
    - Holding: No need to establish absence of carelessness by mistaken party to render contract void. Apply principles of operative unilateral mistake as to terms where mistake known by other party.
  + *O’Brien v Australia and New Zealand Bank Ltd* (1971) 5 SASR 347
    - Not radical difference where signing guarantee of existing and future indebtedness, believing guarantee to only cover future indebtedness.
* Where case involves rights of third party who acted in good faith in reliance on signed document without notice of mistake
  + Mistaken party not entitled to assert absence of consensus ad idem against third party (i.e. unilateral mistake principles not applied; only basis for setting aside contract is non est factum)
  + Estoppel?（不懂）
    - Alternatively, not true estoppel but person not allowed to take advantage of their own wrong against third party (where there was carelessness): Saunders v Anglia per Lord Hodson

**Frustration**

* General
  + The doctrine of frustration discharges a contract when an event occurs after its formation that renders performance impossible, illegal, or radically different from what the parties contemplated.
  + **Test**: whether, without default of either party, contract has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract - *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 per Lord Radcliffe
* ***\*Taylor v Caldwell*(1863) 3 B & S 826**:
  + Facts: Defendants agreed to let plaintiffs use the Surrey Gardens and Music Hall for concerts. Before the first concert, the hall was destroyed by fire without fault of either party.
  + Holding: The contract was discharged. Both parties were excused from performance – the plaintiffs from paying, the defendants from providing the hall.
  + Principle: Introduced the concept that where performance depends on the continued existence of a specific thing, and that thing perishes without fault, there is an implied condition that the impossibility of performance arising from the perishing shall excuse performance. The continued existence of the hall was essential and its destruction made the contemplated performance impossible.
  + Significance: Regarded as the origin of the modern doctrine of frustration, moving away from the stricter rule of absolute contracts (*Paradine v Jane*). It initially based the doctrine on an implied term reflecting presumed party intention.
* **\*Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696**:
  + Facts: Contractors agreed to build houses for a fixed price within 8 months. Due to unforeseen labor shortages (without fault), the work took 22 months and cost significantly more. The contractors claimed the contract was frustrated and they should be paid more than the contract price.
  + Holding: The contract was not frustrated. The delay and increased cost did not fundamentally change the nature of the obligation.
  + Principle: Established the modern test for frustration, articulated by Lord Radcliffe: Frustration occurs "whenever the law recognises that 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 it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do." It rejected the "implied term" theory as artificial, focusing instead on the true construction of the contract and the impact of the supervening event. Hardship, inconvenience, or material loss alone are insufficient.
  + Significance: Sets the high threshold for frustration, emphasizing it's not merely about performance becoming more onerous or expensive. It confirmed the restrictive approach and highlighted that foreseeability of the event (labor shortages were a known post-war risk) weighs against frustration.
* ***\*Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226:**
  + Facts: A ship was chartered for a voyage via the Suez Canal. Both parties knew the canal might close due to military conflict but failed to agree on a specific clause. The charterers sailed into the canal (breaching a war clause) and became trapped when it closed. They claimed frustration based on the closure (arguing the alternative route via the Cape was radically different).
  + Holding: The contract was not frustrated. The charterers could not rely on the trapping (self-induced), and the alternative route via the Cape, while longer and more expensive, did not render performance "radically different" from the original undertaking for the whole voyage (108days vs. 138 days).
  + Principle: Lord Denning MR controversially stated that foreseeability does *not* prevent frustration; the key is whether the parties made provision for the event. If they foresaw it but didn't provide for it, frustration can still apply if the "radically different" test is met. However, this part of the judgment is likely *obiter* and criticized (e.g., by Prof. Treitel), with the prevailing view being that foreseeability *is* a factor against frustration, potentially indicating assumption of risk.
* ***\*National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675**:
  + Facts: A 10-year warehouse lease was impacted when the sole access road was closed for 20 months, starting about 5 years into the term. The lessees stopped paying rent, claiming frustration.
  + Holding: While the House of Lords held that the doctrine of frustration *can* apply to leases in principle (overruling previous doubts, though Lord Russell was hesitant), it was not frustrated on these facts. The interruption, though significant, was temporary relative to the overall lease term.
  + Principle: The Lords reviewed various theories for the basis of frustration (implied term, total failure of consideration, justice demands, construction/radically different). Lord Hailsham and Lord Roskill expressed preference for Lord Radcliffe’s “radically different” test from *Davis Contractors*. Lord Wilberforce suggested the theories shade into one another.
  + Significance: Confirmed that leases are not immune from frustration, though it will be “exceedingly rare”. Reinforced the “radically different” test as the dominant approach.
* **Foreseeability and terms dealing with frustration**
  + Frustration generally doesn't apply if the event was foreseeable (raising the question of the required degree of foreseeability) or if the contract makes express provision for the event (e.g., via a force majeure clause).
  + **Foreseeability**
    - No frustration where supervening event foreseeable
      * Suggested test: whether event would reasonably be seen as having a real likelihood to occur (Prof. Treitel)
      * *Walton Harvey Ltd v Walker & Homfrays Ltd* [1931] 1 Ch 274
    - Doctrine may still apply if frustrating event exceeds what would be reasonably contemplated by the parties.
      * *Tatem v Gamboa* [1939] 1 KB 132
  + **Express provision**
    - Contractual terms apply instead of doctrine of frustration, the doctrine of frustration is excluded (except in cases of supervening illegality where public policy prevails, see below).
    - Doctrine of frustration still applicable where contractual term construed as not covering truly catastrophic events beyond the parties' contemplation.
      * *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119
* *Metropolitan Water Board v Dick Kerr & Co Ltd*[1918] AC 119:
  + Facts: A contract to build a reservoir within 6 years was interrupted after 2 years by a government order during WWI, halting work indefinitely and requiring the sale of plant. The contract contained a clause allowing the engineer to grant time extensions for delays caused by various specified reasons or "any other difficulties, impediments, obstructions... whatsoever and howsoever occasioned".
  + Holding: The contract was frustrated despite the clause.
  + Principle: The House of Lords held that the clause, despite its broad wording, was intended to cover temporary difficulties, not a fundamental interruption of such character and duration that it vitally changed the conditions of the contract and could not have been in the parties' contemplation. The government prohibition was of such a nature.
  + Significance: Shows that even broadly worded clauses dealing with delay or impediments may not prevent frustration if the supervening event is of a magnitude and character that fundamentally alters the contractual venture beyond what the clause was intended to cover.
* **Self-induced frustration**
  + Frustration cannot be invoked if it results from the act, election, or fault of the party seeking to rely on it. The frustrating event must be external and beyond the party's control.
* ***\*J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep 1:**
  + Facts: Defendants (Wijsmuller) contracted to transport plaintiff's rig using either Super Servant One or Super Servant Two (at Wijsmuller's option). Super Servant Two sank (potentially due to Wijsmuller's negligence). Wijsmuller had allocated Super Servant One to other contracts and told the plaintiff they could not perform. They claimed frustration.
  + Holding: The contract was not frustrated.
  + Principle (Bingham LJ):
    - If the sinking was due to Wijsmuller's negligence, frustration couldn't be claimed, as the event must occur without fault. "Fault" here is interpreted pragmatically, not just limited to deliberate acts or breaches of duty owed *to the plaintiff*.
    - Even if the sinking wasn't negligent, frustration failed because Wijsmuller had a choice. The contract allowed performance using Super Servant One. Wijsmuller's decision to allocate Super Servant One elsewhere meant the impossibility was due to their own election, following Maritime National Fish Ltd v Ocean Trawlers Ltd. The fact the choice might have been commercially necessary was deemed irrelevant to the doctrine of frustration.
  + Significance: Demonstrates the breadth of self-induced frustration, encompassing situations where a party's choice (even if reasonable or forced by other commitments) leads to the inability to perform a specific contract. It also highlights the importance of force majeure clauses (though the clause here didn't cover negligence) and careful contract drafting (e.g., specifying a single vessel).
* Frustrating events generally fall into **categories**:
  + **Impossibility of performance:**
    - The classic case is the destruction of the essential subject matter (Taylor v Caldwell).
    - Also includes death or incapacity in personal service contracts.
    - Unavailability of the subject matter can also frustrate, depending on the duration and nature of the unavailability relative to the contract (Jackson v Union Marine Insurance Co Ltd - ship ran aground and was unavailable for the chartered voyage; The Nema - extent of unavailability is key).
  + **Supervening illegality:**
    - Where performance becomes illegal after the contract is formed.
    - Public policy considerations are strong; the doctrine cannot be excluded by contract terms or foreseeability in such cases (*Ertel Bieber Co v Rio Tinto Co Limited* [1918] AC 260).
    - Generally relates to illegality under the governing law (English law) or the law of the place of performance.
    - If illegality affects only part of the contract, frustration depends on whether the impact is substantial or fundamental (Denny, *Mott & Dickson v James B Fraser & Co Ltd*) versus insubstantial (*Cricklewood Property & Investment Trust Ltd v Leightons Investment Trust Ltd*).
    - *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 - 二战
      * Facts: Contract for English company to manufacture and deliver machinery to buyers in Poland. WWII broke out, and Poland was occupied by Germany, making performance illegal (trading with the enemy). Buyers had made a prepayment.
      * Holding: Contract frustrated by supervening illegality. House of Lords also held buyers could recover the prepayment because there had been a total failure of consideration (they received no machinery), overruling *Chandler v Webster*.
      * Significance: Key example of frustration by illegality and landmark case reforming the law on recovery of prepayments upon frustration (paving the way for the 1943 Act).
    - *Scanlon’s New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169
      * *Principle: No frustration merely where illegality makes performance less beneficial or more onerous*
  + **Frustration of purpose:**
    - Where the common purpose for which the contract was entered into ceases to exist, even if performance is technically possible. Courts are cautious here.
    - ***\*Krell v Henry*[1903] 2 KB 740 -** King Edward VII's coronation
      * Facts: Defendant hired plaintiff's flat for two days (at a high price) specifically to view King Edward VII's coronation processions advertised to pass along Pall Mall. The processions were cancelled due to the King's illness. The contract didn't explicitly mention the coronation.
      * Holding: Contract frustrated.
      * Principle (Vaughan Williams LJ): Extrinsic evidence showed the purpose (viewing the procession) was regarded by both parties as the "foundation" or "basis" of the contract.(i.e. goes to the root of the contract).The cessation of that state of things (the procession happening) rendered performance impossible in the sense that the foundation was gone.
      * Not necessary for such thing or state of affairs (i.e. purpose) to be set out in contract.
      * Distinguished from a hypothetical cab hire to Epsom on Derby Day, where the race itself wouldn't be the foundation, merely the hirer's motive.
      * Significance: Leading, though controversial, case on frustration of purpose. Emphasizes the need for the purpose to be common to both parties and foundational to the contract.
    - ***Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683:**
      * Facts: Defendant hired plaintiff's steamboat for two days "for the purpose of viewing the naval review and for a day's cruise round the fleet." The naval review (part of the coronation festivities) was cancelled, but the fleet remained anchored.
      * Holding: Contract not frustrated.
      * Principle: The naval review was not the sole foundation of the contract. The cruise round the fleet was still possible. The court viewed the venture as primarily the defendant's; the stated object was his concern, not the shared foundation in the same way as in Krell.
      * Boat hired out generally for whatever purposes of hirer: no common purposeOr even if there is common purpose: although one common purpose cannot be fulfilled, other common purpose can be (so no frustration of contract
      * Significance: Limits *Krell*. Shows that if a significant part of the contractual purpose remains achievable, the contract is unlikely to be frustrated. Reinforces the idea that the purpose must be truly shared and foundational, not just one party's motive.
    - Where written contractual document contains statement of purpose (c.f. Herne Bay):
      * Analysis:
        + Is the purpose incorporated as a term? (Ie is the purpose a condition precedent to obligations to perform?)
        + If not a term, is it a common purpose, failure of which can give rise to frustration (see *Krell v Henry*)?
        + If it is a term and a condition precedent, then failure of purpose means no contract or parties’ are discharged from obligations to perform.
        + Note: Krell v Henry regarded as an exceptional case
  + Other circumstances: **whether contract radically different:**
    - General test from *Davis Contractors*. The core question is whether performance in the changed circumstances is radically different from the obligation undertaken.
    - *Davis Contractors Ltd v Fareham Urban District Council*: Discussed under General – delay and extra cost were held *not* to make performance radically different.
    - **Delays**
    - *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 – 晚班禁令 – 工程延期
      * Facts:
        + Contract for excavation work: fixed period for completion in 130 weeks (time of the essence)
        + Work commenced: 3 shifts seven days a week
        + Third parties obtained injunction preventing work from 10pm to 6am
      * Issue:
        + Was contract frustrated?
        + Argument made to recover on quantum meruit basis (to recover additional costs) instead of contract price
      * Holdings:
        + Contract frustrated by injunction
        + Performance (excavations) not impossible as such
        + Purpose of excavations can still be fulfilled
        + But situation resulting from injunction fundamentally/radically different to situation contemplated by contract
        + Performance by 3 shifts a day (24 hrs) (foundation of contract) fundamentally different to performance by 2 shifts a day (16 hrs) rendering completion within 130 weeks (essential to both parties) impossible.
    - *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125 – 运铁轨船搁浅 – 维修导致运送延期
      * Facts: ship grounding and subsequent delay (6 months) made the chartered voyage radically different.
      * Holding: Contract frustrated.
        + Delay had put commercial venture at an end in commercial sense (Contract for specific voyage impossible or contract for charter of ship rendered radically different). Mere delay often would not frustrate contract, but significant delays in performance can.
    - Wong Lai-ying v Chinachem Investment Co Ltd [1980] HKLR 1 (PC) – 重大山体滑坡 – 工程延期
      * Facts: Residential tower blocks to be constructed – vendor contracted to sell to purchasers. Major landslide prevented building works for 3.5 years. Delay in completion: 2.5 years
      * Holdings: Major landslide not foreseeable. Delayed completion of 2.5 years sufficient to frustrate contract
    - Cheung Kit Lai v Rich Prosper Ltd (unreported, CFI, HCA 973/2011, 10 April 2014) - 通货膨胀- 评估补地价时间过长
      * Facts:
        + Owner (D2) of Ting house in NT obtained loan from lender (D1), using house as security
        + D2 defaulted, D1 obtained order for sale. D1 to sell to Plaintiff under a contract of sale.
        + Delayed completion of sale and purchase contract of 4 years 8 months because of time taken by District Lands Officer to assess premium for sale
      * Holdings: Contract frustrated.
        + Where delay relied upon for frustration, “the delay must be abnormal in its cause, its effects, or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting”
        + Time for assessing premium: normally a few months only
        + Radical difference in performance because of significant period of delay + serious uncontemplated effects of delay (exorbitant premium payable by D1 under contract, due to D2’s prior breaches of condition of grant to D2, increased by inflation)
    - **Covid pandemic**
    - *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd* [2021] EWHC 1117 (Comm) – COVID
      * Facts: 10 year leases of aircraft (Boeing 737s). Two planes grounded by government indefinitely from 2019; third plane little used since pandemic.
      * Holdings:
        + (1) lease terms allocated the risk of grounding/unavailability to the lessee, requiring payment regardless;
        + (2) the period of grounding (approx. 18 months) was not sufficient to frustrate long-term leases (6-10 years).
    - B*ank of New York Mellon (International) Ltd v Cine- UK Ltd* [2021] EWHC 1013 (QB) – 电影院、游戏厅
      * Facts: Commercial tenancies: cinemas + bingo parlour. Statutory restrictions on use of, and public access to, premises due to pandemic
      * Holdings: No frustration
        + COVID pandemic not foreseeable. But periods of closure did not add up to more than 18 months. Leases here ranged from 15 to 20 years
    - The One Property Ltd v Swatch Group (Hong Kong) Ltd [2022] 1 HKLRD 975
      * Facts:
        + Commercial tenancies in two shopping malls
        + 3 year terms; leases entered into in Sep/Oct 2018
        + Def stopped business in April 2020; failed to pay rent from July 2020. Def argued frustration from June 2020
      * Issue:
        + Def argued: frustration because of radical difference in performance / frustration of common purpose of operating luxury watch retail store
      * Holdings: CFI: No frustration
        + Even if operation of luxury watch retail stores was a common purpose: no frustration of leases because such purpose still possible.
        + Leases possibly frustrated if there was a common purpose for stores to be operated in a commercial viable manner
        + Court held there was nosuch common purpose?
        + Under the leases, tenant bears the risk of commercial failure; Landlord did not agree to bear this risk
* **Effects** of frustration
  + Contract not rendered void or voidable.
  + Frustration automatically discharges the contract (*Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497). Both parties are released from future obligations, without liability for breach concerning those obligations. This is drastic, unlike potential suspension or adjustment under force majeure/hardship clauses.
  + Accrued rights or liabilities before frustration unaffected by doctrine of frustration under common law.
  + The financial consequences are primarily dealt with by the **law of restitution** for **unjust enrichment**: i.e. where unjust for def to retain a benefit that was obtained at the expense of the pl.
    - **Common law**:
      * e.g. Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd
        + Prepayment of £1000 by purchaser to seller can be recovered where total failure of consideration (total failure of basis).
      * No recovery in unjust enrichment where failure of basis is only partial.
      * Also no recovery for wasted expenditure by a party where other party did not receive any benefit.
    - **Statue**: now largely governed by Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (“LARCO”) s.16. Applies even on partial failure of consideration.
      * Section 16(1): section applies where contract frustrated
      * Section 16(2) – first scenario: paid sum
        + Payor entitled to recover sum paid to recipient.
        + Subject to deduction of expenses incurred by recipient (in, or for the purpose of, the performance of the contract). If the court considers it just to do so.
      * Section 16(2) – second scenario: sum payable
        + Discharge of pre-frustration obligations for payment(cease to be payable).
        + Subject to payment of expenses incurred by other party.(whom the sums were payable can recover whole or any part of the sum from the expenses so incurred).
      * Section 16(3) -
        + Allows recovery for valuable non-money benefits obtained by one party due to the other's actions pre-discharge.
        + **Effect** of s 16(3):

B entitled to recover from A a sum not exceeding value of the benefit as the court thinks just.

* + - * + Two step analysis in s 16(3):

Determine value of benefit obtained by A

Determine just amount payable to B (which must not be more than the value of the benefit).

Recovery is a "just sum" determined by the court, capped at the value of the benefit obtained by the defendant. Requires considering expenses incurred by the benefited party and the effect of the frustration on the benefit itself.

* + - * **\*BP Exploration Co (Libya) Ltd v Hunt (No 2) [1979] 1 WLR 783:**
        + Facts: BP developed Hunt's oil concession in Libya under an agreement providing for reimbursement from Hunt's share of oil. The concession was expropriated by the Libyan government after partial reimbursement, frustrating the contract. BP sought a "just sum" under s.1(3) of the 1943 Act. equivalent to HK’s s.16(3)
        + Holding/Analysis (Robert Goff J at first instance):

The Act's underlying principle is preventing unjust enrichment.

Section 1(3) involves a two-stage process: (1) Identify and value the benefit obtained by the defendant due to the plaintiff's performance pre-frustration. (2) Assess a "just sum" to award the plaintiff, capped by the value of the benefit.

"Benefit" under s.1(3) should, in appropriate cases (like building or development), be identified as the "end product" of the plaintiff's services (e.g., enhanced value of land/concession), not just the services themselves. This value is assessed after considering the effect of the frustrating event (s.1(3)(b)). On the facts, Hunt's benefit was the enhanced value of his share of the concession, reduced by the expropriation to the value of oil actually received plus compensation obtained.

The "just sum" is assessed having regard to all circumstances. Robert Goff J considered the basic measure to be the reasonable value of the plaintiff's performance (quantum meruit/valebat), adjusted for factors like the defendant's expenses and potentially limited by the contract price/rate. On the facts, BP was awarded essentially their net expenditure plus farm-in contributions less reimbursement received.

Valuation of benefit and expenses is generally done without accounting for the time value of money prior to frustration.

* + - * + Court of Appeal View: While upholding the result, Lawton LJ was critical of Goff J's reliance on "unjust enrichment" (not in the statute) and emphasized the broad, almost unfettered discretion of the trial judge in assessing the "just sum" under s.1(3).
        + Significance: The leading (though complex) judicial analysis of the 1943 Act, particularly s.1(3). Highlights the difficulties in identifying and valuing non-money benefits and assessing a just sum, and the tension between a principled approach (Goff J) and broad judicial discretion (Court of Appeal).

**Duress, Undue Influence, Unconscionability**

**Duress**

* **General:** 
  + **Remedy:** Contract voidable under common law for duress where a party applies illegitimate pressure on other to procure other’s consent to contract
  + Duress may involve coercion or compulsion of the will of a party (who does not act freely)
  + But duress may also arise where the will is not overborne as such – person exercising free will by choosing to submit to pressure instead of taking alternative action
    - *Zebra Industries (Oregenesis Nova) Ltd v Wah Tong Paper Products Group Ltd* [2016] 1 HKC 213, citing *Crescendo Management Pty Ltd v Westpac Corp* (1988) 19 NSWLR 40
  + **Two elements**
    - 1. Threat or pressure exerted by def which is illegitimate
    - 2. Illegitimate threat or pressure caused pl to contract
    - \*3. The claimant had no reasonable alternative but to give in.(only applies for economic duress)
    - *E.g. Times Travel (UK) Ltd v Pakistan International Airline Corp* [2023] AC 101
      * Provides the most recent authoritative exposition of the elements of duress (esp. economic duress).
      * Identified three essential elements for economic duress: (i) an illegitimate threat or pressure by the defendant, (ii) the illegitimate threat/pressure caused the claimant to enter the contract, and (iii) the claimant had no reasonable alternative but to give in.
      * Confirmed the existence of lawful act duress in English law, but held it operates within very narrow limits. A demand motivated by commercial self-interest is generally justified.(simply taking advantage of its monopoly position and was not acting unconscionably in maneuvering the other party into a vulnerable position) Lawful act duress requires more than just hard-nosed commercial negotiation or exploiting a monopoly position; it typically involves reprehensible means or bad faith maneuvering to create vulnerability. On the facts, PIAC's actions (terminating old contracts, offering new ones conditional on waiving claims, reducing ticket allocation) were seen as lawful commercial pressure, not illegitimate duress.
      * HK case law: see *Re Li Xiaoming* [2019] HKCFI 2782, appeal dismissed [2021] HKCA 779
    - **Illegitimate pressure**
      * Overwhelming pressure – not sufficient
        + *Zebra Industries*; *Crescendo Management*
      * Fairness of contract – not critical
        + *The Law Debenture Trust Corpn plc v Ukraine* [2024] AC 411
* **Categories of duress**
  + **Duress to person**
    - Illegitimate pressure: Threats to the life, health or liberty of a person.(*Re Li Xiaoming*)
    - *Barton v Armstrong* [1976] AC 104 – 威胁谋杀 – 不需要是唯一cause – 不需要but for – Onus of proof on duressor to disprove the effect of threat
      * Facts:
        + Disputes between 2 major shareholders in company (A and B)
        + Agreement between A and B to buy out A’s interests in company
        + B to pay A $140,000 + $400,000 (A’s loan to co) + $180,000 (buy out of A’s shares)
        + B argued duress because of A’s threats to murder him
      * Holdings:
        + Agreement may be set aside for duress
        + Sufficient if illegitimate pressure was a cause of pl entering into contract even if it is not the only cause.
        + Not necessary to establish “but for” causation.
        + Onus of proof on def to prove that pressure had no effect.
        + B in genuine fear; threats contributed to his decision to sign even if the threats were unnecessary and he would have signed anyway
    - Mir v Mir [2013] 4 HKC 213
      * Facts:
        + De facto couple – H owned 75% and W owned 25% interest in flat
        + 2001: H transferred 75% to W
        + 1 June 2006: H assaulted W in flat
        + 12 June 2006: W transferred 50% interest to H by deed
      * Holdings:
        + Deed voidable for duress
        + H pressed W for transfer; assault plus ongoing threat posed by presence of H sufficient to constitute illegitimate pressure on W
        + *Barton v Armstrong* applied regarding causation
    - The Law Debenture Trust Corpn plc v Ukraine [2024] AC 411 – 乌克兰
      * Facts:
        + Contract: Ukraine borrowed money from Russia (US$2 billion, pursuant to notes issued by Ukraine to Russia) - 2013
        + United Kingdom trust corporation was trustee under trust deed for notes (governed by English law)
        + Repayments due in 2015
        + Ukraine argued that contract to borrow was procured by duress
        + Alleged pressure: Russia pressuring Ukraine not to seek financial support from European Union but from Russia (with threats to territorial integrity of Ukraine and use of unlawful force)
        + Holdings:

Threats to person need not be directed at contracting party

Threats to a state’s citizens or to safety of members of its armed forces capable of constituting duress against a state which is contracting party

* + **Duress to goods**
    - Actual or threats of unlawful taking of or damage to goods can constitute illegitimate pressure.
      * *Dimskal Shipping Co SA v International Transport Workers’ Federation (The Evia Luck)* [1992] 2 AC 152
    - *Law Debenture Trust Corpn plc v Ukraine:* see above
      * Threats of invasion can also involve duress to goods.
      * Use of force to invade = threat to destroy or damage property..
  + **Economic duress**
    - Threats or pressure affecting the economic well-being of the person can amount to duress
      * *Times Travel (UK) Ltd v Pakistan International Airline Corp* [2023] AC 101
    - Elements:
      * Pressure must be illegitimate
        + Crimes, torts and, threatened breach of contract

“Generally”, a threatened breach of contract may constitute duress, “particularly” if the party making the threat knows that there would be a breach of contract

*Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm)

But compare genuine disputes over existing contractual obligations leading to a settlement agreement. Generally no duress even if a party’s assertion that they need not perform some obligation under original contract was incorrect.

* + - * No reasonable alternative to giving in to threat/pressure
        + *Pao On v Lau Yiu Long* [1980] AC 614 (PC): see below
      * Causation in entering into contract.
        + Stricter test of causation compared with other forms of duress.
        + Pressure must be “significant cause”:

*Dimskal Shipping Co SA v International Transport Workers’ Federation (The Evia Luck)* [1992] 2 AC 152

* + - * + Possibly “but for” test applies. (by offering no alternative)

*Kolmar Group AG v Traxpo Enterprises Pty Ltd* [2010] 2 Lloyd’s Rep 653

* + - * + Whether these formulations provide for a different test (and if so which formulation applies) left open by HKCA:

*Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corp Ltd* [2007] 3 HKLRD 439

* + - *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (Atlantic Baron)* [1979] QB 705
      * Facts: Def shipbuilder contracted to construct tanker for pl. Def demanded 10% increase because of devaluation in US$ (currency for contractual payment) threatened to terminate contract. Pl subsequently agreed. (Note separate issue of whether there was consideration).
      * Holdings: Threat to break contract constituted economic duress. But on facts, pl lost right to rescind due to affirmation.(absence of protest)
    - *Times Travel (UK) Ltd v Pakistan International Airline Corp* [2023] AC 101 - 巴基斯坦航空 - lawful act duress
      * Facts: Claimant travel agent had agency agreement with def airline. Dispute over non-payment of commissions alleged to be owing from def to claimant. Airline gave notice to terminate existing agreements and offered new agreements on terms that agents waive claims for unpaid commission. Claimant accepted
      * Holdings: No duress on facts
        + Lawful act duress a narrow principle
        + Focus on nature of demand and not nature of threat.
        + Demands motivated by commercial self-interest not illegitimate per se. So a finding of lawful act duress should be rare. So it is not enough that the defendant was acting in bad faith.
        + **Principle of lawful act duress (existing categories, but not exhaustive)**

Def uses knowledge of criminal activity of pl to obtain personal benefit by threats to report crime.

Def who is civilly liable to pl, deliberately maneuvers pl into position of vulnerability by illegitimate means to force pl to waive claim

Illegitimate means: highly reprehensible; unconscionable

* + - * + In the present case, it is a hard-nosed commercial pressure but there is no maneuvering of travel agent into vulnerable position.
    - *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm)
      * Facts:
        + Claimant chartered vessel to def
        + Claimant sought to provide different vessel (breach of contract)
        + Claimant originally said they would compensate def but at last minute, reneged and required def to waive claims, otherwise would not provide vessel.
        + Def reluctantly agreed to avoid liabilities to own customers
      * Holdings: The agreement to waive the claim was voidable for economic duress. C's pressure was illegitimate because they acted in bad faith, having created D's vulnerability through their own breach and then exploiting it with a demand they knew they weren't entitled to make (forcing waiver of a valid claim).
    - *Fine Vision Opportunity III Ltd v Xinyuan Real Estate Co Ltd* [2024] 5 HKLRD 300 (CFI) - 香港 lawful act duress. - Majority judgment in Times Travel (UK) Ltd reflects HK law.
    - *Pao On v Lau Yiu Long* [1980] AC 614 (PC) -economic duress
      * Facts:
        + Main agreement (27/2/1973):

sale of shares in private company from Paos (pls) to Laus (defs)

Payment by issue of shares in public company controlled by Laus.

Paos agreed with Laus not to sell 60% of shares in public company until 30/4/1974

* + - * + Subsidiary agreement (27/2/1973):

Laus to buy shares at $2.50 per share on 30/4/1974

* + - * + But Paos wanted to revise agreement; threatened not to complete main agreement unless subsidiary agreement revised
        + Revised subsidiary agreement (4/5/1973): Laus to indemnify Paos if price of shares on 30/4/1974 lower than $2.50
      * Holdings: No duress.
        + Reasonable alternative available to Laus – seek legal remedy through litigation (specific performance of main agreement)
    - *Law Debenture Trust Corpn plc v Ukraine*
      * See above for facts;
      * Holdings:
        + No economic duress on basis of threats of trade restrictions, sanctions and embargoes. Such threats not illegitimate pressure under English law.
        + Additionally, threats unlawful under international law still not a basis for duress under English law (international law not applicable in UK unless incorporated by domestic law).

**Undue Influence**

* **General:** 
  + **Remedy**: Contract voidable and may be set aside by weaker party:
  + Equitable doctrine
  + Applies to both gifts and contracts
  + **Scenario** where weaker party can void a contract under undue influence: (and)
    - where it was procured by the influence of another person as a result of the weaker party placing trust and confidence in the latter.
    - such that the weaker party cannot be said to have exercised a free and independent will in entering into the transaction
      * See *Royal Bank of Scotland plc v Etridge* (No 2) [2002] 2 AC 773
  + **Definition**: “Undue influence is concerned with a situation where, by reason of the relationship between them, one party (B) has such influence over the other (A) that A does not exercise a free judgment, independent of B, in relation to the making of a transaction between A and B”: - *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] UKPC 10 at [10] per Lord Briggs and Lord Burrows
* **Categories**:
  + **Actual undue influence**: direct proof of undue influence by plaintiff.
    - **Definition:** “Actual undue influence refers to where the person alleging undue influence relies on direct proof (of A’s conduct, within a relationship with B, which led to B not exercising a free and independent judgment)” - *Nature Resorts*
    - Not necessary to prove transaction disadvantageous to weaker party.
  + **Presumed undue influence**: plaintiff relies on evidential presumption.(**two elements** - *Nature Resorts v First Citizens Bank* [2022] UKPC 10 para.12)
    - 1. Relationship of influence (trust and confidence reposed by one party on another)
      * **Established categories**: (The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship. - *Etridge* at [18]) *Etridge* at [18]; *Nature Resorts* at [12]; *Johnson v Buttress* (1936) 56 CLR 113
        + trustee and beneficiary
        + solicitor and client
        + doctor and patient
        + religious adviser and advisee
        + parent and child
        + guardian and ward
      * Relationship pf trust and confidence established by PL and facts.
        + *Barclays Bank plc v O’Brien* [1994] 1 AC 180 per Lord Browne-Wilkinson
        + Rejection of utility by *Etridge* per Lord Hobhouse, Lord Scott, Lord Clyde; *Li Sau Ying v Bank of China (HK) Ltd* (2004) 7 HKCFAR 579

Focus should not be on raising presumption but simply for pl to prove on facts the undue influence (i.e. actual undue influence)

However, this category seems to be implied to exist in *Nature Resorts* by Lord Briggs and Lord Burrows. – “First, there must be a relationship of influence. This may be established on the facts.” –disputable.

* + - 2. Transaction must not be readily explicable on ordinary motives
      * Preferred test under *Etridge* and *Nature Resorts* to “manifestly disadvantageous”: whether transaction readily explicable by relationship of the parties and by ordinary motives
        + Whether transaction calls for explanation
        + “The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised.” - *Nature Resorts*
    - **Effect of presumption**
      * Evidential presumption. Shift in burden of proof on stronger party to show that weaker party not acting under undue influence (ie they exercised free and independent judgment)
    - Rebut the presumption
      * Main method(not necessary nor conclusive): weaker party obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer.
      * But not always conclusive, nor always necessary
      * See *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127
      * Stronger evidence needed where weight of presumption strong on facts.
    - Cases:
      * *Allcard v Skinner* (1887) 36 Ch D 145
        + Facts: 1871: PL joined sisterhood of St Mary at the Cross. Requirements for obedience to “lady superior” (def). Vow of poverty, property transferred to sisterhood. PL left sisterhood 8 years later.
        + Holdings: Gifts can be set aside for undue influence. No explicit pressure but PL was “absolutely in the power” of the lady superior. Not shown that PL acted freely in disposing of property.
* **Third parties exercising undue influence:** A contracts with B because of undue influence of C (over A)
  + **Elements to establish TP exercising undue influence(OR) –** See*Bainbridge v Brown* (1881) 18 Ch D 188
    - B has notice of undue influence, or
      * Actual notice
      * Constructive notice
        + B has notice of risk of undue influence; and

Where B has knowledge of facts indicative of impropriety (*Bank of New South Wales v Rogers* (1941) 65 CLR 42), or

Where B is aware that relationship between A and C is a non-commercial one (in circumstances where A is providing security for benefit of C) (*Etridge*)

* + - * + B fails to take reasonable steps to bring home to A the implications (including risks) of the transaction
    - C was acting as B’s agent, or
    - B is a volunteer (i.e. where B provided no consideration)
* **Basis of doctrine of undue influence**
  + Two views:
    - 1. Undue influence based on wrongful conduct of def (unfair exploitation of position of influence to procure pl’s assent)
      * *R v Attorney*-General *for England and Wales* [2003] UKPC 22
      * *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51
    - 2. Undue influence based on will or independent judgment of pl being impaired because of their trust and confidence in def
      * *Pesticcio v Huet* [2004] EWCA Civ 372
      * *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] 1 WLR 2788
      * *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
  + Case:
    - ***\*Royal Bank of Scotland plc v Etridge* (No 2) [2002] 2 AC 773 – 夫妻关系**
    - Facts: A number of cases heard together. Wife contracting with bank to charge her interest in home as security for husband’s indebtedness.
    - Holdings:
      * Husband-wife relationship is not an established category of presumed undue influence.
      * Proof that wife placed trust and confidence in husband and that wife confers substantial advantage to husband is not sufficient for court to draw inference of undue influence.
        + Conferring advantage for husband’s business readily explicable.
      * Bank is ”put on inquiry” where surety given by wife for husband’s indebtedness.
      * Bank must take reasonable steps to bring home to wife risks of giving surety
        + Bank explaining transaction and risks in separate meeting with wife, or
        + Bank requiring wife obtain independent legal advice and solicitor confirms that they have duly advised wife
    - *Li Sau Ying v Bank of China (Hong Kong) Ltd* (2004) 7 HKCFAR 579
      * Facts:
        + Appellant (Catherine Li) platonic/business friends with Mr Li
        + 1994: loans/mortgages taken out by appellant in favour of Mr Li
        + 1996: replaced by mortgage with the Bank (loan now in favour of company owned by Mr Ip – business associate of Mr Li)
      * Holdings: CFA (Lord Scott):
        + Not established category of presumed influence.
        + Appellant did place trust and confidence in Mr Li (but no undue influence in procuring 1996 mortgage)
        + Also Bank is not put on inquiry
        + In any event, Bank had taken reasonable steps to explain transaction to appellant.
    - *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] 1 WLR 2788
      * Facts:
        + Dankou owned company (Nature Resorts Ltd): sought to develop eco-resort
        + Paler and James to buy 75% of shares in company from Dankou
        + Company granted mortgage over property to def (bank) to secure loan to Paler and James
        + Wheeler (lawyer) engaged by both bank and Dankou/Paler/James
      * Holdings UKPC:
        + No presumption of influence between Wheeler (lawyer) and Dankou/Nature Resorts: Wheeler only acted for Dankou on share sale and not mortgage with bank.
        + In general, where solicitor advises client on mortgage given to third party (where no benefit to solicitor), mortgage is readily explicable on ordinary motives [as between solicitor and client]
        + Any presumption of undue influence was rebutted on facts as Dankou was an experienced businessman and understood implications of mortgage

**Unconscionability**

* **General**
* Equitable doctrine of unconscionability as basis for regarding contract voidable:
* Accepted in Australia and Hong Kong. Some UK cases illustrating doctrine but scope of doctrine might be narrower than Australian/HK law.
* Compared with undue influence (Commonwealth Bank v Amadio):
  + Undue influence focuses on pl – quality of assent
  + Unconscionability focuses on def – whether def acted unconscientiously in taking advantage of vulnerability of weaker party.
  + Not mutually exclusive
* Unfairness in terms or inequality in bargaining power not in themselves sufficient to establish unconscionability (but relevant factors)
* **Definition**: “Contract is voidable on the basis of unconscionability where a party has a special disability or is in a position of special disadvantage in dealing with the other party so that there is inequality; and that disability was known to the other party who unconscientiously takes advantage of their superior position in obtaining the assent of the weaker party to the contract” - *Commonwealth Bank of Australia Ltd v Amadio* and acceptedin HK by *Ming Shiu Chung v Ming Shiu Sum* (2006) 9 HKCFAR 334 per Ribeiro PJ
* **Common law Elements(and)**:
  + 1. PL under special disability or special disadvantage
    - Poverty
    - Sickness
    - Age
    - Infirmity of body or mind
    - Drunkenness
    - Illiteracy
    - Lack of education
    - Ignorance / inexperience
  + 2. Def know of that disability/disadvantage
    - Actual or constructive knowledge
      * Sufficient if def aware of possibility that pl occupies a situation of disadvantage or is aware of facts that would raise that possibility in the mind of any reasonable person
  + 3. Def acted unconscionably in exploiting the disability/disadvantage
    - Whether def explained transaction to enable pl to form judgment for themselves
    - Whether def ensured that pl obtained independent legal advice
    - Whether any benefits of transaction to PL
* Cases and **Legislation**:
  + *Boustany v Pigott* (1995) 69 P & CR 298
  + *Times Travel (UK) Ltd v Pakistan International Airline Corp* [2023] AC 101
  + *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 – 小子骗老子抵押
    - Facts:
    - Mr. and Mrs. Amadio granted mortgage to bank to secure son’s business overdraft account
    - Amadios 71 and 76, Italian immigrants, limited knowledge of written English
    - Son’s business in financial difficulties; security required by bank for continuation of overdraft; son procured parents to grant mortgage
    - Parents misled by son as to scope of liability and as to the financial position of his business
    - Bank manager did not explain mortgage terms to Amadios; no independent legal advice
    - Holdings: Contract voidable for unconscionability
    - Special disability/disadvantage of Amadios:
      * Elderly
      * Poor English
      * No business experience
      * Relied on son about transaction
    - Bank:
      * Knew of Amadios’ circumstances
      * No reasonable basis for assuming they had received adequate advice
      * Knew of poor financial situation of son’s business and risks/prejudice to Amadios.
    - Bank acted unconscionably:
      * Took advantage of Amadios in obtaining mortgage which disadvantaged Amadios.
      * No explanation of terms to Amadios.
      * Did not ensure there was independent legal advice.
  + *Ming Shiu Chung v Ming Shiu Sum* (2006) 9 HKCFAR 334
  + *Lo Wo v Cheung Chan Ka Joseph* [2001] 3 HKC 70
    - Facts:
      * HK developer (D2) purchasing flats for redevelopment
      * One flat: 50% ownership had earlier devolved to 3 PLs (elderly sisters living in remote part of Guangdong province) – “simple country folk”
      * D1 (conveyancing clerk) and real estate agent travelled to village with cash
      * Procured sale and purchase agreement for $870,000 (serious undervalue)
    - Holdings: Contract voidable for unconscionability
      * Special disability: age, inexperience
      * Defs aware of disability
      * Defs acted unconscionably: misleading statements, unfair tactics, seriously disadvantageous terms for pls, no independent advice.
  + **\*Unconscionable Contracts Ordinance (Cap 458)**
    - Compare:
      * Trade Practices Act 1974 (Cth of Aust) s 51AB (repealed)
      * Competition and Consumer Act 2010 (Cth of Aust) Sch 2 (Australian Consumer Law) ss 20-22
    - S.5 –
      * **Elements:**
        + Contract for sale of goods or supply of services
        + One party deals as consumer (and see s 3)
        + Contract (or part of contract) unconscionable in the circumstances relating to contract at time it was made
      * **Court’s power**
        + Refuse to enforce contract
        + Enforce contract without unconscionable part
        + Limit application of, or revise or alter, any unconscionable part
    - S.6 - **matters to be considered** in determining whether unconscionable include
      * Parties’ respective bargaining power
      * Whether terms not reasonably necessary for protection of legitimate interests of other party
      * Whether consumer could understand documents
      * Whether undue influence/pressure exerted or unfair tactics used
      * Amount which consumer could acquire equivalent goods/services from another
    - Comparison with equitable doctrine
      * UCO: focuses on whether contract unconscionable
      * Common law: focuses on unconscionable conduct of stronger party
    - But conduct also relevant to see whether contract unconscionable under UCO
  + *Chang Pui Yin v Bank of Singapore Ltd* [2017] 4 HKLRD 458 – UCO
    - Facts:
    - Changs: elderly couple, “simple couple who led uncomplicated lives”
    - Acquired fortune in late life from relatives and became private banking customers of bank.
    - Intended to make low risk investments only
    - Bank changed their investment profile without informing them; sold them US$14 million worth of high risk products
    - Losses suffered in 2008: global financial crisis
    - Service agreement terms: customers to assess own risk; bank assumes no responsibility or liability
    - Holdings: contract unconscionable under UCO
    - Changs were dealing as consumers (Under UCO jurisdiction)
    - Unconscionability: something not done in good conscience
    - Section 6 list of factors not to be applied mechanically (as score card)
    - Other factors can be taken into account
    - Clauses in service agreement exempting bank from liability were unconscionable
  + *Shum Kit Ching v Caesar Beauty Centre* [2003] 3 HKC 235 – UCO
    - Facts:
    - 29 March 2001: appellant (Shum) bought 2-month membership with beauty centre ($549)
    - 2 days later, extended membership to end of year (additional $1675)
    - Week later, appellant persuaded to buy “gold card VIP membership” for 267 facial treatments + other benefits ($48,060)
    - Next day, appellant sought to cancel and obtain refund; beauty centre refused
    - Clause 19 of contract: no refunds possible
    - Holdings: clause 19 unconscionable under UCO
    - Standard terms in small fine print
    - No explanation of terms to customer; no opportunity to read
    - Clause 19 went further than necessary to protect beauty centre’s legitimate interests
    - Clause 19 not to be enforced
      * But contract otherwise valid and binding on appellant.
  + Trade Descriptions Ordinance (Cap 362)
    - S. 13F: **Aggressive commercial practices** by trader in relation to consumer (offence)
      * + (1) A trader who engages in relation to a consumer in a commercial practice that is aggressive commits an offence.
        + (2) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances—

(a)it significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and

(b)it therefore causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise.

* + - * + (3) In determining whether a commercial practice uses harassment, coercion or undue influence, account must be taken of—

(a) its timing, location, nature or persistence;

(b) the use of threatening or abusive language or behaviour;

(c) the exploitation by the trader of any specific misfortune or circumstance, of which the trader is aware and which is of such gravity as to impair the consumer’s judgement, to influence the consumer’s decision with regard to the product;

(d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or to switch to another product or another trader; and

(e)any threat to take any action which cannot legally be taken.

* + - * + (4)In this section—
        + **coercion** (威迫) includes the use of physical force;
        + **undue influence** (不当影响) means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly impairs the consumer’s ability to make an informed decision.
    - S. 36: civil action for damages by consumer for loss or damage suffered because of conduct which constitutes an offence
      * (1) If—
        + (a) a person (the claimant) suffers loss or damage because of conduct of another person (not being an exempt person) that is directed to the claimant; and
        + (b) the conduct constitutes an offence under section 4, 5, 7, 7A, 13E, **13F**, 13G, 13H or 13I,
        + the claimant may recover the amount of the loss or damage by action against that other person, or against any person (not being an exempt person) involved in the contravention.
      * (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.
      * (3) A term of a contract that purports to exclude or restrict the right of a claimant to bring an action under subsection (1) against any person is of no effect.

**Termination**

* **Breach of contract**: failure or refusal to perform contractual obligation (without lawful excuse)
  + **Types of breaches:** 
    - **Actual breach**: failure to perform when time for performance expired
      * Non-compliance with contractual representation/warranty
      * Non-performance of obligation
      * Late performance of obligation
      * Defective/unsatisfactory performance
    - **Anticipatory breach**: repudiation of contract before time for performance
  + **Standard of contractual duty**
    - Strict liability: liability regardless of fault or intent
      * *E.g. Grant v Australian Knitting Mills Ltd* [1936] AC 85
      * Strict liability usually applies for contractual obligations
    - Absolute liability: technically distinguished from strict liability
      * E.g. where buyer’s obligation to pay under sale of goods contract is contingent on transfer of title to goods:
        + Buyer’s liability to pay is strict liability but not absolute liability
      * Absolute liability:
        + Any failure to perform constitutes breach
      * Strict liability:
        + Obligation to perform may depend on a contingency
    - Reasonable care
      * Breach only if failure to exercise reasonable care
      * E.g. contracts of personal service or professional services
  + Remedies for breach of contract
    - Damages: available for any breach of contract
    - Termination: available only if innocent party has right to terminate for other party’s breach of contract
* **Discharge of contracts:** contract comes to an end
  + Discharge by frustration
  + Discharge by performance
  + Discharge by agreement
  + Discharge by termination
* **Termination** 
  + Distinguished from rescission
    - Rescission of voidable contract: parties put in original position as if contract never made
    - Termination: parties discharged from obligations for further performance
  + Right to terminate may arise
    - Pursuant to contractual provision (e.g. contractual right to terminate upon notice; or contractual right to terminate for breach of contract)
      * **Express termination clauses**
        + Prima facie, parties entitled to provide for contractual right of termination for any breach of contract. But termination clause can be read down.

*Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* [2003] TCLR 1

* + - * + Avoiding being read down

McKendrick: right to terminate for “any breach (whether or not that breach is repudiatory)”

Cover specified conditions only (considered by party to be important) and not breach of any term of contract.

Can provide for wider right of termination than under common law

Possible to distinguish Rice case: see *Secretary for Justice v Yu's Tin Sing Enterprises Co Ltd* (unreported, CFI, HCA 398/2006, 9 Sep 2008)

Separate clause giving right to terminate upon giving written notice (with specified period of notice that is reasonable)

* + - Pursuant to common law for breach of contract.
      * Right to terminate arising out of
        + Breach of condition; or
        + Serious breach of intermediate term
      * No right to terminate for:
        + Breach of warranty; or
        + Non-serious breach of intermediate term
* **Contractual terms**
  + Conditions
    - If term is a condition, right to terminate does not depend on gravity of breach that occurred. - *Lombard North Central plc v Butterworth* [1987] QB 527 per Mustill LJ16
  + Warranties
  + Intermediate terms
    - Whether innocent party has right to terminate depends on actual effect of breach in question (whether consequences sufficiently serious) - *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 474
* **Classification of contractual terms**
  + **Factors to consider**
    - Default classification as intermediate term unless clear that parties intended term as condition or warranty. - *Grand China Logistics Holdings (Group) Co Ltd v Spar Shipping AS* [2016] 2 Lloyd’s Rep 447 at [92]
    - Importance of term to the promisee: would promisee have entered into contract if no assurance of strict or substantial performance of promise? - *Bannerman v White* (1861) 142 ER 685
    - Whether term goes to root of the contract: whether the likely effect of a breach (as opposed to effects of actual breach) would deprive promisee of substantially whole benefit of contract - Bensen v Taylor Sons & CO (No 2) [1893] 2 QB 274
    - Expressly designated
      * Contract may expressly designate which terms are conditions or warranties but wording adopted by parties (e.g. “condition”, “warranty”) not necessarily decisive.
        + *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 – see below
      * Uncertainty can be avoided by clearer drafting
        + E.g. expressly provide for consequences of breach: express contractual right to terminate for breach of specified terms in contract
      * Time of the essence
        + *Lombard North Central plc v Butterworth* [1987] QB 527
        + *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514
    - Business practice: Whether term previously classified in decided cases (parties presumed to contract on basis of accepted interpretation)
    - Whether damages for breach would be adequate remedy
    - Whether construing term as condition would lead to an unreasonable result
* **Terminate or Affirm contract** (Choice of innocent party)
  + Termination: occurs where words or conduct clearly and unequivocally conveys to other party that the innocent party is treating the contract at an end. - Vitol SA v Norelf Ltd [1996] AC 800, 810
    - Where election is made to affirm the contract, then right to terminate is lost.
      * *Cheung Ching Ping Stephen v Allcom Ltd* [2010] 2 HKLRD 324
    - Where delay in termination, there is no implicit affirmation of contract unless the delay is consistent only with affirmation
      * *Cheung Ching Ping Stephen v Allcom Ltd* [2010] 2 HKLRD 324
  + Affirmation: Unequivocal act indicating that the innocent party has elected to proceed with the contract or reasonable time passed(even without such knowledge).
    - Generally, affirmation can only occur if innocent party has knowledge of facts giving rise to breach:
      * *Peyman v Lanjani* [1985] Ch 457
    - But there may still be affirmation (even without such knowledge) if a reasonable time has passed:
      * *Kosmar Villa Holidays Inc v Trustees of Syndicate* 1243 [2008] EWCA Civ 147
    - Merely requesting other party to perform does not necessarily mean there is affirmation:
      * Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia [1996] 2 Lloyd's Rep 604
* **Repudiation and anticipatory breaches**
  + **Repudiation**
    - Wider sense: covers both actual breaches and prospective breaches where innocent party entitled to terminate for the repudiation
    - Narrower sense: concerned with repudiation of prospective obligations only.
    - Repudiation occurs where a party expressly or impliedly indicates that they are unwilling or unable to perform all of the party’s obligations or where the proposed breach, when it occurs, would give rise to a right to terminate.
    - **Principles**: - *Chao Keh Lung v Don Xia* [2004] 2 HKLRD 11
      * Words or conduct evincing an intention not to perform, or express declaration that party is or will be unable to perform their obligations under the contract in some essential respect.
        + Creatiles Building Materials Ltd v To’s Universe Construction Co Ltd [2003] 2 HKLRD 309 – conduct constituting repudiation
      * Short of an express refusal or declaration, the test is to ascertain whether the actions of the party are such as to lead a reasonable person to conclude that they no longer intend to be bound by the contract
      * Where one party has, by their own act or default, disabled themselves from performing their contractual obligations in some essential respect, the other party will be entitled to accept the repudiation and terminate
    - **Wrongful termination:** Wrongful termination itself amounts to repudiation - *Kensland Realty Ltd v Whale View Investment Ltd* (2001) 4 HKCFAR 381 – see below
  + **Acceptance**
    - Anticipatory breach arises where innocent party elects to terminate (accepts repudiation).
      * Election to terminate is required to complete cause of action for anticipatory breach.
        + E.g. if contract not terminated but is frustrated in interim, there is no breach by repudiating party: *Avery v Bowden* (1855) 5 E & B 714
    - Innocent party entitled to accept repudiation and terminate contract immediately (without waiting for time for performance to arrive for actual breach) - *Hochster v De La Tour* (1853) 118 ER 922
      * Choice for innocent party whether to terminate immediately or keep contract on foot
    - **Affirmation:** The innocent party does not accept the repudiation, contract remains on foot
      * **General rule:** Innocent party may elect to continue with performance of contract.
        + *White and Carter (Councils) Ltd v McGregor* [1962] AC 413
      * **Exceptions:**
        + 1. situations where innocent party not entitled to continue performance to claim full contract price.

where performance by innocent party is dependent on cooperation of party in breach: *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, 253-4

e.g. A contracts with B for B to restore painting owned by A. A repudiates and agrees to sell painting in original form to C. B is not entitled to perform the first contract or sue for price.

* + - * + 2. where innocent party has no legitimate interest in completing the contract

No legitimate interest where damages adequate and keeping contract alive is wholly/extremely unreasonable or perverse

*Isabella Shipowner Ltd v Shagang Shipping Co Ltd [2012]* 2 Lloyd’s Rep 61, [44]

*Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)* [1978] 2 Lloyd’s Rep 357

* + - * **Retraction**
        + Repudiating party may change their mind and retract repudiation; and may perform when time for performance arrives
* Cases:
  + *Bettini v Gye* (1876) 1 QBD 183 – Terms classification
    - Facts:
      * Contract: opera singer (pl) to be available for rehearsals 6 days before commencement of engagement (for 3 months).
      * Pl arrived 2 days before commencement due to illness
    - Holdings: breach of warranty
  + *Bannerman v White* (1861) 142 ER 685
  + *Bensen v Taylor Sons & CO* (No 2) [1893] 2 QB 274
  + *Lombard North Central plc v Butterworth* [1987] QB 527
    - Facts:
    - Plaintiff finance company leased computers to defendant for 5 year period
    - Clause 2(a): time of the essence with regard to payment of quarterly rentals
    - Clause 5: failure to make due and punctual payment entitled pl to terminate
    - Def fell into arrears. Pl repossessed computers and sued for non-payment.
    - Holdings:
    - PL entitled to terminate under common law independently of cl 5.
    - Express stipulation that time of the essence for payment by due date (time stipulation a condition)
  + *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235
    - Facts:
    - Distributorship agreement between manufacturer (Schuler) and distributor (Wickman)
    - Wickman to act as agent for Schuler in procuring sales of panel presses
    - Clause 7: “It shall be condition of this Agreement” that Wickman’s representative visit 6 specified firms at least once each week
    - Clause 11: right to terminate if other party commits material breach and fails to remedy within 60 days
    - Extensive failures by Wickman to comply with cl 7. Schuler sought to terminate for breach of condition in cl 7
    - Holdings: Schuler does not have right to terminate
    - Use of word “condition” gives rise to presumption that term intended as condition
    - But cl 7 is not a condition based on the facts. It’s very unreasonable if Schuler has right to terminate for minor breaches of cl 7: court should strive towards an interpretation to avoid unreasonable result if possible (on basis that parties could not have intended unreasonable result).
    - Possible to avoid interpreting cl 7 as condition because of cl 11\
  + *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514
    - Facts:
    - Contract for sale of land: 1 Aug 1991
    - Completion to take place by 5pm, 30 Sep 1991: time of the essence
    - Purchaser tendered payment of balance by cheques at 5:10pm, 30 Sep
    - Vendor refused to accept payment and sought to terminate
    - Holdings: Vendor entitled to terminate
    - Time stipulation for completion was a condition (time of the essence)
    - No equitable jurisdiction to intervene to allow specific performance, even if delay is minor.
  + *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 474
    - Facts:
    - Pl hired def’s ship – 24 month charterparty
    - Term: ship to be “in every way fitted for ordinary cargo service”
    - Problems: repairs for over 15 weeks needed
    - Pl sought to terminate after 4 months
    - Holdings:
    - There is a category of terms where some breaches are serious but not always [intermediate terms].
    - Requirement of seaworthiness is such a term.
    - Right to terminate if innocent party deprived of substantially whole benefit of contract
    - No right to terminate in present case
  + *Bunge Corporation New York v Tradax Export SA* [1981] 1 WLR 711
    - Facts:
    - Sale of goods contract adopting standard terms used in industry
    - Time of shipment at buyer’s option
    - Port of shipment at seller’s option
    - Buyer required under contract to give 15 days’ notice of readiness of vessel which was to receive the goods.
    - Shipment in June 1975: buyers did not give sufficient notice
    - Holdings: Right to terminate granted. Term requiring notice was a condition and not intermediate term
    - Need for certainty in commercial contracts where parties are both buyers and sellers in the market
    - Obligations interdependent
    - Business practice treated term as condition
    - Damages not adequate remedy: difficulties in assessment of damages where insufficient notice given
  + *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* [2003] TCLR 1
    - Facts:
    - Two contracts between claimant and def local authority for maintenance of sports grounds, parks, gardens etc.
    - Clause 23.2.1: “if the contractor commits a breach of any of its obligations under the Contract ... the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor’s employment under the Contract by notice in writing having immediate effect”
    - Def sought to terminate on basis of substandard maintenance of cricket and football pitches and bowling greens, plus other complaints
    - Eng CA held: Not entitled to terminate
    - If cl 23.2.1 applied to any breaches, this “flies in the face of commercial common sense”
    - Cl 23.2.1 only applies to repudiatory breaches (including cumulative breaches which are sufficiently serious)
    - Trial judge entitled to find that breaches in present case not sufficiently serious 32
  + Cheung Ching Ping Stephen v Allcom Ltd [2010] 2 HKLRD 324
    - Sale of land contract; time of the essence; vendor required to obtain certain government approvals before completion; completion on 19 Aug 2008
    - Approvals not obtained by 19 Aug
    - Purchaser enquired about status in letters on 20 Aug and 11 Sep
    - Vendor replied: still waiting on approvals
    - Purchaser terminated on 10 Oct
    - HKCA: purchasers had not affirmed contract and were entitled to terminate
  + Hochster v De La Tour (1853) 118 ER 922 – Repudiation
    - Contract: def employing pl as courier
    - Before commencement of employment, def told pl his services no longer required
    - Held: repudiation by def; and pl can immediately terminate and sue for damages.
  + *Creatiles Building Materials Ltd v To’s Universe Construction Co Ltd* [2003] 2 HKLRD 309
    - *Facts:*
    - Nov 1997: Pl (building contractor) contracted with def (builder) to apply granite spray coating to external walls of building
    - Contract price to be paid by deposit/initial amounts (40%) and remainder by interim instalments
    - May 1998: debit note for 1st interim payment of 20% of contract price issued
    - Def refused to pay
    - Pl left building site next day
    - Holdings: def repudiate the contract which entitle PL to terminate
    - There is Actual breach in failure to pay instalment
    - Depending on facts, failure to pay can amount to repudiation (of future obligations)
  + *Chao Keh Lung v Don Xia* [2004] 2 HKLRD 11
    - Facts:
    - Oct 1998: contract for sale of 30,000 shares in Teleway from def to pl
    - 4th instalment payment due: 6 July 1999
    - 5th instalment payment due: 13 December 1999
    - Shares to be transferred after final payment
    - 3 June 1999: def contracted to sell all his Teleway shares to another (shares transferred 16 June 1999)
    - 6 July 1999: pl did not pay instalment
    - Holdings: No repudiation by def
    - Sale of shares to another not repudiation because def still had time to acquire shares from other shareholders to transfer to pl
    - Even if there was repudiation, there was no acceptance by pl
    - Non-payment of 4th instalment was not an unequivocal acceptance of the repudiation in the circumstances.
    - Principles:
    - Repudiation: words or conduct evincing an intention not to perform, or express declaration that party is or will be unable to perform their obligations under the contract in some essential respect.
    - Short of an express refusal or declaration, the test is to ascertain whether the actions of the party are such as to lead a reasonable person to conclude that they no longer intend to be bound by the contract
    - Where one party has, by their own act or default, disabled themselves from performing their contractual obligations in some essential respect, the other party will be entitled to accept the repudiation and terminate
  + *White and Carter (Councils) Ltd v McGregor* [1962] AC 413
    - Facts:
    - 1954: appellant (advertising contractor) agreed with respondent (garage proprietor) to display ads of respondent on council litter bins – 3 year contract
    - 1957: agreement to renew contract – 3 year renewal
    - But respondent then cancelled renewal: repudiation
    - Appellant did not accept repudiation; displayed ads and sued for full sum due under contract (clause 8)
    - House of Lords held: appellant is entitled to the full contract price
    - Appellant can elect to affirm contract and continue performance
    - Appellant entitled to sue in debt for contract price under cl8
    - Note different causes of action: action in debt and action for damages for breach of contract
      * A debt claim is almost always easier to enforce. Because PL does not have to prove lost and there is no duty of PL to mitigate losses.
  + Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)[1978] 2 Lloyd’s Rep 357 *-* no legitimate interest
    - 10 year charterparty of ship; charterer repudiated with over 7 years of charter left to run
    - Shipowner kept contract on foot for further 9 months (and claimed agreed hire for that period), terminated thereafter
    - Held: shipowner entitled to do so, but would have no legitimate interest in keeping contract open for remaining charter period
  + *Kensland Realty Ltd v Whale View Investment Ltd* (2001) 4 HKCFAR 381 – wrongful termination
    - Facts:
    - Sale of shop in Mongkok for $55M
    - Settlement at 1pm on specified date – time of the essence
    - “Split payment” direction by V to P – information provided 72 mins before time for settlement
    - 8 cheques and 2 cashier’s orders paid by 1:06pm
    - V refused to complete but sought to keep deposit
    - Can V treat late payment as breach by P giving rise to V’s right to terminate (enabling V to keep deposit because of P’s breach)?
    - Held:
    - V in breach of implied term for split payment information to be given within reasonable period before settlement
    - Even if V’s breach gives P a right to terminate, P is entitled to affirm contract
    - But P is then in breach of condition (late payment)
    - V is not entitled to terminate
    - V caused P’s late payment: V cannot obtain benefit from own breach
    - V’s termination wrongful and amounted to repudiation.
    - V not entitled to retain deposit

**Remedies**

**Damages**

* Common law remedy of damages available for breach of contract
  + Effect: Award of financial sum for loss suffered by pl
  + Purpose: put the pl, in economic terms, in the position which they would have been in if the wrong had not been committed
  + Contract context: put the PL, in economic terms, in the position which they would have been in if the contract had been performed
    - *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528
    - *Richly Bright International Ltd v De Monsa Investments Ltd* (2015) 18 HKCFAR 232
  + Ordinary damages (substantial damages): compensate for loss
  + Nominal damages: where no loss suffered
* Measure of damages
  + Basis for assessing what the loss is and what damages award should be
  + Categories:
    - Expectation damages
    - Reliance damages
    - Restitution damages
* **Expectation Damages**
  + **1. Protects performance / expectation interest**
    - E.g. sale of goods where non-delivery by seller
      * Contract price: $100
      * Purchaser has not paid
      * Market price at date of breach: $120
      * Loss: $20 (difference in value between contract price and market price – cf Sale of Goods Ordinance (Cap 26) s 53(3))
      * Damages: $20
  + **2. Defective performance**
    - E.g. sale of goods; defective goods delivered (breach of warranty of quality)
      * Contract price (paid): $100
      * Value of defective goods: $70
      * Market price if goods not defective: $100
      * Loss of $30 (difference between value of goods and value they would have had if they had answered to the warranty – SOGO s 55(3))
      * Damages: $30
      * E.g. Ruxley Electronics and Construction Ltd v Forsyth, *Alfred McAlpine Construction Ltd v Panatown Ltd*
  + **3. Loss of profit**
    - E.g. sale of goods contract where seller in breach and purchaser loses the profit which could have been earned on a re-sale
    - Pl can claim lost benefits where pl can prove, on balance of probabilities, that expectation of receipt of benefit had a likelihood of attainment
      * *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80
  + **4. Loss of chance** 
    - *Howe v Teefy* (1927) 27 SR(NSW) 301
      * Measurement of value of chance
      * It can be deduced that difficulty in assessing damages does not prevent a court from awarding damages.
  + **Methods** for calculating expectation damages
    - “Cost of cure” basis, or cost of reinstatement; or
    - “Difference in value” basis: determine loss on basis of difference between value received by pl and value which pl ought to have received under contract
  + Case:
    - *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 - nominal award – swimming pool
      * Facts:
      * Pl contracted with def to build swimming pool for def
      * Contract: max depth of 7 feet 6 inches. Pool built: max depth of 6 feet
      * Cost of cure basis: £21,560
      * Difference in value basis: nil
      * Pl sued for full contract price
      * Trial judge: def liable to pay full price but can obtain damages for pl’s breach
      * House of Lords held:
        + Element of reasonableness taken into account in assessing loss of innocent party
        + Compare situation where cost of reinstatement less than the difference in value: reasonable to spend on repairs – former amount recoverable
        + Present case: not reasonable to claim £21,560
        + The law must cater for cases where full performance of the promise would vastly exceed the loss which had truly been suffered. Cost of reinstatement wholly disproportionate to non-monetary loss of pool-owner and does not properly represent such loss.
        + Nominal damages awarded for loss of amenity: £2500
    - *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 – 无产权 – nominal damages
      * Facts:
      * Pl (Panatown) and Unex were companies in same corporate group
      * Unex owned land
      * Pl entered into building contract with def builders (Alfred McAlpine) to construct building on land
      * Unex and def entered into separate duty of care deed
      * Def breached building contract: serious defects
      * Holdings:
      * Pl suffered no loss and not entitled to substantial damages (only nominal damages)
      * Pl not the owner of the property and any loss in value in property is not a loss suffered by pl
      * No expenditure incurred or intended to be incurred by pl for repairs
      * Unex had direct remedy against def for building defects under deed
    - *Howe v Teefy* (1927) 27 SR(NSW) 301 – loss of chance – not a nominal damage
      * Facts:
      * Def leased racehorse to pl trainer
      * Horse not provided by def
      * Pl’s loss: loss of chance to earn prizemoney in race
      * Damages awarded for loss of chance: £250
      * Damages: measurement of value of chance, and not the value of the lost prize
* **Reliance damages**
  + Reliance damages compensate for losses reasonably incurred by plaintiff in or for the purposes of performance of contract
    - Covers wasted expenditure or out-of-pocket expenses
    - *McRae v Commonwealth Disposals Commission* (1952) 84 CLR 377
      * Pl entitled to reliance damages for wasted expenditure in locating non-existent oil barge
  + Protection of reliance interest: pl’s reliance on promise of def
  + Alternative view: reliance damages is part of protection of performance interest: pl relies on promise of performance / expectation of performance
  + Practical convention:
    - Often expectation damages already covers reliance loss (because calculation of profit takes into account expenses incurred): no need to separately claim reliance damages
    - But reliance damages would be specifically claimed if pl cannot prove loss of profits
  + **Pre-contractual expenditure**
    - Wasted expenditure (either pre-contractual or post-contractual) recoverable if parties contemplated or ought reasonably to have contemplated that the expenditure is likely to be wasted if the contract is not performed
      * *Anglia Television Ltd v Reed* [1972] 1 QB 60
  + Cases:
    - *Anglia Television Ltd v Reed* [1972] 1 QB 60
      * Facts:
      * English TV station (pl) contracted with US actor to make film
      * Actor repudiated and film could not continue
      * Pl incurred pre-contractual expenditure (director’s fees etc.)
      * Held: def liable for pre-contractual expenditure
      * Pre-contractual wasted expenditure recoverable if parties contemplated or ought reasonably to have contemplated that the expenditure is likely to be wasted if the contract is not performed
    - *C & P Haulage v Middleton* [1983] 1 WLR 1461
      * Facts:
      * Pl granted contractual licence to def to use pl’s premises as office
      * Licence: def should not remove any fixtures added to premises
      * Def incurred expenses making the premises suitable for his work.
      * Ten weeks prior to the expiry of a term, Def was unlawfully evicted and he sought damages from PL.
      * Def then used own home as office
      * Proceedings and issues:
      * Pl sued for certain payments owed
      * Def counter-claimed for breach of contract
      * Holdings:
      * Def was awarded nominal damages for the wrongful eviction.
      * Awarding him the cost of the improvements would place him in a better position than he would have been had the contract been fulfilled, and this was not the function of the courts.
      * Had Def been appropriately given notice(of the eviction), he would not have been able to recover these expenses and so he could not claim them as losses flowing from the breach.
* **Restitution damages** 
  + Restitution damages enable pl to claim for value of benefits conferred upon def in course of pl’s performance of contract
    - E.g. purchaser pays contract price but seller fails to deliver
    - Damages for purchaser: contract price paid
    - Recovery only if total failure of consideration
  + Alternative remedy to damages for breach of contract: restitution for unjust enrichment
* **Non-pecuniary losses**
  + E.g. compensation for pain and suffering in connection with personal injury caused by breach of contract (where injury not too remote)
    - *Grant v Australian Knitting Mills Ltd* [1936] AC 85
  + **Mental distress**
    - **General rule**: damages for injured feelings or distress not recoverable
      * *Addis v Gramophone Co Ltd* [1909] AC 488
  + **Exceptions** where non-pecuniary losses recoverable: - Farley v Skinner per Lord Steyn
    - 1. Pain and suffering and loss of amenities
    - 2. Where object of contract is to provide pleasure, relaxation or peace of mind
    - 3. Physical inconvenience
  + ***\*Farley v Skinner* [2002] 2 AC 732**
    - Facts:
    - Pl contracted with def surveyor to survey property intended to be purchased
    - Pl concerned about aircraft noise
    - Def’s report: unlikely that property would suffer greatly from aircraft noise
    - Pl affected by aircraft noise after purchasing property
    - Def breached contract: failed to adequately investigate
    - Property value not affected by noise though
    - HL held: pl can recover damages for distress and inconvenience
    - Exception 2 can apply if major or important object of contract is to give pleasure, relaxation or peace of mind
    - Important part of contract for pl to obtain report on aircraft noise and peace of mind that pl would not be affected if property purchased
    - Exception 3 also applicable
    - Physical inconvenience (affecting senses) going beyond mere disappointment (Lord Scott); or where it arises from conduct amounting to nuisance (Lord Steyn)
    - Damages awarded: £10,000
    - Cf *Ruxley v Forsyth*
      * Exception 2?
        + Where contract expressly or implied intended to confer the non-pecuniary benefit
        + Value to pool-owner of slightly greater depth
      * Exception 3?
        + Consequential non-pecuniary losses
* **Date of assessment**
  + Damages normally assessed at the time of breach
    - *Johnson v Agnew* [1980] AC 367
  + Anticipatory breaches:
    - Damages normally assessed at time when performance should have been made
    - *Millet v Van Heck & Co* [1920] 3 KB 535 at 542-3
* **Causation**
  + Loss must be caused by the breach of contract
    - *C & P Haulage v Middleton* [1983] 1 WLR 1461
  + Where multiple causes, look at whether breach was an effective cause
    - C*ounty Ltd v Girozentrale Securities* [1996] 3 All ER 834
  + Common sense approach to causation:
    - *March v E & M H Stramare Pty. Ltd.* (1991) 171 CLR 506 at 522; *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360 at 1374–1375
      * “but for” test was not a definitive test of causation in tort
      * Question of causation is one of fact. The court decides whether the breach of duty was the cause of loss or merely the occasion for the loss by the application of common sense,
  + “But for” test may be applied
    - *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516
  + Novus Actus Interveniens?
* **Remoteness of loss**
  + Damages will not include losses which are too remote
  + Damages recoverable only where there is (objectively) an assumption of responsibility by the def for the type(kind) of loss concerned
    - Based on what kind(type) of loss may be reasonably contemplated by parties
      * What is reasonably contemplated arises from either imputed or actual knowledge of def regarding pl’s circumstances.
      * Imputed or actual knowledge provides basis for assumption of responsibility for the likely loss.
    - *Transfield Shipping Inc v Mercator Shipping Inc (The Archilleas)* [2009] 1 AC 61
    - *Richly Bright International Ltd v De Monsa Investments Ltd* (2015) 18 HKCFAR 232
  + **Hadley v Baxendale (1854) 9 Exch 341:** sets out rule as to the losses which may be recoverable
    - Two limbs of rule: (under Lord Hoffman’s analysis: use assumption of responsibility concept to determine whether loss should be assessed under 1st or 2nd limb)
      * (1) General damages: loss fairly and reasonably considered to arise naturally from breach (arising in usual course of things) - imputed knowledge of def (regardless of actual knowledge)
      * (2) Special damages: loss reasonably supposed to be in contemplation of parties, at time of contracting, as probable result of breach - actual knowledge of def
  + Suggested approach (Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia) [2010] 2 Lloyd’s Rep 81 per Hamblem J):
    - Assumption of responsibility concept provides basis for rule in Hadley v Baxendale
    - **Starting point**: apply rule in *Hadley v Baxendale*
    - Where necessary, then specifically consider whether def can reasonably be expected to have assumed responsibility for loss in question
  + *Hadley v Baxendale* (1854) 9 Exch 341:
    - Facts:
    - Contract for carriage of pl miller’s crankshafts to be transported for repairs
    - Delivery of shaft delayed by def carrier
    - Mill shut for 5 days: pl suffered loss of profits
    - Held:
    - Loss of profits not recoverable: loss too remote (not within either limb)
  + *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 – 锅炉 – 洗衣店 – special damage not upheld
    - Facts:
    - Boiler delivered by def sellers to pl launderers 5 months late (breach of contract)
    - Loss of business
    - Held:
    - Loss of business for normal profits recoverable under first limb of Hadley v Baxendale
    - But pl could not recover losses arising from highly lucrative dyeing contracts with Ministry for Supply
    - Actual knowledge of contracts required in order to apply second limb.
  + *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 – 卖糖 – 延误 – 市价降低
    - Facts: Carriage of sugar by sea; late arrival (breach of contract by carriers) cause loss suffered by charterer on sale of sugar arising from drop in market price.
    - Held: Loss was within 1st limb of *Hadley v Baxendale*. Actual knowledge of proposed sale by charterer not required.
  + *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 – type of loss
    - Facts:
    - Def sold and installed bulk feed storage hopper for pl to feed pl’s pigs
    - Hopper not reasonably fit for purpose (breach of contract)
    - Pigs ill from eating mouldy nuts
    - Pigs contracted E Coli (254 pigs dying)
    - Held:
    - Parties could not have contemplated that pigs would contract E Coli
    - But within reasonable contemplation that pigs would suffer injury or death if hopper unfit for storing pig feed
    - Where type of loss is foreseeable, then def is liable for whole extent of loss (even if more serious than contemplated)
    - Def liable for loss of pigs.
  + ***\*Transfield Shipping Inc v Mercator Shipping Inc (The Archilleas)* [2009] 1 AC 61**
    - Facts:
    - Charterparty contract
    - Appellant charterer 9 days late in re-delivery of ship to respondent ship-owner
    - One possible basis: difference between market rate for hire and charter rate for 9 days (total of $158,301.17)
    - Ship-owner argued on different basis: loss of actual profits in contract with subsequent hirer of ship (for 191 day hire) because of reduction of rate ($8000) caused by delay (total claimed: $1,364,584.37)
    - UKSC:
    - **Lord Hoffmann:**
    - Is loss a kind or type for which contract-breaker ought fairly to be taken to have accepted responsibility?
    - Presumed intentions based on what people entering into contract in the particular market would reasonably be considered to have undertaken.
    - **Lord Hope:**
    - Reasonable foreseeability of loss not sufficient for loss to be recoverable; party must (objectively) have undertaken responsibility for loss.
    - Rule in *Hadley v Baxendale* is based on presumed intentions of parties on what def would undertake to be responsible for in the event of the def’s breach
    - Justification for def’s liability on this basis: def is aware (or taken to be aware) of circumstances of likely loss and can quantify potential liability and assess whether to bear risk in contracting
    - **Lord Hoffmann and Lord Hope:**
    - Party cannot be expected to assume responsibility for something that they cannot quantify
    - Ship-owner losing profits on subsequent charter foreseeable but impossible for appellant to quantify what that loss might be (no knowledge of terms of hire – e.g. period of hire etc.)
    - Appellant cannot reasonably be expected to have assumed responsibility for such loss
    - Parties can (largely) quantify loss of profits based on market fluctuations in price of hire – loss of profits arising in the ordinary course of things
    - It can be presumed that appellant has assumed responsibility for loss arising from difference between market rate and charter rate where late re-delivery
    - General understanding of shipping industry taken into account in determining what liabilities were being undertaken
    - **Lord Rodger and Baroness Hale:**
    - Same conclusion reached but without adoption of assumption of responsibility concept
    - Lord Rodger: difference between market rate and charter rate recoverable under 1st limb of *Hadley v Baxendale*; special losses arising from subsequent hire only recoverable under 2nd limb but no knowledge on part of appellant to allow 2nd limb to be applied.
    - Lord Walker agreed with Lord Hoffmann, Lord Hope and Lord Rodger
  + *Richly Bright International Ltd v De Monsa Investments Ltd* (2015) 18 HKCFAR 232
    - Facts:
    - Sale of commercial premises
    - Head agreement: Win Profit selling to World Orient
    - 1st sub-sale: World Orient selling to 823 Investment
    - 2nd sub-sale: 823 Investment selling to Richly Bright ($133,266,600)
    - 3rd sub-sale: Richly Bright selling to De Monsa ($135,864,000)
    - De Monsa failed to complete (and confirmers also failed to complete their sub- sales upstream)
    - CFA Holdings:
    - *Hadley v Baxendale* applied (1st limb), with adoption of concept of assumption of responsibility
    - Richly Bright’s loss of profit: $2,597,400
    - But Richly Bright already forfeited 10% deposit of $13,586,400 from De Monsa
    - No additional damages can be claimed on top of deposit
    - Richly Bright not entitled to recover against De Monsa for Richly Bright’s own loss of deposit and other liabilities of Richly Bright in settlement of claims against them made by 823 Investment: De Monsa could not have assumed responsibility for such upstream losses which would have been unquantifiable and unpredictable
* **Mitigation**
  + Duty of pl to mitigate losses
  + Where pl unreasonably fails to mitigate loss, pl not entitled to recover loss that would not be suffered if there was mitigation
    - E.g. where pl acts unreasonably in not attempting to minimize loss suffered
  + Eg:
    - Wrongful dismissal of employee (breach of contract)
    - Loss of income
    - But employee unreasonably declines alternative employment immediately available elsewhere (on same or better terms)
    - Failure to mitigate: loss of income not recoverable if same (or more) income could be earned had employee taken up alternative employment
    - See *Brace v Calder* [1895] 2 QB 253 on similar facts
* **Recovery of sums fixed by the contract**
  + Action for liquidated sum:
    - Cause of action in debt for sum owing
      * One could also bring an action in debt for other specific sums due under a contract, not just liquidated damages (e.g., the price of goods delivered but not paid for)
    - Not an action for damages for breach of contract
  + Action in debt – elements to be established:
    - Sum fixed by contract
    - Sum is now due for payment by the def
  + **Agreed damages clauses**
    - Agreed damages or liquidated damages clauses:
      * Term of contract specifying amount payable by one party as liquidated damages if that party in breach of contract
    - Where clause applies, then:
      * Pl can sue for liquidated sum and need not prove loss
      * Def liable for liquidated sum regardless of whether actual loss is greater or less than liquidated sum
      * See *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234 at [77]–[79] 27
    - Agreed damages clause not enforceable on public policy grounds though if amount to be paid constitutes a penalty
      * Test: whether the agreed sum is a genuine pre-estimate of loss in the event of breach by other party - Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd
        + Penalty if amount is extravagant or unconscionable in comparison with greatest loss that could conceivably be proved
        + But clause can be upheld as setting fair compensation agreed by parties where precise pre-estimation of losses impossible
  + *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79
    - Facts:
    - Pl manufactured motor tires
    - Contractual obligations on def purchasers included: not to re-sell below list prices
    - Agreed damages clause: payment of £5 for each tire or tire cover or tube sold or offered in breach of contract.
    - Def sold below list prices to a co-operative society
    - Holdings
    - Express designation by parties not conclusive on whether clause is genuine agreed damages clause or whether it is a penalty
    - **Test**: whether the agreed sum is a genuine pre-estimate of loss in the event of breach by other party
      * Penalty if amount is extravagant or unconscionable in comparison with greatest loss that could conceivably be proved
      * **Reformulated** in *Cavendish Square Holding BV*
        + Provision is penal if it is a secondary obligation imposing detriment on contract-breaker out of all proportion to any legitimate interest of innocent party in enforcement of primary obligation
    - But clause can be upheld as setting fair compensation agreed by parties where precise pre-estimation of losses impossible
    - Clause upheld in present case: not a penalty
  + Cavendish Square Holding BV v Makdeshi [2016] AC 1172
    - Two cases heard together
    - Second case: car park – first 2 hours free; overstay: £85 payable
    - UKSC held: £85 not a penalty even though not a genuine pre-estimate of loss
    - **Test** on whether clause is penal in nature reformulated:
      * Provision is penal if it is a secondary obligation imposing detriment on contract-breaker out of all proportion to any legitimate interest of innocent party in enforcement of primary obligation
      * Innocent party potentially has legitimate interest extending beyond recovery of compensation for loss
  + *Law Ting Pong Secondary School v Chen Wai Wah* [2021] 3 HKLRD 185 (CA) : Cavendish states law in HK
    - Facts:
    - Employment contract for teacher (def): July 2017
    - Teaching duties commence 1 Sep 2017 (for one year to 31 Aug 2018)
    - Contractual right to terminate: upon 3 months’ notice or paying 3 months’ salary in lieu of notice
    - Aug 2017: def indicated would not report for duty in Sep; did not give 3 months’ notice and refused to make payment in lieu
    - Held:
    - Cavendish principles applied
    - A penalty must involve a secondary obligation arising from a breach of contract
    - Provision on payment in lieu involves a primary obligation of performance (pursuant to contractually stipulated method for termination)
    - Even if the provision involves a secondary obligation, the employer school has a legitimate interest in deterring teachers from leaving without giving sufficient notice (school needs to have sufficient time to find replacement)
    - Provision was not a penalty
* Deposits
  + Upfront deposit payments
    - E.g. 10% deposit paid by purchaser upon entry into contract for sale of land
  + Deposit:
    - Applied towards payment of contract price
    - Forfeited if party (payor) in breach
    - **Exception**: deposits recoverable by payor in some cases:
      * Where deposit constitutes a penalty
      * Equitable jurisdiction for relief against forfeiture (of deposit)
      * Where deposit invalid and regarded as part payment
      * E.g. *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573
  + Deposits vs. Part payments
    - Deposits distinguished from part payments
    - Part payments:
      * Payor may recover if contract not completed (even if payor may be in breach)
    - Basis for return of payment:
      * Advance payment conditional on contract being performed; or
      * restitution where total failure of basis (total failure of consideration)
    - Whether payment is deposit or part payment:
      * Question of construction of contract
  + *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573
    - Facts:
    - Sale of land in Jamaica
    - 25% deposit paid (Jamaican $3M)
    - Time of the essence; balance of purchase price tendered late
    - Vendor terminated and sought to retain deposit
    - Held: Deposit was a penalty and cannot be forfeited
    - Deposit invalid if it constitutes a penalty:
    - Test is not whether it is a genuine pre-estimate of loss
    - Test is whether amount of deposit is reasonable as earnest money
    - Standard 10% deposits reasonable
    - Larger amounts: there must be special circumstances justifying the deposit
  + *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234
    - Facts:
    - Sale of land (commercial property) for $115M
    - Contract date: 23 May 1997; completion 9 months
    - 35% deposit paid ($40.25M)
    - Completion deferred to 2 April 1998
    - Property collapse
    - P sought to terminate (for alleged unauthorized building works)
    - P terminated unlawfully: P in breach
    - CFA held: V is not entitled to keep deposit
    - Ribeiro PJ:
      * Test as to whether deposit is a penalty not the same as test applied for agreed damages clauses
      * Even if higher deposit intended to compensate for loss on P’s breach: deposit not necessarily valid
      * Test is whether deposit is reasonable
      * Amounts higher than conventional amount will be invalid as a deposit and recoverable as a part payment unless justified by exceptional circumstances
    - Bokhary PJ:
      * Where deposit unreasonable, it is recoverable either because deposit is a penalty or because it is a recoverable part payment
    - Chan PJ:
      * Unreasonable deposits are an invalid penalty and relief against forfeiture can be granted.
* Specific performance
  + Equitable remedy:
    - Order compelling party to perform contract
  + Granted only in particular circumstances
    - Discretionary remedy
  + **Basic principle**:
    - Specific performance granted only if remedy of damages is inadequate
  + **Sale of land**
    - Specific performance may usually be granted against vendor
    - Land regarded as unique; damages inadequate remedy
  + **Sale of goods**:
    - Specific performance against seller usually not available
    - Purchaser can usually obtain identical goods in the market: damages adequate remedy
    - But damages inadequate if goods unique
    - E.g. Dougan v Ley (1946) 71 CLR 142 (sale of licensed taxi-cab; specific performance granted)
  + **Factors against the grant of specific performance:**
    - Contract for personal services
      * Employment contracts usually not specifically enforced
        + De Francesco v Barnum (1890) 45 Ch D 430
        + Reasons:

Inappropriate to force parties to cooperate together

Form of slavery

Difficulties in enforcing court orde

* + - * + Same principles apply to other contracts for provision of services (eg engagement of a singer for performances)
    - Contract requiring constant supervision of court
      * *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*
    - Contract which is too vague
      * *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*
    - Lack of mutuality
      * Specific performance generally only granted against defendant if plaintiff is able to perform plaintiff’s own obligations
        + *Price v Strange* [1978] Ch 337 at 367-368
    - Severe(undue) hardship on def
      * Patel v Ali [1984] Ch 283
    - Mistake on part of def in entering into contract (e.g. Tamplin v James (1880) 15 Ch D 215)
    - Possibility of PL being enriched at the expense of def
    - *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*
  + *Beswick v Beswick* [1968] AC 58
    - Facts:
      * Peter Beswick (A) assigned business to John Beswick (B)
      * B agreed to pay weekly sum of £5 to A’s wife (C)
      * A died and B no longer paid weekly sums to C
      * C, as A’s legal personal representative, sought specific performance against B
    - House of Lords held: Specific performance granted
    - No loss suffered by A; damages not an adequate remedy
    - Note privity of contract doctrine
      * See now Contracts (Rights of Third Parties) Ordinance (Cap 623)
  + *Patel v Ali* [1984] Ch 283 – 贼惨的夫妻 – 卖婚房 – hardship
    - Aug 1979: contract by def and def’s husband to sell matrimonial home to pl
    - Trustee in bankruptcy of husband’s bankrupt estate obtained injunction preventing sale; injunction discharged July 1980
    - Pl then instituted proceedings for specific performance; but only sought summary judgment in July 1983
    - Meanwhile: def diagnosed with bone cancer while pregnant; leg amputated; def’s husband jailed for a year
    - Specific performance not ordered due to def losing home in circumstances of hardship.
  + *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* 1998] AC 1 – 商场里超市 – business – uncertain obligation
    - Facts:
    - Def operated Safeway supermarket as major tenant in pl’s Hillsborough Shopping Centre (35 year lease entered into in 1979)
    - Lease covenant: def to keep premises open for retail trade during usual hours of business
    - 1994: Def to close a number of stores, including Hillsborough one.
    - House of Lords held: No specific performance granted.
    - General principle: specific performance usually not granted to compel party to carry on business
    - Reasons:
      * Specific performance not granted where continued supervision of court required to ensure performance (distinguish orders for carrying on activity and orders for achieving particular result)
      * Contractual obligation (and court order) not sufficiently precise
      * Possibility of plaintiff being enriched at expense of def
    - Present case:
      * Present case:
      * Specific performance not appropriate: obligation to keep premises open for retail trade not precise enough
      * Is there breach of court order if business not operated at optimal level or at reduced capacity (eg def seeks to save on costs; avoid devoting resources on loss-making business)? Too uncertain
      * Business compelled to be carried on under threat of imprisonment for contempt of court order: no way to run a business
* **Injunctions**
  + Prohibitory injunctions: usually granted unless hardship to def.
    - Elements:
      * The breach of a negative obligation in a contract.
      * Damages would not be an adequate remedy.
    - Araci v Fallon [2011] EWCA Civ 668, [70]
  + Mandatory injunctions: test of balance of convenience applied
    - Elements:
      * The breach of a negative covenant in a contract
      * To remedy the breach some positive action will need to be taken (in our example, removing the garage)
    - *Sharp v Harrison* [1922] 1 Ch 502
      * However, this remedy is rarely granted. The primary reasoning for this is that it will be far easier for the party in breach to pay damages for the cost of the cure, rather than the defendant themselves having to remedy the breach,
    - Relevant to look at whether damages adequate remedy: *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80
  + *Lumley v Wagner* (1842) De GM & G 604
    - Facts:
    - Contract: pl owner of Her Majesty’s Theatre engaged def as singer for 3 months
    - Clause: def not to sing elsewhere
    - Def sought to perform at Covent Garden
    - Held:
    - Injunction granted to restrain performance at Covent Garden
    - But specific performance not ordered to require performance at Her Majesty’s Theatre
    - Note: possibilities of restraint of trade clauses not being enforced on grounds of public policy