**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**

**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'
* Does not apply to written contracts, where extrinsic evidence contradicting written terms is generally not permitted

**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  + Contract voidable in equity (contract may be rescinded)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 (because of mistake of mistaken party)
    - 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:
      * 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.
    - *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337
      * 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
      * Facts: ship grounding and subsequent delay (6 months) made the chartered voyage radically different.
      * Holding: 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). Contract frustrated. Mere delay often would not frustrate contract, but significant delays in performance can.
    - *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd* [2021] EWHC 1117 (Comm): Discussed in the text's final section. Leases for aircraft grounded due to the Covid-19 pandemic were held not frustrated. Reasons included: (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).
* The following cases listed in the outline are not discussed in the provided text: Codelfa Construction Pty Ltd v State Rail Authority of New South Wales, Wong Lai-ying v Chinachem Investment Co Ltd, Cheung Kit Lai v Rich Prosper Ltd, Bank of New York Mellon (International) Ltd v Cine-UK Ltd, The One Property Ltd v Swatch Group (Hong Kong) Ltd.
* Effects of frustration
* Frustration automatically discharges the contract (Hirji Mulji). 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. The financial consequences are primarily dealt with by the law of restitution, now largely governed by the Law Reform (Frustrated Contracts) Act 1943 (the text does not mention the specific Hong Kong Ordinance, Cap 23 s 16).
* Common Law Background: Chandler v Webster initially held loss lay where it fell (no recovery of prepayments unless total failure of consideration, narrowly defined). Fibrosa overruled Chandler, allowing recovery of prepayments on total failure of consideration (basis for payment failed), but didn't allow for partial failure or payee's expenses/reliance loss, nor did it help those providing services (Cutter v Powell).
* Law Reform (Frustrated Contracts) Act 1943: Aims to prevent unjust enrichment.
* Section 1(2): Allows recovery of sums paid before discharge, and sums payable cease to be payable. Payee may be allowed (at court's discretion, if just) to retain/recover expenses incurred before discharge for the purpose of the contract, up to the amount paid/payable. Applies even on partial failure of consideration. Gamerco SA suggests a broad discretion, not a rigid rule, with the onus on the payee to justify retention for expenses.
* Section 1(3): Allows recovery for valuable non-money benefits obtained by one party due to the other's actions pre-discharge. 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.
  + 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).