

# The Contract Law Bible

Hey Guys. I worked really hard on this on the run up to the June exam last year. I found it really useful and so did the people in my class. Please feel free to pass this on to your friends who are studying contract law, but please don't pass it off as your own, or make any money from the reproduction of this. Thanks =)

Lucy Rimington ©

## **Offer and Acceptance**

**Offer** - A proposal to enter into an agreement with another person. An offer must express the intent of the person making the offer to form a contract, must contain some essential terms--including the price and subject matter of the contract--and must be communicated by the person making the offer. A legally valid acceptance of the offer will create a binding contract.

E.g. Would you like to buy my house for £100,000?

## **Invitation to Treat**

- **Goods Displayed on Shelves**
  - Pharmaceutical Society GB v Boots Cash Chemists [1953]
  - Pharmacy and Poisons Act 1933 – chemist to be present at point of sale. Point of sale was cash desk, displaying of product was invitation only.
    - Freedom of contract preserved – shops can refuse sale
- **Goods Displayed in Shop Window**
  - Fisher v Bell [1961]
    - Offensive Weapons Act 1959 – sale of prohibited weapons. Failed as display was not sale, rather invitation to treat.
- **Advertisements**
  - Partridge v Crittenden [1968]
    - Protection of Birds Act 1954 – “Bramblefinch cocks and hens 25s each” not an offer.
- **Lack of objectivity**
  - Gibson v Manchester City Council [1979]
    - Gibson invited to buy house. Council invited application on “**may be prepared to sell**” basis. Not an offer.
- **Mere statement of price**
  - Harvey v Facey [1893]
    - Sale of Penn. H: “telegram lowest price”. F: “lowest acceptable £900”. Not an offer, merely statement.
- **Lots at Auction**
  - Harris v Nickerson [1873]
    - Furniture listed in catalogue, Harris hoped to buy. Items withdrawn. Advertising was invitation to treat, acceptance only at fall of hammer.
  - British Car Auctions v Wright [1972]
    - Prosecution for offering for sale an unroadworthy car. No offer to sell at auction only an invitation to bid. Failed.

## **Not Invitation to Treat**

- **Unilateral Offer**
  - Carlill v Carbolic Smoke Ball Company [1893]

- Promise to pay £100 for using smoke ball as directed and catching influenza in advert was an offer that could be accepted by anyone. Acceptance by performance
  - This was an offer not a mere trade puff as the Carbolic Smoke ball co. claimed.
- **Statement of Price where offer is intended**
  - Biggs v Boyd Gibbins [1971]
    - B: “for a quick sale I will accept £26,000”. Boyd Gibbins accepts and Biggs affirms. There is an offer and acceptance.
- **Competitive tendering**
  - Spencer v Harding [1870]
    - Invitation to submit tenders is not an offer to sell to highest bidder.
  - BUT: Harvela Investments v Royal Trust of Canada [1986]
    - Advert stipulated sale to highest bidder. Lowest bidder stated \$2,100,000 or £101,000 in excess of any other. H sued successfully. Wording ensured offer could only be accepted by the highest bidder.
  - Blackpool and Fylde Aero Club v Blackpool BC [1990]
    - Council put up airport pleasure flight usage for competitive tender. Stated not bound by any bid. Tender time closed early. RR Helicopters won. Council discovered mistake and re-run but legal threat from RRH. Court acknowledged implied undertaking to operate by the set rules.
- **Auctions without reserve**
  - Warlow v Harrison [1859]
    - Collateral contract created between the highest bona fide bidder and the auctioneer himself when the auctioneer refuses sale.
  - Barry v Heathcote Baal & Co. [2000]
    - Auction without reserve withdrawn, thus auctioneer refused sale to claimant (2 x £200). Then sold privately for £750 each. Existence of collateral contract - £27,600 damages.
    - The court accepted the rule in Warlow v Harrison

## Offer

- **Must be communicated to the offeree**
  - Taylor v Laird [1856]
    - Taylor gave up captaincy and worked as member of crew, wages claim failed, owner had no knowledge.
  - Inland Revenue Commissioners v Fry [2001]
    - Fry owed £113,000; Fry sends £10,000 cheque “in full and final settlement to be accepted when banked”. IRC procedure to bank any cheques before correspondence. Court held unilateral offer could be accepted, but IRC had no knowledge, hence ignorant and thus no acceptance.

- **Can be made to the whole world**
  - Carlill v Carbolic Smoke Ball Co [1893]
- **Must be certain**
  - Guthing v Lynn [1831]
    - £5 more “if horse is lucky” is too vague.
- **Can be withdrawn at any time before acceptance**
  - Routledge v Grant [1828]
    - Grant offered house for sale for 6 weeks. Withdrew early, legitimate as no acceptance had occurred and no deposit to keep offer open.
- **Withdrawal must be communicated**
  - Byrne v Tienhoven [1880]
    - VT: 1st October offered sale in writing, 8th October withdrew. B: 11th October accepted by telegram, 15th October confirmed in writing. 20th October received VTs withdrawal. Invalid.
- **Communication can be by reliable third party**
  - Dickinson v Dodds [1876]
    - Berry notified Dickinson that Dodds had withdrawn offer to sell houses. Berry was a mutual acquaintance, on whom both could rely therefore notification valid.
- **Unilateral offer cannot be withdrawn during performance of the offeree**
  - Errington v Errington & Woods [1952]
    - Father mortgages house in own name. Promised son and daughter in law it would be theirs after mortgage paid off. Father’s promise could not be withdrawn by relatives after his death so long as mortgage paid off.

### Termination of Offer

- **Acceptance,**
- **withdrawal,**
- **reasonable time can lapse**
  - Ramsgate Victoria Hotel v Montefiore [1866]
    - Montefiore’s offer to buy shares in June elapsed because Ramsgate Victoria has issued shares in November
- **Death**
  - Reynolds v Atherton [1921]
    - Offeree dies then the offer lapses and representatives unable to accept
  - Bradbury v Morgan [1862]
    - Offeror dies, and offeree is ignorant then acceptance can still occur. Unlikely when offeree is aware of this.

### Acceptance

- **Must be communicated**
  - Felthouse v Bindley [1863]

- “If I hear no more from you, I shall consider the horse mine at £30:15s”. Sold at auction and not withdrawn so no claim against auctioneer.
- **Can be in any form – unless expressly requires in a specific form**
  - Yates v Pulleyn [1975]
    - Option to purchase land was required to be “sent by recorded delivery”. No acceptance by ordinary post.
- **The postal rule – The contract is formed at the time the letter of acceptance is posted, not when it is received.**
  - Adams v Linsell [1818]
    - Wool offered for sale, acceptance by post requested and sent but not received until long after sale of wool.
  - Household Fire Insurance v Grant [1879]
    - Grant wrote to purchase shares. Notification of acceptance was sent by HFI but never received. Grant was liable for value of shares when liquidation occurred; he had become a shareholder even though he was unaware of it.
  - Holwell Securities v Hughes [1974]
    - Acceptance required “by notice in writing”. Need for notice meant postal rule was not effective.
- **Modern methods of communication**
  - Brinkibon v Stahag Stahl [1983]
    - Telex received out of office hours, only effective once reopened
  - Consumer Protection (Distance Selling) Regulations 2000
    - Apply to sale of goods and provision of services
    - R7: bound to supply minimum information: right to 7 day cancellation, description, price, arrangements for delivery and length before elapsing.
  - Electronic Commerce Directive 2000/31
    - No contract until the seller has notified the customer electronically.
- **Must be unconditional – The mirror image rule**
  - Hyde v Wrench [1840]
    - Wrench offered sale of farm for £1000. Hyde rejected and offered £950 which Wrench rejected. Hyde tried to accept original, but his counter offer had terminated it so it could no longer be accepted.
- **Enquiries do not count as rejection**
  - Stevenson v Maclean [1880]
    - Maclean offered to sell iron, Stevenson enquired as to delivery and after hearing nothing sent acceptance anyway. Maclean sold to third party, his claim that Stevenson’s enquiry had been a counter-offer failed. The offer had still been open to Stevenson when he sent his acceptance.

## **Problems**

- **Battle of the forms**
  - General rule: take the last counter offer as having been accepted
    - Davies v William Old [1969]
      - Davies contracted William who sub- contracted builders. Builders issued a work order to Davies using standard form “not pay for work until they had been paid”. Davies sued for unpaid work but failed – standard form was counter offer that D had accepted by carrying on.
    - British Steel Corporation v Cleveland Bridge [1984]
      - CB to build framework of bank. BSC to supply 4 steel nodes. BSC want disclaimer for liability for any loss caused by late delivery. Never agreed upon, BSC delivered 3 but 4th was delayed. CB refused to pay for 3 nodes, claiming breach. No contract existed. However the judge did order that BSC be paid for what they had supplied.

## Consideration

- **Definition:**

- Thomas v Thomas [1842] – “some detriment to the plaintiff or some benefit to the defendant”
- Currie v Misa [1875] – “some right, interest profit of benefit accruing from one party or some forbearance, detriment or loss or responsibility given, suffered or undertaken by the other”
- Dunlop v Selfridge [1915] – “an act of forbearance, or the promise thereof is the price for which the promise of the other is bought and the promise thus given for the value is enforceable”.
- Executory consideration – promise to carry out acts later, however no obligation to Offeror in unilateral contracts.

- **Rule: need not be adequate but must be sufficient**

- Thomas v Thomas [1842]
  - Man died, expressing that his wife be allowed to remain in house. Executors carried this out, charging £1 per year. Dispossession failed – moral obligation not relevant but paying ground rent was good consideration.
- White v Bluett [1853]
  - Son owed money. Claimed agreement that debt would be forgotten if he did not complain about distribution of assets. This was not tangible, nor sufficient.
- Ward v Byham [1956]
  - Father promised money towards upkeep if child “well looked after and happy”. Mother bound to look after, but no legal provision for happiness. Keeping child happy was good consideration.
  - **However this does contradict White v Bluett and was a Denning case – discussion required**
- Chappel v Nestle [1960]
  - Nestle offered record cheaply + 3 wrappers. Wrappers were good consideration when copyright holders sued successfully for full royalties.

- **Rule: past consideration is no consideration**

- Re McArdle [1951]
  - Daughter in law spent money on house to be inherited by son and 3 other children. Mother made children sign agreement to reimburse. She sued when they didn't unsuccessfully – consideration was past.
- Lampleigh v Braithwaite [1615]
  - Braithwaite received a king's pardon from Lampleigh Braithwaite's request. Braithwaite later promised £100. Lampleigh sued successfully – the service had been requested. .
- Re Casey's Patent [1892]
  - Casey offered 1/3 share in return for manager role. Claimed unenforceable for past consideration as offer

was in respect of past services. Bowen LJ: Implied promise of payment, therefore enforceable.

- **Rule: consideration must move from the promisee**
  - Tweddle v Atkinson [1861]
    - Fathers agreed to settle a sum of money on a couple. Atkinson died before giving it over, Tweddle junior could not sue executors as he had given no consideration himself.
- **Rule: performing an existing duty cannot be the consideration for a new promise**
  - Collins v Godfrey [1831]
    - Policeman under court order to give evidence, promised payment by defendant. Not enforceable as he was bound by law.
  - Stilk v Myrick [1809]
    - Two ship deserters, crew promised cut of their wages if they got the ship back safely. Yet this task already in their contracts as crew. They were bound to deal with the normal contingencies of the voyage and this may include desertions.
  - **Exceptions:**
    - Glassbrook v Glamorgan CC [1925] – exceeding duty
      - Pit owner promised to pay police for protection during strike. Pit owner claimed there had only been an existing duty but the claim failed, police had provided more people than usual.
    - Shadwell v Shadwell [1860] – engagement bound by law
      - Uncle promised £150 a year to nephew on marriage. Even though claimant legally bound to marry (breach of promise actionable at the time), doing so was good consideration.
    - Hartley v Ponsonby [1857]
      - Similar to Stilk v Myrick [1809]. 19 of 36 remained. This time promise enforceable as the considerable loss made voyage much more dangerous.
    - Third party consideration?
    - Williams v Roffey [1990]
      - Roffey sub-contracted Williams carpenters to build flats for £20,000. Williams under-quoted and had financial difficulties. Roffey would have had to pay clients for delay. Roffey promised Williams and extra £10,300 for on time completion. Failed to pay and Williams sued successfully. Roffey gained benefit of not having to pay client.
      - May be commercial realism of the time – requires discussion
- **Rule: promise to accept part-payment cannot be enforced**
  - Pinnel's Case [1602] – part-payment (no consideration)
    - Payment of a smaller sum on due day can never relieve the debtor of whole debt liability



- DC Builders v Rees [1965]
  - Builders were owed £482. Accepted £300 due to financial pressure. Sued for full balance successfully.
- Foakes v Beer [1884]
  - Foakes owed £2,090 from court settlement and agreed to pay in instalments, with no interest. Beer demanded interest, took action and was successful.
- **Exceptions:**
  - Accord and satisfaction
    - Earlier payment
    - accepting something other
    - accepting part-payment with something else
- **Doctrine of Promissory Estoppel**
  - Defence when a creditor claims for the remainder of the debt where part payment has been accepted.
  - Central London Property v High Tree's House [1949]
    - HTH leased flats from CLP. War made it impossible to find tenants, HTH unable to pay rent. CLP agreed to accept half-rent. 1945 war over and CLP sued for 2 years full rent and wanted return to full rent. CLP successful, but obiter, Denning said they would have failed due to estoppel if they claimed for the full period.
  - Combe v Combe [1951]
    - Husband gratuitously promised £2 a week. Lack of consideration but promissory estoppel allowed her to win.
    - However the CA then overruled this, Denning apologised for the confusion he had caused in High Trees and outlined the doctrine.
    - Requirements: existing contract; claimant has agreed to waive; claimant knew defendant would rely; defendant has in fact acted on reliance.
  - Re Selectmove [1995]
    - Company owed IR, saying they would pay by instalments. IR stated that they would contact company if this was not satisfactory. IR insisted on immediate payment. Company argued Williams v Roffey principle: existing obligation was good consideration. Court used Foakes v Beer, distinguishing from Roffey by saying that this was debt and not goods or services. IR not bound by previous agreement.

## Intention to Create Legal Relations

Legal intention is required in contracts in order to maintain consensus ad idem. However it would not be sensible to assume that every promise ever made was legally binding or that legal intention always had to be proven. In order to provide protection to parties, there are two presumptions in law. It is presumed that there is no legal intention in social and domestic arrangements, and it is presumed that there is always legal intention in commercial situations.

### Social Arrangements

- Balfour v Balfour [1919]
  - Husband promised £30 a week to wife. Following divorce, the wife's claim for this failed. **The presumption was applied**
- Meritt v Meritt [1970]
  - Husband deserted wife for another. Agreement to pay income if she paid off the mortgage was legally binding. **The presumption was rebutted**
- Jones v Padavatton [1969]
  - Mother gave allowance for Bar study, and then provided a house. Mother sought repossession and daughter failed to prove contractual nature. **Presumption was applied**
- Simpkins v Pays [1955]
  - Lodger and two others entered a competition in the lodger's name. Lodger bound to share winnings. **Presumption was rebutted**
- Peter v Clarke [1960]
  - Couple persuaded to sell house and move in with older couple, with promise of inheritance. Young couple asked to leave and sued successfully – giving up security proved intention. **Presumption was rebutted**

### Commercial and Business Agreements

- Edwards v Skyways [1969]
  - Agreement to make ex-gratia redundancy payment is binding. **Presumption was applied**
- Esso Petroleum v Commissioners of Customs and Excise [1976]
  - Free world cup tokens with every 4 gallons of petrol. Customs claimed purchase tax. Esso were trying to boost business, hence intention to be bound. **Presumption was applied**
- McGowan v Radio Buxton [2001]
  - McGowan entered competition for Clio. Given small model. Radio Buxton claimed no intention, but this was not upheld. No hint in radio transcript that car was not real. **Presumption was applied**

- Jones v Vernons' Pools [1938]
  - Coupons: "binding in honour only". Jones claimed winning coupon was binding and lost. Clause prevented his claim.  
**Presumption was rebutted**
  - Would this be the same now? Is this a fair term?
- Kleinwort Benson v MMC [1989]
  - Parent company issued comfort letter, but would not guarantee loan. Kleinwort Benson claimed using letter but claim failed.
- Julian v Furby [1982]
  - Plumber helped daughter and son-in-law furnish house. Following split, he invoiced for materials and labour. Court agreed with materials but would not acknowledge the invoice for labour. – **Commercial presumption rebutted**

## **Privity of Contract**

- Price v Easton [1833]
  - Easton agreed to pay £19 to Price if third party did specific work. Price's claim for money failed. Any person who is not a party cannot sue or be sued under it.
- Dunlop v Selfridge [1915]
  - Dew agreed to buy tyres from Dunlop, would not sell at below a fixed price. Same agreement with client, Selfridge. Dunlop sought injunction but failed due to lack of privity.
- Consequences:
  - Gifts, embarrassment, purchaser only able to cover own costs.
  - Prevent enforcement of services already paid for.
  - Benefactor's express wishes denied – Tweddle v Atkinson

## **Exceptions**

- **Statutory law**
  - Road Traffic Act 1888 – third party insurance
  - Married Women's Property Act 1882 – insurance can be enforced
  - Beswick v Beswick [1968]
    - Widow relied on Law of Property "other property" Act to enforce agreement between former husband and nephew. Failed – personal property.
- **Trust law**
  - Trust of money created in favour
  - Gregory & Parker v Williams [1817]
    - Parker owed money to Williams and Gregory. Assigned all property to Williams who would pay off Gregory. Williams failed to pay, but Gregory could enforce.
  - Not accepted if claimant does not show express intention to claim benefit
    - Walford's Case [1919]
      - Walford third party to charter party and shipowners, on 3% commission. Could claim due to being expressly named.
  - Must conform to general character of a trust
    - Green v Russell [1959]
      - Insurance policy covering employees. But no trust since policy could be revoked at any time.
- **Restrictive Covenants**
  - Tulk v Moxhay [1848]
    - Tulk successfully sought injunction to prevent Moxhay from building on land in London as it would be "against conscience"
  - Only applies to land: Taddy v Sterious [1904]
    - Could not apply to the selling of tobacco at fixed prices
- **Dunlop v Lambert rule**

- Darlington v Wiltshier [1995]
  - Third party was seen as a fiduciary as all rights had been handed over to the council – collateral contract enforceable.
- McAlpine v Panatown [1998]
  - Rule relevant, Panatown could recover damages even though Unex (actual owners of site) suffered loss. Accepted transfer of rights to Unex, yet Panatown had right to sue as all accounts were bound to be settled by Panatown.
- **Leases**
  - Enforceable with new landlords/tenants under Law of Property Act 1925
- **Rules of procedure**
  - Snelling v John Snelling [1973]
    - Three brothers all directors, agreement to forfeit own loan in to company upon resignation. JS left, sued S for loan amount, yet agreement upheld. Brothers and company were effectively the same.
- **Holiday Cases**
  - Jackson v Horizon Holidays [1975]
    - “family holiday” fell short. HH accepted liability, but refused to pay damages for all family. Jackson sued successfully – loss of enjoyment of entire family was loss to him.
- **Prosecuting Third Parties in exclusion clauses**
  - Scruttons v Midland Silicones [1962]
    - Shipping company carrying chemicals under exclusion clause limiting damage claim to \$500. Stevedores, sub-contracted, did \$1800 damage and could not rely on exclusion.
  - The Eurymedon [1974]
    - Similar case, except stevedores allowed to rely on exclusion as they were named as agents
- **Collateral Contracts**
  - Shanklin Pier v Detel Products [1951]
    - Shanklin pier instructed painters to use paint advised by Detel. Paint peeled, hence Detel liable.
  - Agents, assignment and negotiable instruments

## Terms

### Statements

- **Terms – attach liability**
- **Mere representation – no liability**
- **Misrepresentations – attach liability**
  - Esso v Marden [1976]
- **Mere opinions – no liability**
  - Bisset v Wilkinson [1927]
- **Expert Opinions**
  - Dick Bentley v Harold Smith [1965]
- **Trade Puffs – no liability**
- **Puffs with specific promise**
  - Carlill v Carbolic Smokeball Company [1893]

### Incorporating Express Terms

- **Importance of representation**
  - Birch v Paramount Estates [1956]
    - “as good as the show house”
    - Comment was so central to agreement it was incorporated as a term
  - Couchman v Hill [1947]
    - Heifer unserved, yet having calve despite reassurances
    - Despite written terms, the representation was so crucial that it was incorporated as a term.
  - Bannerman v White [1861]
    - “if they are treated with sulphur then I am not interested in knowing the price of them”
    - Argument that discussions were preliminary failed, stipulations regarding sulphur amounted to a condition which was therefore breached - repudiation
- **Knowledge or skill affecting equality of bargaining strength**
  - Oscar Chess Ltd Williams [1957]
    - Car sold as 1948 Morris 10, actually 1939 but not known.
    - Claim for breach of warranty failed. Defendants had no skill or expertise
  - Dick Bentley Productions v Harold Smith [1965]
    - DB asked for “well vetted” car. H misrepresented 20,000 miles.
    - Claim for breach of warranty succeeded. The claimant had relied on the expertise of the car dealer.
- **Time margin**
  - Routledge v McKay [1954]
    - Error on registration book of car, stated as 1941 and not 1939. Sale in 1949, enquiry as to age. Wrong age given. Bought a week later and sued for breach of warranty. Not upheld for lapse of time.

- **Reduction to writing**
  - Routledge v McKay [1954]
    - Written agreement did not mention age. Not a term.
  - L'Estrange v Graucob [1934]
    - Clause excluding liability from terms not mentioned upheld. Need to read before signing!!
- **Drawing to attention**
  - O'Brien v MGN [2001]
    - Scratch-card winner
    - "normal Mirror rules apply" just sufficient. Rules available online and in back issues.
- **Significance of standard forms**
  - Lidl v Hertford Foods [2001]
    - Hertford failed to supply all of order due to external reasons. Lidl incurred extra cost buying elsewhere. Both relied on standard forms.
    - Hertford had 'force majeure', both did business before so had seen each others' terms. But terms had been inconsistent
    - Contract over telephone, neither forms applied, seller in breach.
- **Whether the term is reasonable then the discretion should not be used for an improper purpose.**
  - Paragon Finance v Nash [2001]
    - Mortgage lenders loaned money on a variable interest rate. The claimant later fell into arrears and challenged the agreements on the grounds that the rates were much higher than those of other lenders.
    - CA held that term should be implied that rates will not be set arbitrarily or dishonestly, for improper purpose, or in a way that no other reasonable mortgage lender would do
    - However the agreement in this case was held to be excessive.

### **"Parol Evidence" Rule**

- Where party tries to show written document does not reflect agreement, parol evidence prevents admission on the basis of uncertainty and presumption omission was for a reason.
- Exceptions:
  - **Custom or trade usage** – terms can be implied by trade custom
  - **Rectification (written inaccurately represents agreement, equity allows admission)**
    - Webster v Cecil [1861]
      - Written document for purchase of land at £1250, yet Cecil able to show refusal of £2000 offer, accurate price of £2250 used in amendment.
  - **Vitiating factors** – Claimant entitled to produce evidence of a misrepresentation of mistake etc.

- **Written agreement only partial to wider agreement**
  - Evans v Merzario [1976]
    - Evans regularly used Merzario as carriers, using Merzario's standard forms. Machinery liable to rust on deck. Use of on-deck containers concerned Evan, but was reassured that below deck storage would still be used. Incorrectly stored on deck and fell overboard, CA allowed admission of evidence to show oral reassurance. Merzario liable.
- **Dependent on fulfilment of a specified event**
  - Pym v Campbell [1856]
    - Agreement to buy share of patent. Contract not in effect until examination by third party. Campbell was allowed to introduce evidence of this oral agreement.
- **Collateral Contracts**
  - City and West Minster Properties v Mudd [1958]
    - Mudd rented shop with small sleeping room, landlord's restricted use of room on renewal, but said he could still sleep there. Landlords tried to bring action for forfeiture of the lease but unable to succeed due to collateral contract.

## Implied Terms

- **Terms implied by fact**
  - **Custom or habit**
    - Hutton v Warren [1836]
      - Termination of agricultural lease, tenant entitled to allowance for seed and labour.
  - **Trade or professional custom**
    - Walford's Case [1919]
      - Walford suing for 3% commission for negotiating charter party. Defendants claimed custom of payment only upon hire. French government had requisitioned ship, yet this custom conflicted with general purpose and was not upheld.
  - **Terms to give sense and meaning**
    - Schawel v Reade [1913]
      - Inspected stallion for stud purposes. "If there were anything the matter, I would tell you". Horse unfit for stud purposes – implied warranty.
  - **Terms to provide business efficacy**
    - The Moorcock [1889]
      - Defendants owned jetty. Both aware possibility of low tide, ship grounded, broke up on ridge of rock – implied undertaking as to safety. Defendants liable.
  - **Implied from prior contracts on similar terms**
    - Hillas v Arcos [1832]



- 1931 agreement included option clause for 100,000 more to Hillas in 1932 – vague as to type, terms and shipment. Arcos refused to deliver in 1932, claiming option clause only basis for negotiations. Implicit that it would be carried out on same terms.
- **Process of implying by fact**
  - Shairlaw v Southern Foundries [1939]
    - MacKinnon LJ – **officious bystander test**, prima facie, so obvious that they would say “of course!”
    - **Exception: party unaware**
      - Spring v National Amalgamated Stevedores and Dockers Society [1956]
        - NAS in Bridlington Agreement over transfers between unions. Spring joined unknowingly, NAS asked to expel, but Spring sued and NAS argued implied term
        - Claimant was successful, if he had been informed of the Bridlington agreement by an officious bystander he would have had no idea what it was.
    - **Exception: Where uncertain that parties would have agreed if included as an express term**
      - Shell v Lostock Garage [1977]
        - Shell to supply petrol and oil on agreement Lostock would not buy from elsewhere. Shell sold cheaply to others, Lostock sold at loss. Lostock claimed implied term of “abnormal discrimination” – CA refused since Shell would never have agreed
    - **Lord Denning: include terms that are reasonable in circumstance**
      - Liverpool City Council v Irwin [1976]
        - Irwin withheld rent in protest to untidy common areas, LCC sued and Irwin counter-claimed for breach of implied term, upheld by Denning but rejected by HL.
- **Terms implied by law**
  - **By the courts**
    - Liverpool County Council v Irwin [1976]
      - Failed officious bystander test but accepted general obligation in tenancy agreements to take reasonable care of common areas.
  - **The Sale of Goods Act 1979**
    - **S12 – condition as to title**
      - Rowland v Divall [1923]
        - Rowland bought car that was stolen. Able to recover when rightful owner took car back.
        - Breach of S12
    - **S13 – condition as to description**

- Re Moore & Co [1921]
  - Contract for cartons of 30 tins. Quantity correct but came in tins of 24.
  - Breach of S13
- **S14(2) – conditions as to satisfactory quality**
  - **Sale and Supply of Goods Act 1994**
    - Amended “merchantable” to “satisfactory”
    - Fitness for purpose, appearance and finish, freedom from minor defects, safety and durability
- **S14(3) – condition as to fit for purpose**
  - Grant v Australian Knitting Mills [1925]
    - Grant contracted skin disease from underpants, court accepted buyer implied purpose on purchase.
- **S15 – condition as to goods sold by sample corresponding with that sample**
  - Godley v Perry [1960]
    - Boy injured when catapult elastic snapped. Retailer had tested sample and was able to show that bulk did not match the quality of sample.
- **The Supply of Goods and Services Act 1982**
  - **S13 – reasonable care and skill**
    - Lawson v Supasink [1984]
      - Supasink to design, supply and install kitchen. Did not follow plans, Lawson able to recover money.
  - **S14 – where time not fixed, reasonable time established**
    - Charnock v Liverpool Corporation [1968]
      - Liverpool corporation took 8 weeks to repair car which should have taken 5. Breach of implied term.
  - **S15 – where consideration not determined, party contracting with supplier will pay a reasonable charge.**

### **Relative and significance of terms**

- **Conditions**
  - Poussard v Spiers and Pond [1876]
    - Actress as lead in operetta. Unable to attend early performances, role given to understudy. Poussard sued but she had already breached, her attendance was crucial, hence condition and Spiers and Pond were able to treat as repudiated and terminate contract.
- **Warranties**
  - Bettini v Gye [1876]

- Singer contracted for concerts. 6 day rehearsal term in contract, attended 3. This was a warranty – producers could not replace singer. Attending rehearsals was only ancillary to main purpose of the contract, could not be a condition.
- **Construction of terms**
  - Sometimes impossible to follow express terms where inequality of bargaining power, standard forms, modern methods.
    - Schuler v Wickman [1974]
      - Wickman distributor of Schuler's presses. Condition: Wickman to make weekly visits to 6 manufacturers, contract could be terminated if any condition not remedied within 60 days. Contract to last +4 years = 1400 visits. One visit not made, Schuler sought to terminate. Reid LJ saw this as unreasonable – term not a condition.
    - The Mihalis Angelos [1970]
      - Charter party repudiated with ship owners when vessel not read to load. Statutory terms and commercial character meant judges saw predictability and certainty as crucial, hence condition.
        - (Judges refer to statute and market)
  - **Innominate terms**
    - Hong Kong Fir Case [1962]
      - Defendants chartered a ship for two years.
      - Term that fit for service, yet it was in poor state, not seaworthy and broke down due to incompetence.
      - 18 weeks lost.
      - Repudiated by Defendants and Claimants sued stating term as a warranty. CA agreed, but Diplock LJ noted difficulty in classification to only two categories.
    - The Hansa Nord [1976]
      - Buyers rejected cargo of citrus pulp pellets to be used for cattle feed as they overheated and term "shipment made in good condition" was breached. Rotterdam court ordered sale. Third party bought and sold at lower price to original buyers. Buyers used for same purpose so it could not be a condition, but it was more serious than a warranty.
    - **Technical rather than material breach where injustice would ensue**
      - Reardon Smith line v Hansen Tangen [1976]
        - Charter contract, named ship as "Osaka 354" – reference for shipyard of building. Sub-contracted to another shipyard where reference became "Oshima 004". Buyers

tried to repudiate, but this technicality was not a condition.

- **Importance of time and court decision to judge condition irregardless of consequences**
  - Bunge Corporation v Tradex [1981]
    - Buyers required to give 15 days notice to load, but only gave 13. 2 days would not have major consequences; hence first instance court would not define as condition. BUT HL said seller had condition to ship, so buyer should have condition to load. Time crucial.

## Exclusion Clauses

### Rules of incorporation

- **Signed agreements – prima facie bound**
  - L'Estrange v Graucob [1934]
    - Purchaser of vending machine bound even though she had not read clause
- **Express knowledge at time of contracting is required**
  - Olley v Marlborough Court Hotel [1949]
    - Notice on wall, after the contract had been made
- **Implied knowledge**
  - Spurling v Bradshaw [1956]
    - Bradshaw stored orange juice for many years in Spurling's warehouse. Went missing, Bradshaw claimed negligence and exclusion clause sent on receipts after contracting. Clause valid – had deal on same terms previously.
    - BUT: must be consistent
      - McCutcheon v MacBrayne [1964]
        - MacBrayne used ferries to ship cars, sometimes signing risk note. Relative of MacBrayne took cars and given note but not asked to sign, ferry sank through McCutcheon's negligence, inconsistency invalidated exclusion clause.
- **Sufficiency of Notice**
  - Parker v SE Railway [1877]
    - Exclusion clause on back of ticket: not liable for luggage exceeding £10. Failed as not sufficient.
  - Chapleton v Barry UDC [1940]
    - Exclusion clause on receipt for hire of deckchairs cannot be relied upon, unreasonable to expect Chapleton to consider it a contractual document.
  - Dillon v Baltic Shipping Co [1991]
    - Booking for cruise, form pointed to conditions on tickets. Baltic Shipping could not rely on this, insufficient notice.
- **Machines**
  - Thornton v Shoe Lane Parking Ltd [1971]
  - Denning LJ: ticket issued by barrier subject to conditions inside (parallel with Olley), no chance of negotiating, insufficient notice.
- **Burdensome**
  - Interfolio Pictures v Stiletto Visual [1988]
  - Stiletto Visual hired photographic transparencies, with exclusion clause of holding fee for late return. Dillon LJ: insufficient notice of a burdensome clause.

## Limitations

- **Queries and oral misrepresentations**
  - Curtis v Chemical Cleaning and Dyeing Co [1951]
    - Claimant took wedding dress, querying “any damage howsoever arriving”, orally told it applied to beads and sequins, hence, CCD cannot rely.
- **Effect on third parties**
  - Scruttons v Silicons [1962]
    - Third party and Scruttons contracted for carriage of chemicals, third party exclusion clause limits damage to \$500. Stevedores, Silicons, do \$583 damage and cannot rely on exclusion clause in other contract
    - **Possible action where responsibility is with third party**
      - Cosgrove v Horsefell [1945]
        - Bus company limited liability, yet tort of negligence possible against driver when he caused injury.
  - **Successful claims**
    - The Eurymedon [1975]
      - Clause in shipping contract exempting agents employed by carrier. Negligence damaging the equipment by stevedores was within the scope of the exclusion clause due to consideration: carrying out duties against exemption
      - Were also named as agents – there was an agency relationship which can affect the rules

## Construction

- **Contra preferentem rule**
  - Hostile to ambiguities
    - Andrews Bros v Singer & Co [1934]
      - “new singer cars”, excluding from “all conditions, warranties and liabilities implied by statute, common law or otherwise” – express term, not implied
    - Hollier v Rambler Motors [1972]
      - Clause: “not liable for damage caused by fire to customers’ cars on the premises” – fire caused by negligence, not specific enough
- **Fundamental Breach**
  - Karsales v Wallis [1956]
    - Hire purchase agreement for car – “no condition or warranty that the vehicle is roadworthy is given by the owner or implied herein” – car not roadworthy, fundamental breach.
  - Suisse Atlantique Case [1967]

- Charter party breached loading contract, only making 8 voyages rather than 14. S claimed due to payment based on voyages. CP argued limitation clause, ship owners argued fundamental breach. In fact, liquidated damages clause.
  - Photo Productions v Securicor [1980]
    - Securicor to provide night patrol: “no circumstances shall Securicor be responsible...unless could have been foreseen”. Employee started fire, CA held fundamental breach, yet HL reversed this.
- **Impact of Unfair Contract Terms Act 1977**
  - George Mitchell v Finney Lock Seeds [1983]
    - Finney lock agreed to supply George Mitchell with seeds, with clause limiting effects of breach to cost of the seed only or replacement. Farmers planned to sow £61,000 worth, hence clause unreasonable.
  - **Trade Customs: Overland Shoes v Schenkers [1998]**
    - Overland shoes tried to “set off” invoice against sums Schneckers owed for VAT. British International Freight Association standard form with no “set-off” clause, hence clause reasonable.

### **Statutory and EC control**

- **Unfair Contract Terms Act 1977**
  - **Exclusions and limitations**
    - Cannot be excluded for death or Personal Injury caused by negligence; reference to guarantee; no exclusion from implied conditions of Sale of Goods Act 1979; similarly Consumer Credit Act 1974; similarly for care/skill, reasonable time, reasonable cost in Sale of Goods and Services Act 1982;
  - **Distinctions between consumer contracts and inter-business**
    - “consumer”: does not make contract in course of business, other party does, goods passed are of a type ordinarily supplied
  - **Exclusions subject to reasonableness test**
    - Other than death or Personal Injury; consumer dealing on standard forms; ss13, 14, 15 and 16 Sale of Goods Act 1979 in inter-business (and private sellers), misrepresentations; indemnification clauses
    - Thompson v Lohan [1987]
      - Plant Hire Company hired JCB and driver. Driver to be competent, yet Thompson liable, Lohan to indemnify Thompson, upon death of claimant, to be subject to reasonableness test
  - Test for reasonableness
    - **S11 – “reasonable in all circumstances”**
      - Warren v Truprint [1986]

- Truprint claimed to only be liable for replacement film, not reasonable in Silver Wedding photos which were lost
- **S11 – reasonable at the time**
  - Smith v Eric Bush [1990]
    - Negligent valuation causing loss, exclusion clause of accuracy not reasonable
- **S11 – inter-business dealings with implied term exclusions**
  - Consider: bargaining strength, inducement or advantage, adaption to buyers specifications, customary practice
    - Watford Electronics v Sanderson [2001]
      - Sanderson provided software for Watford electronics that did not work, incurring losses of £5.5 million. Exclusion clause limiting indirect or consequential losses. Equal bargaining strength, negotiation – clause reasonable
- **S11 – limitation clauses**
  - Capability to meet liability:
  - George Mitchell v Finney Lock Seeds [1983]
    - Clause unreasonable as suppliers had settled out of court before and could have insured themselves.
- **Contracts outside the scope of UCTA 1977**
  - Insurance; land; patents; creation and dissolution of companies; salvage
- **Unfair Terms in Consumer contract Regulations 1999**
  - Consumer “any natural person acting for purposes which are outside his trade or business”
  - Only applies where negotiation has not occurred
  - Unfair: “any term which contrary to good faith causes a significance imbalance”
  - Examples:
    - Partial performance; sole seller discretion; excessive compensation sums; one-sided dissolution; irrevocably bind, alteration, limit obligations of agents, transfer obligations, hinder the right to legal action
  - Regulation 6: plain and intelligible language
  - Limitations:
    - Only consumer, does not apply to negotiated term – preserves freedom but presumes equality in bargaining strength



## Vitiating Factor: Misrepresentation

### Rules

- **Must be of material fact to be relied upon**
  - Bisset v Wilkinson [1927]
    - Estimate as to sheep capacity of field was not expert and could not be relied upon. No misrepresentation.
  - Edgington v Fitzmaurice [1885]
    - Directors borrowed money for improvements, misrepresenting actual use to pay off debts
  - Carlill v Carbolic Smoke Ball [1893]
    - £100 “puff” argument failed. Simplex commendation non obligate failed because they had lodged £1000 in bank.
- **Must have been made from one party to another**
  - Peyman v Lanjani [1985]
    - Lanjani’s agent orchestrated £10,000 deal. Peyman sued on discovering illegitimacy and successfully rescinded.
- **Must have been made before or at the time of contracting**
  - Roscorla v Thomas [1842]
    - Thomas represented after sale of horse “sound and free from vice” – untrue, but made after deal.
- **Statement must be an inducement**
  - JEB Fastners v Marks Bloom [1983]
    - JEB engaged in takeover, relying on accounts negligently prepared. Accounts were no inducement and not material.
  - Smith v Chadwick [1884]
    - No misrepresentation after claimant admitted not being influenced by the false company director “Grieve” when buying shares.
- **Onus is on the representee to prove inducement**
  - Museprime Properties v Adhill Properties [1990]
    - Adhill listed as rents under review, yet 2 completed, Museprime relied on Adhill’s misrepresentation, and Museprime could rescind as they were induced even where a reasonable person may not have been
- **Statement must not have been intended to form part of the contract**
  - Couchman v Hill [1947]
    - Heifer “unserved” not a misrepresentation, rather a warranty.
- **Actual and complete knowledge will defeat the representees claim**
  - Redgrave v Hurd [1881]
    - Hurd relied on Redgrave’s statement as to practice value, despite having opportunity to examine papers. Onus on Redgrave to show Hurd had complete knowledge.

## **Fraudulent Misrepresentation**

- Derry v Peek [1889]
  - Action in tort of deceit against directors failed. Honest belief that statement in prospectus regarding mechanism power for trams in Plymouth was true as it would be granted in course.
    - “Knowingly, without belief in truth, recklessly or carelessly whether it be true or false “ – Lord Herschell
- **Remedies**
  - Damages according to the tort of deceit measure – put claimant in position they would have been in had deceit not have occurred.
  - Claimant may seek rescission of the contract in equity

## **Negligent Misrepresentation**

- **Common law: Hedley Byrne [1964]**
  - Claimants to provide £100,000 advertising for Easipower on credit. Sought reference from Heller (Defendant) who made a good reference. Easipower liquidation, unpaid Hedley seek action in tort, but failed as bank had disclaimed liability. OBITER: possible success where duty of care created.
    - Esso v Marden [1976]
      - Esso quoted throughput, Marden queried but contracted based on Esso's experience. Local Authority required pump movement, limiting throughput, Marden counter-claimed Esso's back rent claim, saying throughput was a warranty, duty of care relationship existed.
- **Statute law: Misrepresentation Act 1967**
  - Burden of proof partially reversed – defendant to show belief in truth
  - Negligent misrepresentation, choice to sue under Act or Hedley Byrne principle
    - No need to show special relationship if Act is chosen
    - Howard marine Dredging v Ogden & Sons [1978]
      - HMD negligently quoted depositing capacity, work took longer, Ogden successfully counter-claimed under section 2.1
  - **Remedies for negligent misrepresentation**
    - Damages
      - Hedley-Byrne principle: calculated according to standard tort measure; only awarded for a loss that is a foreseeable consequence of the negligent misrepresentation – reduced with contributory negligence
      - Statue: calculated to a tort measure; possibility of test of deceit to be applied which is more beneficial as in Royscot Trust v Rogerson [1991]
      - Rescission in equity

## Innocent Misrepresentation

- **Only rescission in equity**
  - Yet, court able to award damages as an ALTERNATIVE where it is convinced that this is appropriate under section 2.2 of The **Misrepresentation Act 1967**
    - Zanzibar v British Aerospace [2000]
      - Zanzibar bought jet, claiming inducement through misrepresentation. Rescission and damages as an alternative denied as delay in bringing action lost the right to rescind and so no damages in lieu could be provided.
  - **S 2.2**
    - No right of damages – these are at the discretion of the court
    - Damages are an alternative to rescission, hence only one can be awarded
    - Measure of damages is uncertain, but consequential loss is unlikely given that damages are in lieu of rescission
  - **Prior to the Act, only rescission was available**
  - Redgrave v Hurd [1881]
    - Two solicitors, sale of practice, misstated the income. Other backed out and the misrepresenter tried to claim specific performance, other solicitor counter-claimed for rescission

## **Equity and Misrepresentation**

- Actionable misrepresentation is voidable and not void
- Right to rescind can be lost:
  - **Restitution in integrum** – it must be possible to return parties to their pre- contractual positions.
  - Lagunas Nitrate v Laguna Syndicate [1899]
    - Nitrate field purchased under innocent misrepresentation as to market strength. Purchaser profited for a while and then claimed rescission with market depression. Failed as field could not be restored.
  - **Affirmation by rescinding party** will defeat claim
  - Long v Lloyd [1958]
    - Misrepresentation of lorry as “exceptional condition”. Several faults were repaired by seller, but after break-down, purchaser failed to rescind as he had accepted the goods in less than satisfactory condition
  - **Delay “defeats equity”**
  - Leaf v International Galleries [1950]
    - Painting of Salisbury Cathedral misrepresented as one by Constable. Claim for rescission failed due to 5 year time lapse to bringing an action

- **Defeated when third party has gained rights to goods in good faith**
- White v Garden [1851]
  - Rouge bought 50 tons of iron using false bill of exchange and resold it. Claimant seized from third-party wrongly.
- Discretion of court but rescission and damages cannot both be awarded. However, rescission and an indemnity for other expenses can
- Whittington v Seale-Hayne [1900]
  - Whittington took a lease on a premises under oral misrepresentation that it was in sanitary condition. Untrue. Could not prove fraud so no damages, but indemnity representing expenditure of rent and rates was granted alongside rescission

### **Non-Disclosure and Misrepresentation**

- **No obligation at common law to volunteer information not asked for**
  - Fletcher v Krell [1873]
    - Woman who applied for governess position did not reveal former marriage despite single women being preferred. No misrepresentation.
- **Silence itself cannot be classed as misrepresentation**
  - Hands v Simpson [1928]
    - Commercial traveller did not inform employers he had been disqualified from driving, which was vital to job. No misrepresentation.
- **Exception: Uberrimae fides or “good faith” contracts**
  - Locker and Woolf v Western Australian Insurance [1936]
    - Insured party did not reveal previous refusals to insurer, yet this was clearly material to the contract
- **Exception: Fiduciary contracts**
  - Tate v Williamson [1866]
    - Adviser persuaded man in debt to sell land to settle debts. Adviser purchased land at half value due to constructive fraud – contract set aside.
- **Exception: part truth amounts to a falsehood**
  - Dimmock v Hallett [1866]
    - Person selling land, revealed it was let by tenants but did not reveal that tenants were terminating lease – misrepresentation
- **Exception: Where an original statement becomes false during negotiations**
  - With v O’Flanagan [1936]
  - Doctor selling practice stated true income initially, but this was negligible by time of sale, failure to reveal this was a misrepresentation

## Mistake

### Common Mistake

- **Res extincta**

- Courtier v Hastie [1852]
- Customary practice to sell grain when overheated. Captain did so, but owner had contracted with buyer. Contract void.
  - Operative mistake voids contract
- McRae v Commonwealth Disposals Commission [1950]
- McRae bought salvage rights to a wreck, on approximate co-ordinates but ship was never found. CCD claimed common mistake, but this was not upheld – clear representation that goods did exist.
  - More speculative – representation of existence
- Barrow Lane and Ballard v Phillip Phillips [1929]
- Seller stored 700 bags of nuts in warehouse, but 109 stolen, sued buyer for price but failed
  - goods had commercially perished and contract was void
- Associated Japanese Bank v Credit du Nord [1988]
- Sale and leaseback, CN guaranteed Bennett, but Bennett insolvent and machines did not exist. Subject matter was radically different, fundamental to contract, therefore accessory contract of guarantee void.

- **Res sua**

- Cooper v Phibbs [1867]
- Cooper took out three-year lease on fishery. Both believed Phibbs owned it, but Cooper discovered life tenancy and was successful in having it set aside. HL granted Phibbs a lien in respect of considerable expense spent on improvements.

- **Mistake as to quality of the contract**

- Three consequences: no common law effect; not operative; still bound by original obligations
- Bell v Lever Brothers [1932]
- Lever Brothers employed Bell as chairman of subsidiary company with a brief to “rejuvenate”. Bell was successful and settled for £30,000 termination of services. Lever Brothers discovered Bell had breached clause having entered in to private dealings. Lever Bros sued for return of settlement. Settlement invalid for common mistake – LB could merely have fired Bell. Mistake was not operative, settlement given in recognition of work done
- Equity is still possible
  - Solle v Butcher [1950]
  - Lease of flat, both parties mistakenly believed rent not subject to Rent Restrictions Act. Set at £250 per annum, should have been £140. Tenant sued for the difference. No mistake at common law, BUT set aside in equity.

- Possible common mistake means contract neither void nor able to be set aside in equity
  - Great Peace Shipping v Tsavilris Salvage [2001]
  - Salvor defendants chartered ship, relying on information given by OR as to proximity. Ship hundreds of miles away, TS tried to cancel, but GP claimed for five days hire. Not void at common law as no dispute over existence, but not set aside in equity as it was impossible to determine nature of the mistake.
- **Sometimes quality is easily mistaken – court response is varied**
  - Leaf v International Galleries [1950]
  - Subject matter was agreed, mistake only as to quality – no rescission – Denning “still a nice painting of a cathedral”
  - Peco Arts v Hazlitt Gallery [1983]
  - Peco Arts bought drawing, both parties believed was an original. Express term that it was original inscribed by artist. Actually reproduction, and 11 years later, PA claimed for return of price and interest, successful as unable to prove the truth could not have been discovered any earlier.

### **Mutual Mistake**

- **Parties at cross-purposes, courts will try to identify some mutual intent**
- Raffles v Wichelhaus [1864]
  - Contract for sale of cotton on board Peerless sailing from Bombay. Two ships were sailing under the same name from Bombay – no common intention.
- **Ambiguity as to the subject matter**
- Scriven Bros v Hindley and Co [1913]
  - “tow” hemp is inferior in quality. Bidder won hemp believing it was superior product and rejected goods when it was “tow” – mutual mistake as no reconciliation possible
- **Not mutual where only one party is mistaken**
- Smith v Hughes [1871]
  - Smith offered oats which he bought, but refused delivery when they were discovered to be “new” rather than previous years. Believed he had been offered old oats. Not operable, merely because one party discovered it was less advantageous than he believed.

### **Unilateral Mistake**

- Hartog v Colin Shields [1939]
  - Contract for hare skins. 10d and 1 farthing per 1b. Regular practice to sell per piece, reducing cost by one third. Buyers

tried to enforce but failed, sellers said offer wrongly stated as would be common knowledge in trade – void for mistake.

- **Test whether unilateral mistake is operable:**
  - One party genuinely mistaken? Other party ought reasonable have known of the mistake? Party making the mistake was not at fault?
  - Sybron v Rochem [1984]
    - Manager awarded discretionary pension, yet later discovered he had been involved in fraud. Pension agreement set aside. Company had been mistakenly induced by manager's breach of duty.
  - **Other party is unaware of mistake – not operative**
    - Wood v Scarth [1858]
    - Landlord believed clerk had made clear to tenant that £500 premium expected. Tenant unaware and contracted in good faith. Not void.
- **Mistaken identity**
  - **Intended to contract with a different person**
    - Kings Norton Metal Case [1897]
    - Contract for purchase of brass rivet wire. Kings Norton mistook creditworthiness and not identity, hence not void.
  - **Mistake must be material to formation of the contract**
    - Cundy v Lindsay [1878]
    - Blenkarn designed signature for handkerchiefs to be similar to Blenkiron (name of a reputable company). Blenkiron billed but Blenkarn had sold Lindsay's handkerchiefs on, so Lindsay tried to recover. Contract void for mistake.
- **Face-to-face mistaken identity**
  - Ingram v Little [1960]
    - Sisters jointly owned a car, sold to rogue acting as important local figure, they looked him up and relied upon this. Court strangely accepted identity as material.
    - But this has been heavily criticised
  - Lewis v Avery [1972]
    - Rogue represented himself as Richard Greene, producing false studio pass. Lewis sued Avery for recovery, mistake not operative.
    - Lewis could only have intended to contract with the person in front of him and the mistake was as the creditworthiness not identity.
  - Adequate steps: Brown Shipley [1991]
    - Rogue assumed the identity of a company officer, persuading bank to issue a draft to pay for foreign currency he was buying from another bank. Fraud discovered and bank failed to recover as they had not done enough.

## **Mistake and Equity**

- **Rescission**
  - Party claiming needs to show that it would be against conscience to allow the other party to take advantage of the mistake
  - Solle v Butcher [1950]
  - Rent Restriction Act had no effect on contract, but court allowed the tenant the chance to set aside contract in equity by terminating the lease.
- **Refusal to grant specific performance**
  - Where: unfair to expect performance; mistake was the other party's misrepresentation; other party tried to take advantage
  - Webster v Cecil [1861]
    - Webster offered to buy land, Cecil stated it cost more and rejected £2000 offer. Webster tried to enforce written agreement for sale for £1250. Failed as oral conversation contradicted the written agreement.
  - Tamplin v James [1880]
    - James bought inn at auction without checking plans. Believed he had bought land too, so he could not counter specific performance.
      - Courts will not protect a bad bargain.
- **Rectification of a document**
  - Craddock v Hunt [1923]
  - Craddock sold house to Hunt not intending yard to be included, however it was by conveyance mistake, therefore, rectification succeeded.

## **Non Est Factum**

- Saunders v Anglian Building Society [1970]
  - Elderly widow wanted to transfer property to nephew to allow him to start business, with stipulation that she could remain there. Dishonest friend drew up contract, as a conveyance to him. Widow initially successful on repossession claim, yet HL overturned CA decision and held that there was insufficient difference between the document she intended to sign and that which she actually signed.
  - Both gave up her rights to the property



## **Illegality**

- **Contracts void by statute**
  - Contracts of wager under The Gaming Act 1968
  - Contracts under The Restrictive Trade Practices Act 1976, subject to the scrutiny of the Director General of Fair Trading
- **Contracts illegal by statute on formation**
  - Re Mahmoud [1921]
    - Seeds Oils and Fats Order 1919 prevented trading of linseed oil without license. Defendant claimed to have licence, but did not, refused delivery and backed out. Claimant sued unsuccessfully – contract illegal.
    - Sometimes not illegal where provision of act is for different purpose
- **Contracts illegal due as performed**
  - Anderson v Daniel [1924]
    - Illegal to sell fertilisers without list of chemicals on invoice. Claimant sued unsuccessfully for price, because contract illegal due to no listing on invoice.
  - However, **illegality must relate to the contract's central purpose**
  - St John's Shipping v Joseph Rank [1956]
    - Contract for carriage of goods at sea was not illegal merely because ship loaded beyond legal loading line.

## **Contracts void at common law**

- **Contracts seeking to oust the jurisdiction of the courts**
  - Scott v Avery clauses
- **Contracts prejudicial to the family**
  - Contracts threatening marriage void as well as those relinquishing parental responsibility
- **Contracts in restraint of trade**
  - Freedom of contract v courts wishing to protect right to livelihood and public being deprived of skill or expertise
  - Reasonableness: restraint is no wider than is needed to protect interests of the party inserting the clause; restraint must be reasonable in the public interest
  - Employee restraints
    - Succeeds only where clause protects a legitimate business interest and NOT where it merely prevents competition.
    - **Is the work specialised?**
      - Forster v Suggett [1918]
      - Clause prevented glass-blower from working for any competition. This was allowed as it was a trade secret.
    - **What was the position held by the employee?**
      - Herbert Morris v Saxelby

- Clause prevented ex-employee from work with the sale and manufacture of pulley blocks and runways for seven years. Although Saxelby held a key position, this was too wide to be enforceable.
- **Soliciting clients generally upheld unless too wide**
  - Hanover Insurance and Christchurch Insurance v Schapiro [1994]
  - Brokerages sold on from HIB to Christchurch. Three directors left and established own business. Accused of soliciting clients, argued that clause too wide, court accepted but upheld that HIB clause was to be upheld as only HIB was involved in insurance clientele.
  - **Geographical area covered must not be too wide**
    - Fitch v Dewes [1921]
    - Conveyancing clerk not allowed to work within 7 mile radius of town centre for life in the same capacity. Reasonable due to rural nature of town and clerk's contact with client base.
  - **Duration of the restraint**
    - Home Counties Dairies v Skilton [1970]
    - Milkman not allowed to enter any dairy employment, nor allowed to be a milkman for one year. First clause too wide, second reasonable.
  - **Restraint must not be too wide**
    - Mont v Mills [1994]
    - Managing director unable to work in paper industry for 12 months. Too wide – paper industry was all he knew.
  - **Cannot achieve restraint through other means**
    - Bull v Pitney Bowes [1966]
    - Employees forfeited pension rights if they took up work with a competitor. Void for public policy.
- **Vendor restraints**
  - Sellers of business agree not to unfairly compete with purchaser of the business – prima facie void
  - British Reinforced Concrete v Schleff [1921]
  - Steel business sold, restriction preventing vendors from engaging in any similar business. One joined a similar business as a manager – too wide to protect legitimate interests.
  - More likely to be held reasonable than an employee restraint
  - Nordenfelt [1984]
  - Nordenfelt had established worldwide ammunition market. Sold business and was prevented from establishing similar business worldwide for 25 years. Upheld – world was the right market.
- **Mutual Undertakings**
  - English Hop Growers v Dering [1928]

- Bound to sell all products through association – protected the interests of all growers, and eliminated competition – mutual benefit.
- Artists and agents
- Schroeder Music v Macaulay [1974]
- Unknown composer (inequality of bargaining strength), publishers received world copyright, no payment, royalties only on commercially exploited, no guarantees; extend or terminate at will. Plainly unreasonable.
- Where compromises have been made, restrictions on mutual undertakings will be effective
- Panayiotou v Sony Music [1994]
- George Michael attempted to improve control over contract. In 1988, contract changed to reflect “superstar status”, this was a genuine compromise and the court refused his claim that the contract was contrary to public policy.
- Solus agreements
- Esso Petroleum v Harper's Garage
- Two loans from Esso on the agreement that only Esso petrol to be sold. Corner Garage of 21 years, Mustow Green over 4.5 years. First was void for excessive duration, but second fair and reasonable.

### **Contracts illegal at common law**

- **Contract to commit a wrong**
- Dann v Curzon [1911]
  - Claimant unsuccessful in suing for £20 fee to start a riot in a theatre
- **Contract to benefit from the crime of another**
- Beresford v Royal Insurance Co [1937]
  - Relatives could not receive the life insurance from a suicide.
- Napier v The National Business Agency [1951]
  - Claimant received expenses of £6 a week which should have been £1. Deliberate agreement to avoid income tax, thus, N could not claim for back pay.
- **Contracts aimed at corruption**
- Parkinson v The College of Ambulance [1925]
  - Wealthy claimant asked to donate money to charity in return for a knighthood. No knighthood offered, and Parkinson could not claim back money.
- **Contracts to interfere with justice**
- Harmony Shipping v Davis [1979]
  - Witness agreed not to give evidence in return for cash, void and unenforceable.
- **Contracts to promote sexual immorality**
- Pearce v Brooks [1866]
  - Prostitute conducted trade from hired carriages. Owner sued for pay but failed.

## **Consequences of the contract being void**

- **Common law**
  - The entire contract is not necessarily void
  - Money can sometimes be recovered
  - It is possible to sever the clause to avoid the whole contract being void
    - Goldsoll v Goldman [1915]
    - Vendor of imitation jewellery sold business and was restrained from engaging in the sale of real of imitation jewellery through the EU and America. Court severed “real” and clause stood
  - Will not sever where this will alter the whole character, nor where severance would defeat public policy
- **Statute**
  - Depends on the wording of the Act itself. Common law effects apply where act does not specify.

## **Consequences of the contract being illegal**

- **Illegal as formed**
  - Illegal contracts are unenforceable – Dann v Cruzon [1911]
  - Property or money transferred in advance cannot usually be recovered
    - Even where parties are unaware of the illegality
    - Can be recovered: where not to recover is against public conscience; where illegality is not vital to the cause; where the party seeking the recovery is not in pari delicto (not as culpable); where the agreement has been induced by fraud.
- **Illegal as performed**
  - Recovery remedies available when one party is not aware of illegality
    - Marles v Trant [1954]
    - A seed supplier sold seed as “spring wheat”, Trant sold it on to Marles without an invoice which was illegal. Marles discovered it was “winter wheat” and sued successfully – despite illegality.

## Duress and Undue Influence

### Duress

- **Common law: threat to vitiate the consent of the other party**
- Cumming v Ince [1847]
  - Private mental asylum inmate coerced in to signing away title to all of her property with the threat that her committal order would never be lifted
- **Threat can be violence or even death**
- Barton v Armstrong [1975]
  - Former chairman threatened current managing director with death if he did not pay over a large sum of money for the former chairman's shares.
- **Threat to start a legal action is no duress**
- Williams v Bailey [1866]
  - Young man forged his fathers signature on IOU notes, which the bank sought to recover by threatening legal action against the son if the father did not mortgage his farm. Not duress, but undue influence
- **Threat to property is not duress**
- Skeate v Beale [1840]
  - Promise given in return for recovery of goods that had been unlawfully detained was not duress.

### **Economic Duress**

- **Contract can be set aside where extreme coercion has rendered the agreement otherwise commercially unviable.**
- DC Builders v Rees [1965]
  - Rees forced small firm to take £300 in full satisfaction rather than £462. They had no choice but to accept in the circumstances. This was economic duress.
- The Sibeon and Sibotre [1976]
  - World recession in shipping industry. Charters demanded regeneration of contract, ship owners had no choice but to agree.
    - Formal doctrine developed: did the party protest? Did the party try to argue openly about it?
- Atlas Express v Kafco [1989]
  - A was a carrier to deliver Kafco's goods to Woolworth. Estimate of 400-600 cartons at £1.10 each. Actually, 200 cartons only and Atlas refused to carry more without £440 per load. Kafco had to agree to protect contract with Woolworth.
  - Economic duress because: Kafco had no alternative course and was independently advised.
- **It is not always certain what the difference between legitimate and illegitimate pressure is**
- The Universal Sentinel [1983]

- Workers federation blacked a ship and coerced it to pay in to the fund to secure release. This was economic duress with illegitimate pressure – although the court was undecided as to what was legitimate and what was not.
- **The doctrine of economic duress is still uncertain**
- The Atlantic Baron [1978]
  - Shipyard built tanker for shipping company and were paid in five instalments. Shipyard opened a letter of credit to refund payments made if they should fail. Shipyard demanded increase and company reluctantly agreed as they needed that ship for other contracts. Months later, they sued for the excess and failed. Economic duress had occurred but the open credit letter was sufficient consideration for the fresh agreement and the months delay affirmed the contract.

## Undue Influence

- **Distinctions – actual and presumed undue influence**
- Bank of Credit and Commerce v Aboody [1990]
  - Wife avoided liability over surety transaction which her husband induced her to enter
  - Class 1 – actual: no special relationship so party alleging undue influence has to prove it
  - Class 2 – presumed: special relationship so undue influence automatically presumed unless evidence to the contrary
- Barclays Bank v O'Brien [1993]
  - Bank granted £135,000 to failing business on surety of jointly owned home. Bank failed to follow instructions to allow both to receive independent legal advice. Mrs O'Brien not liable.
- **Actual Undue Influence**
  - Williams v Bayley [1866]
    - Threats to son amounted to undue influence – Denning felt it should apply where there is inequality of bargaining strength.
  - Lloyds Bank v Bundy [1979]
    - Lloyds was the bank to farmer and his son and his son's company. Bank manager and son persuaded farmer to make his farm security for son's loan to company. Bank sought repossession but failed – conflict of interest.
- **Presumed undue influence**
  - Party alleging undue influence need only prove special relationship – a defence to undue influence is that the party had full legal and independent advice.
  - Lancashire Loans v Black [1933]
    - Woman induced daughter to stand guarantor. Daughter claimed undue influence successfully – she had no independent advice.
  - "Spiritual leadership" relationships also qualify
    - Allcard v Skinner [1887]

- Woman encouraged to give up all property to order of religious sect. On claiming back railway stock after leaving, court accepted presumed undue influence but 5 year wait prevented her claim – delay defeats equity.
- **Class 2A: type of relationship such as doctor/patient**
- **Class 2B: One party proves that they have placed trust in the other party (husband and wife)**
- “duty of notice” – creditor unable to enforce the defaulted loan where it has notice of equitable interest in the property.
  - Reasonable actions to take: personally interview in absence of the other; explain full extent; encourage independent advice
  - Massey v Midland Bank [1995]
  - Solicitor confirmed that M had received independent advice, and this was sufficient – the bank needed to do no more.
- Is a solicitor appointed by the bank an agent of the bank?
- Leading case: Royal Bank of Scotland v Etridge [2001]
- Wife claimed undue influence – solicitor had not explained charge to her alone, thus bank fixed with notice of undue influence.
- Held: not two types of undue influence, presumed merely evidential lift.
- Guidelines: bank put on enquiry whenever wife stands surety; reasonable steps to satisfy; solicitor can act for more than one party unless real conflict of interest; advice should explain nature, seriousness, choice in absence of husband; bank has duty to obtain confirmation from solicitor – check name of solicitor, communicate directly with wife, send solicitor necessary information, should advise solicitors of suspicions, request written confirmation from solicitor; O’Brien principle covered those in sexual relationships as well

### **Effects of pleading undue influence**

- Voidable by the party alleging undue influence under restitution in integrum
- Exception: where value of property has changed
- Cheese v Thomas [1994]
  - Elderly uncle contributed £43,000 to property; nephew contributed £40,000 in mortgage. In nephews name but to be solely occupied by uncle until death. Nephew defaulted, uncle sought return of £43,000 and court accepted undue influence and ordered house sold. Could only fetch £55,000 so uncle only entitled to 43/83 share.

## Discharging the Contract

### By Performance

- **Strict rule**
  - Cutter v Powell [1795]
  - Wife sued for dead husband's ship wages. Had not completed performance by dying, so quantum meruit was denied.
- **Application of the rule**
  - Arcos v Ronaasen & Son [1933]
  - Staves a sixteenth of an inch narrower than those ordered – buyer able to reject delivery.
- **BUT: de minimis non curat les – law will not remedy something trivial**
  - Reardon Smith Line v Hansen-Tangen [1976]
  - Judges would not accept repudiation on the basis of a mere technicality.
- **Avoidance of the strict rule**
  - Divisible contracts – various parts can be enforced separately
    - Taylor v Webb [1937]
    - Landlord required to lease premises and keep them in good repair. Not maintained so tenant refused to pay. Not legitimate, clause to lease separate from clause to maintain.
  - **Acceptance of Part Performance** – strict rule does not apply where other party has accepted part-performance. Will not apply where other party does not have a choice
    - Sumpter v Hedges [1898]
    - Builder worked to build two houses and stables. Ran out of money so landowner completed using builders' materials. Builder claimed part-performance but landowner had no choice – awarded value of used materials only
  - **Substantial Performance** – party can recover appropriate amount, providing that contract is not an entire contract
    - Dakin v Lee [1916]
    - Builder bound to carry out repairs, but some carelessly. Owner refused to pay. Builder could sue for price of work less an amount representing the value of defective work.
  - **Prevention of performance** – party trying to perform may have an action for damages
    - Planché v Colburn [1831]
    - Publisher hired author for a series, then decided to abandon. Writer able to claim for wasted work.
  - **Tender of performance** – party has offered to complete obligations and has been unreasonably refused
    - Startup v Macdonald [1843]



- 10 tons of oil to be delivered before end of March.  
Delivered at 8.30am on a Saturday. Seller able to recover damages upon refusal.
- **Stipulations as to time of performance**
  - Traditionally, failure to perform would give rise to damages action and not repudiation
  - However: express time stipulation; surrounding circumstances emphasise time (perishable goods); one party has failed to perform so the other gives a deadline – allow repudiation.

## By Agreement

- Problems: lack of fresh consideration and lack of proper form in speciality contracts
- **Bilateral discharges – both parties gain a new benefit**
  - Wholly executory arrangements – neither side have performed obligations; possibility of wavering of new rights and substituting terms. Consideration is not having to perform old obligations.
  - Party executory and partly executed – other can waive rights where one party wishes to give less than full performance – absence of consideration
  - Form is an issue – agreement to vary the terms in a contract requiring specific form may be invalid unless evidenced in writing
- **Unilateral discharges – benefit only to be gained by one party; who is trying to convince the other party to waive rights**
  - Consequences: requires deed of validity to be enforceable, but sometimes as in *Williams v Roffey*, where extra benefit is to be gained, this may be sufficient.
    - Possibility of discharge due to “accord and satisfaction” as in *Pinnel’s Case* by adding a new element that would count as consideration or making a smaller payment before full payment is due.
    - Discharge by the equitable doctrine of Promissory Estoppel

## By Frustration

- **Original Common Law Rule**
  - A party is bound to perform their obligations regardless of intervening events
    - *Paradine v Jane* [1647]
      - Paradine for rent. Jane had been forced off land by invading army. Jane still bound to pay rent as he should have made express provision through ‘force majeure’.
    - **Development of Frustration**
  - **Injustice of original common law led to exceptions.** A party affected by an intervening act would be relieved of the strict obligation and therefore not be liable for breach of contract.

- Taylor v Caldwell [1863]
  - T hired out the Surrey Gardens Music Hall to P for a series of concerts. Six days before the first, the hall was destroyed by an accidental fire. C was not liable for wasted advertising and other expenses.
- **This principle was extended to cover instances where envisaged performance was no longer possible**, even when literal performance could occur.
  - Davis Contractors Ltd v Fareham UDC [1956]
    - D agreed to build 78 houses for F, costing £92,425, within 8 months. This took 11 months and cost £111,076 due to shortages of labour. D claimed frustration by the delay and the additional costs on a quantum meruit basis. No Frustration.
      - But: Lord Radcliffe asserted that frustration occurs where a contractual obligation has become incapable of being performed because external circumstances have caused the performance to be **radically different from that agreed**.

## Frustrating Events

- Impossibility
  - **Destruction**
    - Taylor v Caldwell [1863]
  - **Physical Unavailability**
    - Jackson v Union marine Insurance [1874]
      - A ship ran aground and could not be loaded for some time. The court accepted that there was an implied term that the ship would be available for loading in a reasonable amount of time and the long delay amounted to a frustration.
  - **Service Unavailability – Actual and Potential**
    - Robinson v Davidson [1871]
    - Court held that a contract involving a pianist performing was conditional on her being well enough, and because of illness, she was excused and the contract frustrated.
    - Condor v The Baron Knights [1966]
    - TBK were to perform up to 7 nights a week. One member became ill, but ignored advice not to perform. The contract was frustrated, and it was necessary to have a potential fill-in.
  - Morgan v Manser [1948]
    - Music hall artiste was contracted for 10 years, starting 1938. Conscription during 1940-46 undermined the contract and both parties were excused performance.
  - **Delay**

- The Nema [1981]
    - Time charter of nine months agreed, anticipating 7 voyages. Due to strikes, only 2 possible and the contract was frustrated.
  - **Outbreak of War**
    - Metropolitan Water Board v Dick Kerr & Co [1918]
      - July 1914 – contract formed for construction of a reservoir, to be completed within 6 years. In 1916 government requisitioning and order prevented performance.
- **Illegality**
  - **Change in the law**
    - Denny, Mott & Dickinson v James B Fraser [1944]
    - Import of goods illegal when a change in the law prevented such goods being imported.
  - **Outbreak of War**
    - Re Shipton Anderson & Harrison Bros [1915]
      - Cargo of grain sold but war broke out prior to delivery. The government requisitioned the cargo.
- **Commercial Sterility**
- **Frustration of the common venture**
  - Krell v Henry [1903]
    - Room hired to watch coronation of Edward VII. Postponed due to king's illness. Watching the coronation was "foundation of contract" and thus contract frustrated.
  - **BUT all commercial purpose must be destroyed.**
    - Herne Bay Steamboat v Hutton [1903]
      - Boat hired to observe Edward VII's fleet. Although one purpose had disappeared, the fleet was still viewable. No frustration.

## **Limitations**

- **Self-induced frustration**
  - Maritime National Fish v Ocean Trawlers [1935]
    - Fishing company owned 2 trawlers and hired another. Did not have a licence for all three, used its own, claimed frustration and failed – self-induced.
- **Contract more onerous to perform**
  - Davis Contractors v Fareham UDC [1956]
    - The builders not being able to make the same profit was not accepted as justification for frustration.
- **Foreseeable risk**
  - Amalgamated Investment & Property v John Walker [1977]
    - Defendants sold building to AIP. Unknown to both, it had been listed, resulting in price drop and prevention from redevelopment. Not frustration – associated risk with all old buildings.
- **Force majeure clauses**
  - Fibrosa Case [1943]

- Clause only covered delays in delivery and not German invasion. Frustration.
- **Absolute undertaking to perform**

### Common-law effects

- Chandler v Webster [1904]
  - Room hire for coronation to be paid on the day. Paid in advance so could not be recovered.
  - Overruled and modified in Fibrosa [1943] – payments could be recovered providing there was a total failure of consideration

### Law Reform (Frustrated Contracts) Act 1943

- S1(2) - confirms principle of Fibrosa [1943]
- S1(2) – court has discretion to award reward for work done
- S1(3) – party able to recover for a partial performance which has conferred a valuable benefit on the other party – discretionary
  - BP Exploration Co v Hunt [1979]
    - H had special concession to explore for oil in Libya. BP financed in return for half share. Libya confiscated oil. Awarded \$35 million.
- Limitations:
  - Contracts for carriage of goods by sea except time charter parties; insurance contracts; perishing of goods under SGA 1979

### By breach

- **Fundamental breach** – deprives the other party of substantially the whole benefit they were to receive under the contract
- **Breach of condition** – where the term is so central that its breach renders to contract meaningless
- Different forms of breach:
  - **Ordinary term** – action for damages
  - **Breach of a condition** – by express or by statute
    - Must be a condition: Schuler AG v Wickman Machine Tools Sales [1974]
  - **Anticipatory Breach** – party gives notice, does not necessarily mean obligations will remain unchanged – often just a different manner of performance.
  - Hochster v De La Tour [1853]
    - H hired as a courier two months after contract date. DLT wrote to him to cancel contract. DLT said he could not sue unless he could show that on the due date he was ready to perform. Court disagreed – no requirement that he should wait for the breach.

## Effects of breach

- **Ordinary term – action for damages always available**
- **Condition – continue with damages or repudiate, or repudiate and sue for damages**
  - The Hansa Nord [1976]
  - Refusal to accept animal feed was unlawful – went on to buy the goods and use them for the same purpose, hence, not sufficiently serious.
- **Anticipatory breach**
  - **Damages**
    - Frost v Knight [1872]
      - Defendant had promised to marry his fiancée when father died. Broke it off before father died, yet F sued successfully.
  - **Possible to continue and wait for due date**
    - Avery v Bowden [1855]
      - B contracted to load cargo for A. B unable to meet obligations, A waited for due date and contract was frustrated by Crimean War
  - **Continue and wait has the danger of liability for breach themselves**
  - **Possibility of injustice for the party in breach**
    - White & Carter Ltd v McGregor [1962]
      - Party to supply bins for local council to be paid for by advertising revenue. One business backed out and WC went on to prepare bins and sued successfully for price.
  - **Innocent party is entitled to recover benefits from the other party, who cannot then try to reduce damages**
    - CMUZ v New Millennium Experience [2001]
    - Contract to build roof of dome, NME could repudiate but would have to compensate with “direct loss and damage”. They did so, and CMUZ became insolvent, NME claimed insolvency wouldn’t have enabled them to perform in any case; hence they should not be fixed with loss of profits. Court disagreed.