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NICK'S LAW NOTES

contract law

Offer and Acceptance

A) Offers and invitations to treat

An offer is a definite promise to be bound provided that certain specified terms are accepted. (Cheshire, Fifoot and Furmston). A communication may simply be a request for or supply of information (Harvey v Facey), or an invitation to treat (Gibson v Manchester CC – "may" be prepared to sell, no contract; cf Storer v Manchester CC – intention to be bound, got contract).

1) Advertisements and displays

Advertisements and displays are generally regarded as invitation to treat rather than offer (Boots Cash Chemist) because of the need to protect party placing the advertisement from **indeterminate liability**. This has unfortunate consequences in the context of criminal law (Fisher v Bell; Partridge v Crittenden). To address this, legislators have to extend the scope of offence beyond 'offer' to 'exposure' (UK Consumer Protection Act, s 10). Courts have exceptionally been prepared to treat advertisements and displays as offers when there were good policy reasons for doing so, employing various legal techniques to reach the intended result i.e. backward reasoning (Chapelton v Barry – intention by Df to be bound if Pf accepted offer, and Df cannot reject the money = offer; Carlill v Carbolic Smoke Ball - unilateral in nature and no problem of limited stock = offer).

2) Automatic Machines

Vending machines and automatic ticket machines are generally treated as making offers because once the money has been inserted the transaction is **irrevocable** (Thornton v Shoe Lane Parking per Lord Denning).

3) Auctions

Mere advertisement of an auction is not an offer. Dual contract analysis required for auctions: 1) request for bids (offer by auctioneer that he will accept highest bid) and bidding (acceptance), 2) bid (offer by bidder) and fall of hammer (British Car Auctions v Wright [x] – acceptance in customary manner). Bidder may withdraw his bid before hammer falls and offer made by each bidder lapses once a higher bid is made. Thus, if a higher bid is withdrawn, auctioneer cannot fall back on lower bid. Issues arise with auctions without reserve price, and in Barry v Davies [x], the courts held that there is a collateral contract between auctioneer and highest bidder.

What about electronic auctions e.g. placing an item on EBay?

4) Tenders

At common law, the general rule is that the invitation to tender is not an offer but an invitation to treat (Spencer v Harding). However, an invitation for tender can contain offer in some cases such as Blackpool & Flyde Aero Club v Blackpool Borough Council where it was held that there was an offer to consider Pf's tender. This has been distinguished in the Singapore case of Hiap Huat Pottery v TV Media, where the courts held that there is no collateral contract in existence without the main contract being in existence.

5) Quotes

Merely an invitation to treat if not intended to give rise to binding legal obligations (The Barranduna).

B1) Objectivity & mistake

The law applies an objective test of the parties' intentions, which means it adopts the interpretation of an honest and reasonable person in the position of the promisee. Thus, a party cannot enforce a contract if 1) he knows of the other party's mistake (Chwee Kin Keong v Digilandmall.com; Smith v Hughes; Hartog v Colin & Shields), 2) he has contributed to the other party's 'mistake' in making the offer (Tamplin v James – buyer's fault; Scriven Bros v Hindley – seller's fault) or 3) the agreement was aborted by latent ambiguity (Raffles v Wichelhaus).

B2) Termination of offer

There are generally 3 ways an offer can be terminated: 1) revocation, 2) lapse, and 3) rejection.

1) Revocation

General

An offer is only revocable if it is communicated to the offeree before offeree's acceptance takes effect (Byrne).

Qualifications

- 1) An offer to keep an offer open for a certain length of time can be withdrawn unless an option has been purchased, e.g. **consideration has been given to keep the offer open** (Routledge v Grant).
- 2) Communication need not be made by the offeror; communication through a third party will suffice (Dickinson v Dodds).
- 3) An offer made by advertisement in a newspaper could be revoked by a similar advertisement even if some offerees do not see it (Shuey v US).

2) Lapse

An offer may lapse and thus be incapable of being accepted because of

- 1) Passage of time – either at the end of a stipulated time or, if no time is stipulated, after a **reasonable time** (Ramsgate Victoria Hotel v Montefiore – about 5 months), and
- 2) Death – of **offeree** (Re Irvine), of **offeror** (Coulthart v Clementson), but an offer remains open if offeror could not have terminated the offer during his lifetime and if **performance does not depend on offeror's personality** (Errington v Errington).

3) Rejection

A rejection of offer can be express or implied (counter-offer).

C) Acceptance

An acceptance is a final and unqualified assent to all the terms of the offer (Gay Choon Ing).

1) What's up with counter-offers?!

A counter-offer terminates the original offer (Hyde v Wrench) but a mere inquiry or request for information does not (Stevenson v McLean). In the "battle of forms" scenarios, it was traditionally held that the person who "fired the last shot" would dictate the terms of a contract (Brogden v Metropolitan Railway Co). This appears to have been overruled in Butler Machine Tool v Ex-Cell-O where Lord Denning dismissed the "fire

last shot" approach and held that it was better to [look at the correspondence and decide what was reasonable](#). [Tekdata Interconnections Ltd](#) affirms that the traditional offer-acceptance method is still preferred.

2) Knowledge

Valid acceptance has to be made to a **known offer**; two [identical cross offers](#) made in ignorance of the other do not amount to a contract ([Tinn v Hoffman](#)). **Motive for performance is irrelevant** as long as performance was done with [knowledge of offer at the material time](#) ([Williams v Carwardine](#) – knows of offer but supplied info to “ease her conscience”). However, courts have been willing to depart from the rule where there are [policy considerations](#) ([Gibbons v Proctor](#) – rescuer, don't have to know of reward at material time). [R v Clarke](#) (information leading to the arrest and conviction of a person – Df gave info after he was caught for crime) dismissed mere knowledge and restricted the rule to include [reliance on the offer](#).

3) Method of acceptance

Offeror may require acceptance to be made in a certain way. **If mode of acceptance is not performed as stipulated, offeror is not bound**. However, an acceptance, which accomplishes the [same objective as stipulated method](#), will still be valid ([Manchester Diocesan Council for Education v Commercial and General Investments](#)). In fact, if an alternate means of communication is [more effective](#), it is reasonable to rely on it ([Entores](#)). As a general rule, acceptance cannot be inferred from [silence](#) ([Felthouse v Bindley](#)), but there can be acceptance by [conduct](#) ([Brogden v Metropolitan Railway](#)).

O1) Unilateral Contracts

The rules relating to acceptance must be modified in their application to unilateral contracts. One modification is that the courts may readily imply that the offeror has [waived the requirement that the acceptance be communicated](#) to him ([Carlill](#)). **Revocation** cannot take place once performance has started ([Daulia](#); [Errington v Errington](#)). However, there is an [exception](#) to the rule when the consequence is that the offeror is forever bound and unable to revoke the offer ([Mobil Oil Australia](#)). (**Lapse**) [An offer remains open](#) if offeror could not have terminated the offer during his lifetime and if **performance does not depend on offeror's personality** ([Errington v Errington](#)).

O2) Postal acceptance and revocation

A [postal revocation](#) does not take effect on posting, but [must be "brought to the mind"](#) of the offeree ([Henthorn v Fraser](#)). This should mean the time when it would be reasonable to expect the offeree to acquire notice of it. Thus, a revocation letter [takes effect the moment it arrives at business premises during office hour](#), but not one that arrives near or after closing hours and is not seen that day ([Tenax SS Co Ltd v The Brimnes](#)); it takes effect the next morning. In [Brinkibon](#), [Lord Wilberforce](#) suggested a more [flexible approach](#), looking at all of the circumstances.

The [postal acceptance](#) (PA) rule departs from the general rule that acceptance takes place when communicated and states, by contrast, that [acceptance takes place when a letter is posted](#) ([Adams v Lindsell](#)), [even if the letter goes astray and is lost](#) ([Household Fire](#)). Later cases have confirmed that the [Adams v Lindsell](#) rule should apply whenever it was [reasonable for the offeror to expect the acceptance to be made by post](#) ([Henthorn v Fraser](#)). This [expectation can be removed by express instructions](#) from the offeror ([Holwell Securities](#)), in which a requirement for 'notice in writing' displaced the postal rule.

Additionally, **the PA rule does not apply to instantaneous forms of communication** e.g. [telexes](#) ([Entores, Brinkibon](#) applied), [faxes](#) (because they resemble telexes), [contracts concluded over the web](#) ([Digilandmall](#)). Only uncertainty lies with [email](#), but given that the justifications for the postal rule is inherently weak, it is unlikely that courts would extend the rule to a further category of transaction.

O3) Electronic Contracts

Automated emails sent to buyer after purchase can be seen as valid acceptance ([Digilandmall](#); [Corinthian Lederie Pharmaceuticals](#)). Disclaimers have to be obvious or brought to buyer's mind and not hidden in obscurity ([Specht v Netscape](#)). Electronic contracts are usually subject to the [Electronic Transactions Act](#).

Exam Tips

1. In answering questions that raise issues about the communications of offers and acceptances, in which timing may be very important, it is a good idea to make a chronological outline, and then identify the relevant issues i.e. offers and counter-offers ([Hyde v Wrench](#)), operation of postal acceptance rule ([Adams v Lindsell](#)), time of communication of electronic messages ([The Brimnes](#) – office hours, [Brinkibon](#) – flexible, receipt rule), revocation of offer ([Entores, Brinkibon](#) applied).

Certainty & Completeness

A) Vagueness

Courts are generally reluctant to strike down an agreement on the basis of "vagueness". [Justifications for enforcement](#) are 1) precision in business practices, 2) necessity and difficulty of incorporation flexibility, 3) protecting reliance and 4) unmeritorious pleas of uncertainty.

Factors and methods that help to resolve vagueness are 1) [custom and trade usage](#) ([Shamrock SS Co v Storey & Co](#)), 2) [reasonableness](#) ([Hillas v Acros](#) – because both Pf and Df are intimately acquainted with the course of business, thus there is contract; [Baird Textile Holdings v Marks & Spencers](#) – no objective criteria to assess "reasonable quantity or price", thus no contract), and 3) [severance](#) ([Nicolene Ltd v Simmonds](#) – vague term may be severed if it does not impair the rest of the contract, no get-out-jail-free card for defaulters – defaulter tried to escape by saying "usual conditions" was too vague).

B) Completeness

Agree to (or not to) negotiate

An agreement to negotiate on a particular view to reaching agreement (**lock-in agreement**) is based on good faith and is therefore not enforceable. An agreement not to negotiate with third parties over a particular matter (**lock-out agreement**) is [enforceable if time limited](#) ([Walford v Miles](#) – not time limited; [Pitt v PHH](#) – time limited).

Agree to agree situations

Generally, if the Court is satisfied that the parties intended to be bound, it will strive to find a means of giving effect to that intention by filling the gap. The parties may have agreed workable criteria for resolving the unresolved matter. There [cannot be an indeterminate machinery](#) for setting the price e.g. "to be agreed from time to time" ([May and Butcher v The King](#)) but if [machinery is clear](#) (using valuers) [but faulty](#) (how many valuers is uncertain), then the court can imply a method of **reasonable market assessment** ([Sudbrook](#)). This is subject to exceptions:

- 1) If parties did not intend to be bound unless they themselves filled the gap, the contract is incurable (Sudbrook).
- 2) A court will not imply a missing term if the facts show that the parties intended to leave open the possibility of "backing out" if they did not agree on that term or if there is no mechanism for completing the terms (Koon Seng Construction).

Conditional agreements [x]

When the parties have stipulated that further agreement is required (e.g. subject to contract), it renders "agreement" unenforceable because this makes the agreement conditional on the completion of a formal contract (AG v Humphreys Estate). However, "it is invariable a question of construction whether 1) the execution of a further contract is a condition or a term of the bargain or 2) a mere expression of the parties' desire as to how the transaction already agreed should in fact proceed to completion" (Teo Teo Lee v Ong Swee Lan) (*Singapore*). Quantum meruit is claimable in certain cases (Yeoman's Row Management Ltd v James Cobbe).

Intention to create legal relations

If the contract is a 'domestic' agreement, it is presumed that legal relations were not intended (Balfour v Balfour – husband/wife; Jones v Padavatton – daughter/mother). However, there are some **exceptions** to the rule: 1) where parties are separated and are no longer living together in amity (Merritt v Merritt – husband/wife) and 2) where parties acted in reliance on the agreement to their detriment although this factor does not always suffice to rebut presumption (Parker v Clark).

Likewise for 'social' agreement, it is presumed that legal relations were not intended (Lens v Devonshire Club – golf competition organised by club). However, where there was mutuality between parties, legal consequences were intended (Simpkins v Pays – weekly competition).

However, if the contract is commercial in nature, it is presumed that legal relations were intended (Edwards v Skyways). Presumption rebutted in Kleinwort.

Consideration

A) Consideration must move from *promisee*

Party to a contract who wishes to enforce the contract must furnish or have furnished consideration for the promise of the other party. Does not necessarily have to benefit promisor – can be third party (this means third party cannot enforce promise due to privity of contract).

It must be requested by promisor (Combe v Combe – wife's claim that she chose not to sue for maintenance was not requested for by husband, thus no consideration). But in Alliance Bank, court implied that debtor would have wanted creditor's forbearance, thus forbearance was good consideration even though not expressly requested for by Df. How to reconcile? Alliance is a commercial contract, thus presumed that Pf would have sued for debt if there was no security.

B1) Consideration need not be *adequate*, just sufficient...

Consideration need not be adequate as long as it is valuable in the eyes of the law – acts or omissions of very small value can be consideration (*Chappel v Nestle*).

Consideration cannot be intangible (*White v Bluett* – nuisance is intangible, thus **invalid**; *Hamer v Sidway* – drinking/smoking was a form of giving up legal rights, tangible, thus **valid**; reconciled with *White* because 1) son's promise in *White* too **uncertain** and 2) activities of the son in *White* considered **less socially valuable**).

In *Ward v Byham*, however, policy consideration led to court deciding that making daughter happy was 'extra' consideration, thus constituting **valid** consideration.

B2) ...but it has to be *real*

Performance of public duty

If promisee is already under existing public duty, express promise to perform that duty **does not amount to consideration**, but if undertaking is over and beyond public duty, there is consideration (*Glasbrook*). Challenged by *Ward v Byham* (policy reason led to legal duty of mother to take care of child constituting valid consideration) and *Williams v Roffrey Bros* (practical benefit).

Performance owed to a third party

Performance to perform an existing contract with a third party may be a **real consideration** since it opens party to more possible actions for breach of contract and forgoes liberty to cancel contract with third party, representing a detriment to the party (*Shadwell v Shadwell* – uncle to nephew, 150 pounds every year until annual income reaches certain value; *The Eurymedon*).

Performance of duty owed to promisor

In general, performance of an existing contractual duty owed to a promisor was **no consideration** for a fresh promise given by that promisor (*Stilk v Myrick* – "same for more"). This position has since been refined by the seminal *Williams v Roffrey Bros*, where it was held that practical benefit was **sufficient to constitute consideration**.

However, for "less for same" contracts, where there is part payment of debt, promise by debtor to pay part of debt is **not consideration** but merely promise to perform part of existing duty owed to creditor (*Foakes v Beer*, affirmed in *In Re Selectmove* – rejected the use of *Williams v Roffrey* principles here). However, where there is 1) true accord and 2) creditor voluntarily agrees to accept a lesser sum in satisfaction and 3) debtor acts upon that accord by paying the lesser sum, which creditor accepts, there is held to be settlement (promissory estoppel) (*D & C Builders v Rees*).

C) Consideration must not be *past*

The general approach of English law is that a promise made after work is done or benefit conferred is unenforceable because that work or benefit does not constitute consideration (*Re McArdle*). This is a result of the idea of contract involving a mutual exchange. Exceptions of past consideration have been restated in *Pao On* and confirmed in the Singapore case of *Sim Tony v Lim Ah Ghee* to be: 1) past service performed at promisor's request; 2)

[implication/understanding](#) that services will be paid for ([Re Casey's Patents](#)); and 3) the promise must have been [legally enforceable](#) if it had been made in advance.

Evaluation

What is the future of consideration?

1. Consideration as a vitiating factor

The [Williams](#) decision cast doubt on the future of consideration. While it did not expressly throw out the doctrine, it did seek to 'refine' and 'restrict' the rule in [Stilk v Myrick](#), placing emphasis upon [the need to identify practical benefit rather than legal benefit](#).

Far from being an essential ingredient of a contract, courts appeared to regard consideration as a [vitiating factor](#) – to be used for setting aside an otherwise valid contract. More than that, it is regarded as a '[technical vitiating factor](#)', a vitiating factor which **could not distinguish between modifications which were in the public interest and those which were not**. In fact, this task could be better achieved by the [doctrine of duress](#).

2. Evidence of serious undertaking

Wouldn't **intention to create legal relations** (ITCLR) do the job? But ITCLR is quite a [blunt tool](#), based on two broad presumptions only. Another way of looking at consideration is that it is **not an "end in itself"** but rather performs an [evidential function](#) in terms of proving the parties' intention to create legal relations. This appears to be the position of [Russell LJ](#) in [Williams](#) when he said, "the courts nowadays should be more ready to find [the existence of consideration] so as to reflect the intention of the parties".

In social agreements with clear consideration, it is [evidence of ITCLR](#) ([Simpkins v Pays](#)). [White v Bluett](#) is a good example of how [ITCLR and consideration shade into each other](#). The son arguably did have a right to complain and the father was relieved of the 'nuisance' of hearing his son complain, which can be construed as a [benefit](#) according to [Williams v Roffey Bros](#). But it was clearly not wise for the court to hold ITCLR in such a case.

3. Instinctive justice of exchange

The argument is that [only bargains are worth enforcing](#), yet the law has not been clear on what a bargain truly is, as seen by how frivolous consideration has been found. If we consider the '[peppercorn consideration](#)' dicta by [Lord Somerville](#) in [Chappel v Nestle](#), which states that courts **do not care about the real value as long as the promisor requested** for it, then it seems like ITCLR trumps the need to find a bargain.

4. Boundary-markers

If the law absolutely did away with the need for consideration, we [would be bound by all our promises](#), and that would be too onerous on life. The [exceptions are social agreements](#) then, which would be 'protected' by the presumption highlighted in ITCLR doctrine. There is no real need to dismiss consideration entirely, for even when the consideration is nominal, [courts may consider other factors](#) like promissory estoppel or ITCLR before binding the promisor, as seen in [Ward v Byham](#).

Promissory Estoppel

The doctrine of promissory estoppel – of barring a right of action arising from individual's own act – was first introduced in *Hughes v Metropolitan Railway Company* and later affirmed in *High Trees*. The position of Singapore courts has been stated in *Long Foo Yit v Mobil Oil Singapore* where it was held that it is usually necessary to rely on the equitable doctrine of promissory estoppel where the apparent agreement between the parties is ineffective at common law for want of consideration. Various limitations to the doctrine have also been recognized in *Long Foo Yit*: 1) there has to be a legal relationship; 2) clear and unequivocal promise, express or implied, not to insist on right (*High Trees*); 3) altered position in reliance on promise, which doesn't have to be detrimental (*Abdul Jalil*); 4) inequitable for party to go back on promise (*D & C Builders v Rees* – doctrine should not be used where there is **improper pressure**; *The Post Chaser* – equitable because making of promise and withdrawal only a **short period**). Elsewhere, other limitations are: 5) the doctrine suspends but does not extinguish rights (*Hughes*; *High Trees*; **QBE Insurance** – does permanent estoppel = extinguishing of rights or just permanent suspension?); 6) it is meant to be used “as a shield, and not a sword” (*Combe v Combe*), although this has been reversed in the Australia decision of *Walton's Stores v Maher*. *Tee Soon Kay v AG* questioned use of promissory estoppel as a sword rather than a shield, but also observed that UK House of Lords may adopt a more positive stance in the future.

Terms

Express Terms

1. Term or representation

A representation is a state of past or present fact which induced the representee to enter the contract. A promise is a statement for which promisor assumed contractual responsibility. Thus, the primary distinction between representation and term is the test of intention. Several factors are helpful in finding this distinction:

1) Special knowledge

Courts tend to place emphasis on whether the person making the statement had special knowledge or access to special knowledge about the truth of the statement (Oscar Chess – seller relied on registration book, no knowledge of car, thus not liable | Dick Bentley – seller was in a position to know or at least find out mileage of car, thus liable).

2) Timing/Importance of term

Generally, if a statement were made close to the conclusion of contract, it would be regarded as important, and thus considered a term (Bannerman v White – **2 days**, buyer of hops asked whether sulphur had been used | Routledge v Mackay – **lapse of a week**, thus representation).

3) Statement in writing

Reducing a statement to writing is usually a good indication of seriousness of party and intention that it is a term (*dicta* in Oscar Chess). But this is a rebuttable presumption (Birch v Paramount Estates – quality of house not reduced to writing, but held seller had **special knowledge**).

2. Incorporation of terms

1) By signature

General rule is that you are bound to your signature whether you are aware of the terms in it or not (L'Estrange v Graucob), unless the other party misrepresented to you the term that you are agreeing to (Curtis v Chemical Cleaning). In Singapore, Press Automation v Trans-Link adopts L'Estrange.

2) By notice

In general, the Df must have done what was reasonable to inform Pf that the writing contained conditions and draw attention to relevant conditions (Parker v South Eastern Railway). Lord Denning in Thornton went further and said Df has to draw attention to particular term if it is a particularly onerous term. Interfoto Picture confirmed Lord Denning's dicta and said that the requirement does not apply only to exclusion clauses. This is affirmed in Singapore in Hakko Products.

3) By previous course of dealing

General

STEP ONE How many dealings are required before there is a ‘course of dealing’? (*Hollier* – car repair – **three or four transactions over five years** were not sufficient course of dealing – and **pattern of previous dealing** had not been consistent; *Circle Freight* – **11 contracts over 6 months** constitute sufficient course of dealing; *MGA International* – **17 other transactions** constitute a course of dealing)

But no real numerical requirement – more importantly, there must be evidence that parties had a common understanding of those transactions.

STEP TWO Has there been a consistent course of dealing? *MGA International* (17 other transactions – but held that there must be evidence that MGA knew that whenever Wajilam provided trade finance services, it would be on the basis of discretionary commission – **idea of Wajilam’s role was quite different** – thus no consistent course of dealing)

Exception

Even if there were no prior dealings, there could still be incorporation because contracting parties are 1) commercial parties of equal bargaining power and are 2) in the same industry with 3) one practice (*British Crane v Ipswich Plant*).

4) Online contracts

‘Shrink wrap’ contracts are enforceable, subject to the reasonable notice for onerous terms rule (*ProCD v Zidenberg* – terms found inside wrapped CD software package have been incorporated and are binding on the customer). As for ‘click wrap’, if the terms are embedded in webpage and it is not reasonable for Pf to have taken notice of it, it is not enforceable. Also if terms appear after a download, it is not enforceable (*Specht v Netscape*).

3. Interpretation of terms (Admissibility of extrinsic evidence)

English approach

In UK, the parol evidence rule prohibits the use of extrinsic evidence to add to, vary, or contradict a written instrument. The express terms of the contract are, in other words, to be found only in the written contract itself. Under common law, it is debatable if parol evidence rule even exists because the rule has been emasculated with the number of restrictions placed on it.

Lately, there has been however a shift from the traditional plain interpretation to the use of a contextual approach as restated by *Lord Hoffmann* in *Investors Compensation Scheme*. The significance of Lord Hoffmann’s speech lies in its recognition that all understanding relies upon context to a greater or lesser extent, and that contractual interpretation is no different. **The ‘reasonable person’, in deciphering communicative utterances, utilizes all necessary background knowledge to access meaning.** Thus, a plain meaning or literal approach is not an alternative to contextual interpretation, but can only be understood as operating within contextual method.

1. Absolutely anything can be relied on to build this ‘factual matrix’
 - a. Qualified in *BCCI v Ali* that “the primary source for understanding what the parties meant is their **language interpreted in accordance with conventional usage**”
2. Previous negotiations and declarations of subjective intent are excluded

Singapore background info

In Singapore, s 94 of the Evidence Act statutorily embodies the [thin definition of the parol evidence rule](#).

Section 93, s 94 of Evidence Act

- **93.** When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of such contract**, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
- **94.** When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, **no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms...**

Section 94 complements s 93 by ensuring that where the sole evidence of a contract consists of “the document itself” (*per* s 93), that contract is not varied, contradicted, added to or subtracted from unless the circumstances described in one or more of the six accompanying provisos (*ie*, provisos (a)–(f) to s 94) are satisfied.

S 94(f): The general view of this proviso appears to be that it is not really an exception to s 94, but, rather, a **fundamental rule of interpretation**, the application of which is dealt with in ss 95–100 of the Evidence Act.

Case law

Standard Chartered Bank v Neocorp International (SGHC-2005):

- The court recognised that under the contextual approach to contractual interpretation, [extrinsic evidence could be admitted even if the terms of the contract were unambiguous](#), so long as it was **not applied for the purpose of contradicting** the written terms in contravention of the parol evidence rule.
- Articulated the view that the common law contextual approach was “in accordance with” (at [36]) [proviso \(f\) to s 94](#).
- Note that court ultimately held that, on the facts, the extrinsic evidence which Df sought to rely on to limit scope of guarantee was inadmissible.

China Insurance Co (SGHC-2005), Phang JC (obiter):

- Appeared to accept the continued force of the parol evidence rule as set out in s 94 of the Evidence Act but also tend towards adopting the contextual approach to contractual interpretation
- [Favoured the more liberal approach to s 94\(f\)](#) but **constrained by the views** of [Court of Appeal in Citicorp Investment Bank](#)

Sandar Aung v Parkway Hospitals Singapore (SGCA-2007)

- [Extrinsic material is admissible even if not ambiguity is present in the plain language of the contract](#)

- But did not discuss s 94(f) so the issue of whether ambiguity was a prerequisite for its application and its relationship with the common law contextual approach to contractual interpretation was **left open**

Singapore's approach according to Zurich

1. Determine **essence and attributes of document** (Zurich)
 - a. **Different genres of documents may require different treatment** by the court at various stages of the analytical process
 - i. For standard form contracts and documents intended for commercial circulation (*eg*, negotiable instruments), the presumption that all the terms of the agreement between the parties are contained in the contract will be almost impossible to rebut.
 - b. (*for understanding*) The common law does not in principle differentiate between the interpretation of a rudimentary cobbled-together contract and a sophisticated standard form contract; between the interpretation of a consumer contract and a commercial contract; or between the interpretation of a domestic [contract] and [a] transnational contract. **That is not, however, to say that in working out what is the best interpretation of a contract a court may not have to take into account, for example, a consumer as opposed to a commercial context, or the need for uniformity in international transactions**
2. **Admissibility of extrinsic evidence** (Healthcare Supply Chain)
 - a. **General:** Extent of admissible evidence is very broad and not confined to empirical facts. But objective theory underpins contextual approach to contract interpretation so exercise must not descend into an idle search for parties' subjective intentions
 - b. **Reasonably valuable to parties:** Extrinsic evidence that was only available to one of the contracting parties was held inadmissible as evidence of the parties' objective intention (Goh Guan Chong) → shows what was not the objective intention
 - c. **Relevance:** Test of relevancy is an objective one that asks whether a reasonable man would have regarded the extrinsic evidence as relevant to determining the context of the contract (Tiger Airways)
 - i. **Declarations of subjective intent not allowed**
 - d. **Relation to clear and obvious content:** The extrinsic evidence that is tendered before the court must point to a clear or even obvious context before the court can say with any certainty that such evidence is of assistance to the court (Soon Kok Tiang)
 - e. **Prior negotiations and subsequent conduct:** Zurich departed from English position most recently stated by HL in *Chartbrook v Persimmon Homes* and held that it was possible to use these materials
3. **Task of interpretation** (Zurich):
 - a. **Ambiguity not a prerequisite** for court's consideration of extrinsic material under s 94(f)
 - i. Approved contextual approach to contractual interpretation in *Sandar Aung*
 - ii. Approved its implicit adoption in *Standard Chartered Bank* and *China Insurance Co*
 - iii. Approved *Investors Compensation Scheme* ("absolutely anything")
 - b. **STEP ONE** Take into account the plain language of the contract together with relevant extrinsic material which is evidence of its context.

- i. (A result of [Investors Compensation Scheme](#), that scope and quantity of admissible evidence is increased) Prior negotiation and subsequent conduct may be admissible to aid in interpretation (after courts have determined that there is latent ambiguity) but since most of it will not go towards an objective approach of interpretation, will not be admissible
 - ii. [Healthcare Supply](#) differs from [Zurich](#) even though it's HC vs CA → plain approach first. If it is settled, don't even have to use contextual approach. Shouldn't use it automatically
 - iii. Singapore approach shows **pragmatic** approach: threshold requirements for use of prior negotiation and subsequent conduct, instead of outright rejecting it as in England
 1. Cannot be vague, must be relevant
 2. Must be reasonably valuable to parties
 3. Clear and obvious context
 4. Relevance objectively ascertained
 5. Most likely small number of cases will be allowed
 - iv. No blanket rule against it. Assess evidence first
 - v. Cases: [Goh Guan Chong](#), [Tiger Airways](#), [Marine Centre Holdings](#)
 - vi. But is it **principled**? Unclear. Cases are hard to reconcile.
 1. [Goh Guan Chong v Zurich](#) on the ambiguity threshold.
 2. Problems reconciling [Zurich](#) and the [Evidence Act i.e. s95](#). Does [section 95](#) mean something different? **Patent ambiguity vs latent ambiguity**.
 3. [Section 94\(f\)](#) not designed for contextual interpretation
 - vii. General rule for subjective intention in Singapore: same as UK, not allowed except for in rare cases involving equitable remedies. → **principled**
 - viii. NOT ALLOWED PREVIOUSLY: Prior negotiations, subjective expressions of intention when concluding the contract, subsequent conduct
 1. When parties are negotiating a contract, positions are constantly changing. Does not tell you exactly what they eventually agreed on. Irrelevant. Give-and-take process.
 2. But it illuminates what they were aiming to agree. Some relevance. LOOK AT CHARTBROOK
 3. Practical purposes: Makes litigation more expensive. Bring in all sorts of evidence that may be tenuous and irrelevant. Disadvantages > advantages
- c. **STEP TWO** If plain language becomes ambiguous (takes on another plausible meaning) or absurd in light of context, then courts entitled to interpret it differently
4. **Will continue using canons of interpretation i.e. contra proferentem rule** (LTT Global Consultants)
- a. **STEP ONE** Determine existence of ambiguity
 - i. Contra proferentem rule **would not appear when clauses are clear and unambiguous** ([Neptune Agate](#))
 - ii. Contra proferentem rule **not to be used to magnify ambiguity nor to lead to inconsistency within contract** ([Mohammed Shahid](#))
 - b. **STEP TWO** Identify the proferens (persons relying on it)
 - i. If **both parties were involved in drafting contract, then no 'proferens'**. Thus, contra proferentem rule will not apply ([Levison v Farin](#))

c. **Contra proferentem rule in context of excluding negligence**

- i. (a) if the clause contained language which expressly exempted the person in whose favour it was made (“the *proferens*”) from the consequence of the negligence of his own servants, effect must be given to that provision; (b) if there was no express reference to negligence, the court must consider whether the words used were wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*; and (c) if the words used were wide enough for the above purpose, the court must then consider whether “the head of damage may be based on some ground other than that of negligence”
- ii. **Canadian Steamship** principle as applied in **Marina Centre Holdings**, but uses a cautious approach

Implied terms

A. Terms implied in facts

Courts will imply a term when it is **reasonable, equitable and capable of clear expression**. It also has to be **consistent with all express terms** of contract (**MP-Bilt**). It is often used when it is necessary to give “**business efficacy**” to the contract (**The Moorcock**) or when it is **obvious** (“officious bystander” test as per **Shirlaw v Southern Foundries**). In Singapore, the two tests have been restated: **the officious bystander test is but the practical mode by which the business efficacy test is implemented** (**Forefront Medical Technology**). Based on **necessity**.

Lord Hoffman in **AG v Belize** commented that there are dangers in treating these alternative formulations of the question as if they had a life of their own, and that they are just different ways judges have articulated the central idea that the **term seeking to be implied must spell out what the contract actually means**. Thus, **any contradictory, unreasonable or unclear term cannot possibly be implied**.

B. Terms implied in law

This doctrine is based upon the much broader rationale of **public policy or fairness in general and reasonableness in particular** (**Jet Holdings**). **Caution has to be exercised** because of the consequence of broader effect of implied terms (**Forefront**).

Difficulties with prevailing tests

Necessity

In **Liverpool City Council v Irwin**, **Lord Wilberforce** stated that term implied should be based on **necessity** for the legal relationship of the parties, and not reasonableness. This is subsequently supported in **Scally v Southern Health**, where the courts held that the search for a term, which the **law will imply as a necessary incident of a definable category of contractual relationship**, is based on wider considerations.

Reasonableness

However, in more recent times, the courts in **Crossley** in UK and **Chua Choon Cheng** in Singapore have held that the focus **should fall on reasonableness rather than necessity**.

C. Terms implied in custom

If a particularly commonly held commercial practice has been proven in court time and again, the part may not need to adduce evidence to show that it exists, thus saving time and expense for litigation (Plaza Singapura v Cosdel). The court will not give effect to a custom or usage which is inconsistent with the terms of the contract between the parties themselves (Cunliffe-Owen).

D. Terms implied by statute

Sections 11-15 of Sales of Goods Act

Exception Clauses

What is an exception clause?

General

Limitation clauses attempt to limit liability while exclusion clauses attempt to totally exclude liability (Emjay Enterprises).

Do exception clauses deal with liability or damages?

Total exclusion clauses have everything to do with liability, and the **effect on damages is only a 'by-product'**.

Limitation clauses generally relate to liability. (Emjay Enterprises)

Enforceability of exception clauses

1. Common law principles

- i. **Incorporation:** Is the exception clause part of the contract?
- ii. **Interpretation:** Does the exception clause cover the present situation?
 - a. Contra proferentem rule
- iii. **Collateral contract:** Was there a collateral contract which overrides the exception clause?
 - a. General idea underlying such a device is to argue that the terms and conditions of the collateral contract expressly override the exception clause in the main contract (Couchman v Hill)
 - b. However, Ang Sin Hock v Khoo Eng Lim cautioned against finding a collateral contract all too easily
- iv. **'Fundamental breach':** Was there such a serious breach as to render the exception clause unenforceable?
 - a. Rule of law approach: Fundamental breach of contract would struck down an exception clause, regardless of intention (Sze Hai Tong Bank)
 - b. Rule of construction approach: Construction of relevant clause to see if liability may be excluded even for fundamental breach (Photo Production – distinction between primary and secondary obligations)
 - c. Rule of construction > rule of law (Sun Technosystems): same problems of uncertainty but at least objectively gives effect to parties' intentions

2. Statutory law principles

Does the UCTA render the exception clause unenforceable?

- i. **Does the UCTA apply** at all to clause concerned?
 - a. Only applies to exception clauses, not to clauses defining one's obligation (Philips Products; Thompson v Lohan; UOB v Mohamed Arif)
 - b. **General prerequisite:** 'business liability' as per s 1(3): liability for breach arising from things done in the course of a business
 - i. Section 14: 'business' includes a profession and the activities of any Government department or local or public authority
- ii. **If it applies, which category?** Exclusion for negligence (**s 2**) or breach of contract (**s 3**)?
- iii. Depending on relevant category, **what are the prerequisites** for relevant sections to apply?
- iv. **What is the effect** of applicable? Wholly inoperative? Operative subject to fulfilment of 'reasonableness' test?

Exclusion for liability for negligence as per s 2 of UCTA

2. —(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. **(RENTERS CLAUSE INOPERATIVE)**

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. **(RENTERS CLAUSE OPERATIVE SUBJECT TO 'REASONABLENESS' TEST)**

(3) Where a contract term or notice purports to exclude or restrict liability for negligence, a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

Exclusion of liability for breach of contract as per s 3 of UCTA

3. —(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. **(THRESHOLD REQUIREMENT: CONSUMER OR WRITTEN STANDARD TERMS OF BUSINESS)**

- **Deals as 'consumers'**

- **R&B Customs Brokers**
- **Anti-Corrosion** (Pf not really a consumer – likely to be commercial party that had power to bargain and get consumers from Pf, unlike the average consumer UCTA was meant to protect)

- **Standard form contracts**

- **Hadley Design Associates** (needs to be something more than a form of draft contract i.e. standard form contracts)

(2) As against that party, the other cannot by reference to any contract term – **(THREE POSSIBLE SITUATIONS FOR EXCLUSION OF CONTRACTUAL LIABILITY)**

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled –

(i) to render a contractual performance substantially different from that which was reasonably expected of him; or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness. **(UNLESS REASONABLE TEST SATISFIED)**

Test of reasonableness – s 11 (IS THE EXCEPTION CLAUSE REASONABLE?)

Generally, in establishing whether an exception clause is operative subject to the test of reasonableness, party seeking to rely on it has the **burden of proof** as per s 11(5) of UCTA. The test of reasonableness is consequent upon a few factors, **each of which are important but will not be sufficient in establishing reasonableness alone.**

Established by **case law** in [Smith v Eric Bush](#) and [Lee Chee Wei](#) as well as in **statute**, under [Schedule 2](#).

- 1) The more equal the **parties' bargaining powers** is, the more likely the court will find the exception clause reasonable as affirmed in [Jiang Ou](#) and [Cosmat](#), but the fact that both contracting parties are commercial is not sufficient to establish reasonableness by itself ([Kenwell](#)), nor does the fact that one of the contracting parties is a non-commercial entity leads to a finding of unreasonableness automatically ([Ri Jong Son](#)).
- 2) Regarding the presence of negotiations or absence of protests, the **true enquiry is whether there was a free choice in agreeing to the exception clause concerned.** ([Kenwell](#), cf [Overseas-Chinese Banking Corporation](#))
- 3) **Availability of alternative** makes it reasonable, but lack of reasonable alternative does not inevitably result in a finding of unreasonableness ([Tjoa Elis v UOB](#) – absence of choice, an industry-wide practice i.e. banking, does not make the exception clause unreasonable)
- 4) **Public policy considerations** ([Jiang Ou](#) – clause which expressly excludes liability for fraud would have negative impact on public confidence and trust in modern banking system)

Consumer Protection (Fair Trading Act)

Under s 4 of CPA, it is unfair practice for a supplier, in relation to a consumer transaction, to **1) contribute to fraud or misrepresentation, 2) make a false claim, or 3) take advantage of a consumer** if supplier knows or ought to know that consumer is (a) not in a position to protect his own interests or (b) unable to reasonably understand character of transaction.

Remedies available to consumers who are victims of unfair practices include civil remedies against supplier concerned.

Frustration

Modern test for frustration

Complete definition

Frustration of a contract takes place when there **supervenes an event** (without default of either party and for which the contract makes no sufficient provision), **which so significantly changes the nature** (not merely the expense or onerousness) **of the outstanding contractual rights and obligations** from what the parties could reasonably have contemplated at the time of its execution that it would be **unjust to hold them** to the literal sense of its stipulations in the new circumstances; in such a case, the law declares both parties to be discharged from further performance (**Lord Simon** in **National Carriers**, a restatement of the **Davis Contractors** principle).

Abbreviated definition

Change in circumstances, without default of either party, such that contractual performance is now radically different from the obligations originally undertaken will frustrate a contract (**Davis Contractors**; affirmed in Singapore in **Adani Wilmar**).

What constitutes frustration?

A. Supervening illegality

A contract made illegal due to occurrence of events after formation of contract, also known as **supervening illegality**, **can be frustrated** (**Fibrosa** – English company selling machinery to Polish company – but Poland got occupied by Germany – illegality in trading with enemy in times of war – public policy).

B. Supervening impossibility

Where there is physical impossibility in performance of contractual obligation i.e. **supervening impossibility**, such as **destruction of subject matter** (**Taylor v Caldwell** – **music hall destroyed by fire** – contract was subject to implied term to provide that parties shall be excused from contractual obligations in the event where performance becomes impossible from perishing of essential item without default of contractor | **Kong Swee Eng** – **insolvency of company** does not frustrate agreements for sale and purchase of shares in the company – no intervening event or change of circumstances which were so fundamental as to strike at the root of the agreement for the sale of the shares) or **death or incapacity for personal service** (**Notcutt v Universal Equipment Co** – skilled machinist under contractual employment suffered heart attack and was incapable of working – held that contract was frustrated – if it weren't frustrated, employer would have a right to terminate contract which would in turn affect the compensation due), courts are **likely to hold that frustration occurred**.

C. Frustration of purpose/adventure

Non-occurrence of a particular event which lies at the foundation of the agreement will frustrate the contract (**Krell v Henry** – Df hired flat to watch coronation procession – contract contained **no express reference** to procession – king fell ill – frustration was deemed to have happened – common purpose of both parties – provision of room with a view of coronation was crucial point “as much for lessor as hirer” | **Herne Bay Steamboat Co** – Df chartered vessel for **express purpose** of taking passengers to see coronation – review cancelled – no frustration – **distinguished from Krell because only one party's purpose (defendant's) was frustrated** and that tour of fleet was still possible). **Taxi analogy**: hiring a taxi to take one to Marina for F1. Purpose of watching F1 was hirer's alone. Taxi is not

specialy qualified than another; neither will cancellation of F1 make any difference to the taxi driver, thus Df's own venture was at his own risk.

The effect of an extraneous event which frustrates the essential purpose or subject matter of a contract will frustrate the entire contract. In Jackson v Union Marine Insurance, Df insurance company was not liable for loss of freight by Pf's ship because the **physical unavailability of the ship for the contracted voyage** frustrated the contract between Pf and charterers, who were not reasonably expected to wait for Pf's ship to be repaired.

If the extraneous event only frustrates the private purpose of one party, leaving the essential purpose of the contract still attainable, contract is not frustrated (Amalgamated Investment – Pf was sold property from Df – after sale, building listed as historic interest, so no redevelopment – held that there was **no frustration**).

D. Radically different obligation

Change in circumstances, without default of either party, such that contractual performance is now radically different from the obligations originally undertaken will frustrate a contract (Davis Contractors – Df contracted to build houses but due to unexpected shortage of skilled labour and materials, it took 22 months instead of 8, and cost exceeded fix sum – held that **hardship or inconvenience or material loss could not invoke doctrine of frustration** | Shenyin Wangou – implementation of control measures caused eradication of the entire offshore market, thus rendering performance impossible – frustration was invoked – **Alexander Loke argued against using frustration as an alternate method of performance was available – should use implied term method to defeat the contract instead**).

What does not constitute frustration?

A. Increased cost of performance

Davis Contractors – **hardship** (labour and materials shortage) and **change in profitability**
Glahe – **change in profitability** of contract (200% tax on computer imports) and increased burden
MP-Bilt – **hardship** (impracticality in personal financial position), one-party frustration
Staffordshire – **inflation** (20x) or **deflation** | but courts used an interesting way of coping with astronomical increase in costs by inferring **power to terminate** based on purposive approach of interpreting agreement

This is a classic example of how frustration is hard to invoke because courts do not want to allow escape from bad bargains easily (Davis Contractors – not frustrated – see above; Glahe – Pf contracted to buy computers – contract became unprofitable because of 200% tax on computer imports – not frustrated – **mere change in the profitability of a contract or increase in burden upon a party is not enough** to discharge Pf from performance of contract; MP-Bilt – Pf developer requested for 10% of purchaser price as next instalment – Df alleged frustration because of personal losses – impracticality in financial position **only frustrated purpose of one party** | Staffordshire – cost of supplying water **20 times** the contract price – effects of **inflation or deflation** were not sufficient to frustrate).

B. Failure of original method or particular source

General

Where the 1) method of performance/source of good is not stated in the contract and an 2) alternate method of performance/source is available and becomes necessary due to impossibility of original method due to extraneous

events, contract is not frustrated (*Tsakiroglou* – method of performance – Df contracted to sell groundnuts – but Suez Canal closed – alternative journey possible, **albeit more than twice longer** – contract was not frustrated; *Blackburn Bobbin* – Pf contracted to buy Finland birch timber from Df – outbreak of war cut off source of supply from Finland – no frustration).

Analysis

If goods had been perishable or if a definite date had been fixed for delivery, contract in *Tsakiroglou* might have been frustrated by necessity for longer Cape route. Likewise in *Blackburn Bobbin*, to free Df from liability, it would have to be shown that the continuance of normal mode of shipping from Finland was contemplated by both parties as necessary for fulfilment of contract.

Limitations to frustration

A. Self-induced frustration

When **non-performance is attributable to a conscious election made by either party** then frustration cannot be pleaded (*Maritime National Fish* – Df applied for licenses for 5 trawlers, granted 3 – did not use it for Pf's chartered trawler – contract not frustrated; *The Super Servant Two* – Pf contracted for Df to transport drilling rig – Df planned to transport rig on Super Servant Two – ship sank – no frustration because of element of choice).

The Super Servant Two

1. Elements
 - a. Even where the party claiming frustration practically has no real choice, as long as there was an element of choice, frustration would be seen as self-induced because of the conscious election/choice of Df. Df takes risk of entering multiple contracts with finite resources
 - b. Df argued that even if sinking of SS2 was due to their own negligence, it was not deliberately caused. But frustration can only be invoked without default of either party
2. Criticisms
 - a. The rule of frustration, though automatic, is not an absolute one. Df's election was only as to which contract it was going to perform
 - b. Promisor who wishes protection in the case of a partial failure of supply must include such a clause, for common law offers no protection
 - c. Fairness to WBV? (What is Treitel's criticism) vs business risk voluntarily assumed

B. Foreseeability

Foreseeability is relevant to the question of whether or not a party has assumed the risk of the occurrence of the event and must be to a **high degree** in order to oust frustration (*The Eugenia* – **both parties realised there was danger of Suez closing, but no agreement** – ship was trapped in Suez when it closed – no frustration – ship could have travelled around the Cape, goods not perishable – **Treitel saw the risk of closure as being allocated to and assumed by charters** | *Lim Kim Som* – **compulsory acquisition not foreseen**, thus contract frustrated | cf *Walton Harvey* – Df lessees of hotel **knew that there was a risk of compulsory acquisition** but Pf advertising firm did not – should have provided for it in contract but did not – no frustration | *HDB v Microform Precision* – Df tenant **falsely represented** that MINDEF approved of road usage when they had not sought permission – taken to assume risk that approval may not be granted – no frustration).

C. Contractual provision (e.g. force majeure clauses)

General

Where parties have made provisions, allocated risks or provided relief for the possibility of a supervening event, doctrine of frustration generally cannot be invoked. There is a presumption that force majeure clauses are restricted to supervening external events which occur without default of either party and for which neither has undertaken responsibility for, but this **must still be subjected to construction (RDC Concrete)**.

Metropolitan Water Board (Provision that any delays and impediments in completion of contract will permit a time extension in the completion of project – construction of clause + frustration of essential object = although there was a force majeure clause, a prolonged war was construed as falling outside of scope of clause = **frustration**)

Holcim v Kwan Yong (Supplier of sand shall be in no obligation to provide sand if supply of sand is disrupted by any other factors arising through circumstances beyond the control of the Supplier – held that sand ban of Indonesia resulting in sand being scarce through no fault on its own constituted an event that was “beyond the control of the supplier” – **well drafted force majeure clause**)

RDC Concrete (shortage of aggregate merely made it more expensive and costly to perform contract + plant breakdowns were neither unforeseen nor beyond supplier’s control (supplier even had opportunity to avoid plant breakdown) = both **failed to constitute force majeure**)

Evaluation of force majeure clause

1. A well-drafted clause can exclude the operation of frustration or provide relief in circumstances that do not qualify under frustration (Treitel).
2. It is more flexible than frustration as it allows for choice of relief or allocation of obligations whereas frustration means automatic discharge, with losses subject to FCA
3. It avoids the draconian effects of frustration
 - a. Parties may choose not to terminate the contract automatically
 - b. It minimises uncertainty by clearly defining the circumstances and situations in which the force majeure clause applies
 - c. It minimises hardship by providing nuanced response
4. Comparison between force majeure and frustration
 - a. Both involve rule of construction although one is specific to clause and one is applied to contract as a whole
 - b. Force majeure general caters for defined, foreseeable type of situations (strikes, war, riot etc) or acts beyond the control of party relying on it (acts of God)
 - c. Frustration requires a higher threshold to be met: requirement of radically different performance or frustration to essential purpose of a contract, supervening event must be beyond control of both parties, usually unforeseeable

Effects of frustration

1. Common law

Generally, the features of discharge under frustration are 1) automatic, 2) prospective discharge or 3) from the point of frustrating event.

Under common law, [Chandler v Webster](#) (Pf hired room – paid 100/141 – procession cancelled – had to pay remaining 41) **held that accrued obligations remain enforceable**. Result appears unfair to the payor and goes against purpose of frustration in seeking to allocate losses fairly upon occurrence of supervening event without fault of either party. The [House of Lords](#) in [Fibrosa](#) subsequently overruled [Chandler](#), where the Court **allowed recovery of sums paid based on doctrine of total failure of consideration** (restitution).

While [Fibrosa](#) **showed an improvement** from [Chandler](#) in that money paid before frustrating event could be recovered provided that there is total failure of consideration, the underlying problem of the [Fibrosa](#) principle is that the **all or nothing approach results in one party shouldering the full extent of loss: for the payor**, partial or even trivial performance would result in no total failure of consideration and thus no recovery at all; **for the payee**, no deduction of expenses incurred in performing the contract is allowed. It also **does not protect party who provides service or confers benefit which are non-monetary in nature**.

2. Statutory reform

Common law lays down rules as to **when a contract is frustrated**. [Frustrated Contracts Act](#) works only after a contract is deemed frustrated to try and **apportion losses between parties**.

s 2(2) of FCA

Sums paid are recoverable

Sums payable cease to be payable

Expenses incurred are recoverable, capped at amount of deposit, based on what the court feels is “just” as per [BP](#)

S 2(3) of FCA – main aim is to prevent unjust enrichment and not apportion losses

Where a valuable benefit has been obtained, a “just sum” is recoverable as per [BP Exploration](#) - basic measure of recovery provided it is less than the upper limit of the benefit

Benefit to be identified **as the end product** or the **enhancement of Df's position** instead of services rendered (stricter interpretation as per [BP](#)). So even if you had conferred valuable benefit but looking at the end result, there was no enhancement of Df's position, then there would be no recourse for you.

Breach of contract

Generally, a breach of contract is committed when a party, without lawful excuse, **fails or refuses to perform** what is due from him under a contract, **performs defectively** or **incapacitates himself** from performing ([Treitel](#)).

1. Consequences of breach

Aggrieved party has an **absolute right to damages** – damages will always be awarded even if there is no loss (in which case nominal damages will be awarded). **Not every breach will allow aggrieved party to terminate the contract.**

In [Photo Production](#), [Lord Diplock](#) stated that **primary obligations** are **what each party has to do** under the contract, and that non-performance is a breach of the contract. **Secondary obligations** arise from a breach of the primary obligations, referring to **payment of damages in compensation upon failure to perform primary obligation**. They can be further subdivided into **general** (for breaches occurring before termination) and **anticipatory** (for non-performance of remainder of contract).

2. Claims by defaulting party

- 1) **Entire obligations:** A party **must perform all his obligations** completely before claiming payment or performance from the other party. Consideration is one and entire. ([Cutter v Powell](#) – must **complete entire voyage** before payment)
- 2) **Divisible contracts:** The contract can be **resolved into a number of obligations/considerations** for rights to several promises e.g. instalments, and thus payment can be given for distinct obligations being completed or performed. ([Taylor v Laird](#) – **time-divisible obligation**; [Tong Aik \(Far East\)](#) – held that Pf must be **paid for ore produced and delivered to Df** less damages for Pf's breach in failing to meet stipulated amount)
- 3) **Substantial performance:** The defaulting party may **recover the agreed sum less damages for loss suffered** as a result of breach if he **performs his contractual obligations substantially** ([Building & Estates v A M Connor](#)).

A court will generally hold a contract to have been substantially performed **if cost of remedying defects is not too great an amount in comparison with contract price** ([Hoenig v Isaacs](#) – contract to decorate and furnish flat – work completed but for minor defects – **CoR 7.3%**).

However, performance is not considered substantial if it is **unfit for intended purpose** ([Bolton v Mahadeva](#) – heating system which worked ineffectively – not entitled to payment because defect had gone to root of contract – **CoR 31%**).

- 4) **Restitutionary claim in quantum meruit:** **Failure to perform a contract substantially and being unable to claim payment** under a contract may allow for a quantum meruit claim. This refers to a **reasonable sum of money** to be paid for service rendered or work done, when amount due is not determined by contract. For quantum meruit to succeed, other party must **1) accept the benefit of work** and **2) have the option to accept or refuse the partial performance**. ([Sumpter v Hedges](#) – Pf contracted to build houses on Df's land – failed to complete contract, Df completed it himself using materials Pf left – sued to recover value of work done before

abandonment and value of building materials – held that only value of building materials recoverable because Df had choice to accept benefit and was thus unjustly enriched)

3. Aggrieved party's right to terminate (RDC Concrete Approach)

The Court in RDC Concrete has set out an approach outlining the various situations entitling an innocent party to terminate the contract in Singapore.

Situation 1: Express “termination” clauses

General

Where a contract clearly and unambiguously provided for the events pursuant to which a party was entitled to terminate the contract, the innocent party might elect to do so ([Chua Chian Ya](#) – Clause 12 (Suspension & Termination); [Rice v Great Yarmouth Borough Council](#) – Clause 23 (Termination) – “**last straw approach**” – contract to last for four years, Court suggested that it was relevant to look at performance over a full year – previous breaches not considered sufficiently serious; [Fu Yuan Foodstuff](#) – Clause 3.2 – **unlike approach adopted in Rice**, **Court gave full effect to termination clause** concerned as it reflected the parties’ intentions.

Loss of bargain damages

If right to termination is based solely on contractual provision, only damages in respect of **loss it suffered at or before date of termination** ([Tan Wee Fong](#); [Financings](#)). Damages for **loss of bargain or losses arising after contract’s termination** may be recoverable only if there is a concurrent repudiatory breach under common law ([Max Media](#); [Lombard](#)).

Parties are free to classify as a condition a term which would normally not be considered a condition in common law e.g. using words like “of the essence” as per [Lombard](#) (cf [Financings](#)). In [Man Financial](#), the Singapore courts have also acknowledged that parties’ intention should be given effect to.

Situation 2: Anticipatory/repudiatory breach

General

Renunciation occurs when one party **by words or conduct** evinces an intention not to perform part or all of the contract. Renunciation **at or after time of performance** amounts to actual breach or impossibility. Renunciation **before the time fixed for performance** is itself a breach (anticipatory breach), and if **sufficiently serious**, entitles the aggrieved party to terminate the contract at once and claim damages for loss of contract ([Chen-Wishart](#) 514).

A) Obligor announces in advance that he will not be performing

Renunciation occurs when one party, by words or conduct, evinces an intention not to perform part or all of the contract ([Hochster](#) – Df contracted for Pf to be employed as courier starting at a future date – but later informed Pf that he changed his mind – held that for anticipatory repudiation, Pf has a right to either wait for actual breach or terminate at once and sue for damages; [San International](#) – renunciation of some but not all of obligations under a contract will not entitle innocent party to rescind contract unless renunciation amounts to a breach of condition or deprives him of substantially the whole benefit under contract; [Chua Chay Lee](#) –

liquidated damages clause showed that delay in completion of flats had been considered and provided for, thus did not go to the root of contract).

B) Obligor incapacitates himself from performing

Where defaulting party incapacitates himself from performing his contractual obligations, such as in [Bowdell v Parsons](#) where [Df sold the hay to third parties](#) or in [United Cargo Carriers](#) where Pf [did not do any of his duties three days before due date](#), this constitutes an anticipatory repudiation.

C) Obligor performs in a manner inconsistent with his contractual obligations

Where the defaulting party asserts an interpretation of his contractual obligations which [is inconsistent with his actual contractual obligations, this does not ordinarily constitute a repudiation](#) ([Vaswani](#) – **bona fide erroneous belief not determinative of repudiation** – buyer placed in a difficult position when threatened with non-performance by seller driven by erroneous grounds but on good faith – he must apparently tender sum which he believes is the sum due and persuade court that seller is repudiating contract when he refuses to accept).

Where defaulting party's interpretation of his contractual obligations has such [serious consequences](#) that justify termination of contract, this would constitute a repudiation ([The Nanfri](#) – charterers fail to make payments – owners refused to allow use of ship unless full payment is made **and threatened to issue "claused" bills of lading instead of bills with "freight pre-paid"** – innominate term that is deemed to substantially deprive charters of whole benefit).

[Intention is usually irrelevant in establishing breach of contract](#) (strict liability). However, courts seem to be slow in recognising a repudiatory breach in some cases. The [Vaswani](#) holding could possibly be reconciled with that of [The Nanfri](#) by making the distinction that a renunciation before the time of performance, i.e. **anticipatory breach**, may consider bona fide belief whereas a renunciation at the time of performance will not provide leeway for inconsistent performance, i.e. **actual breach**.

Situation 3a: Condition-warranty approach

Certain factors are relevant in ascertaining whether or not a given contractual term is a condition. At bottom, the focus is on [ascertaining the intention of the contracting parties themselves](#) by construing the actual contract itself in the light of the surrounding circumstances as a whole ([Bowen LJ in Bentson v Taylor](#)).

A) Statute

Where a [statute](#) classifies a specific contractual term as a "condition", then the term will be a condition. Conditions implied into sale of goods contracts by SGA are:

- Section 12(1): Seller's **right to sell**
- Section 13(1): Goods will **correspond with description**
- Section 14(2): Goods are of **satisfactory quality**
- Section 14(3): Goods **reasonably fit for buyer's** particular, disclosed, purpose
- Section 15(2): Bulk of goods with **correspond with sample in quality**
- Section 15A: Where breach is [1\) so slight that it would be unreasonable](#) for buyer to reject them AND where [2\) buyer deals as a business purchaser](#), breach will not be treated as a breach of condition but

rather a **breach of warranty** → thus, if **buyer is consumer**, can still rely on **Arcos** (1/16 of an inch out) and **Re Moore** (24 tins as opposed to 30 tins) to reject goods

B) Express statement that a term is a condition

Where the contractual term itself **expressly states that it is a “condition”**, then the term would generally be held by court to be a condition. However, in **Schuler**, although the word “condition” was expressly utilised, the courts held that the word was not used as a legal term but rather as a **layman phrase**. This approach has been respectfully dismissed in **Man Financial**, where the courts held that **intention of the parties ought to take precedence**.

C) Judicial precedent

Weak factor. In **The Mihalis Angelos**, the court held that an “expected readiness” clause was a condition on the ground that the same conclusion had been reached in its previous decision. In Singapore, the courts believe that while reliance on a prior precedent is convenient when viewed from a practical perspective, it **does not really address the issue of principle**.

D) Mercantile transactions

Time is of the essence (**The Bunge**; **Mihalis Angelos**).

Situation 3b: Innominate term approach

Breach of an innominate term does not automatically give an aggrieved party the right to terminate; whether such right arises **depends on the seriousness of the consequences**. In short, where an innominate term has been breached, aggrieved party has a right to terminate only if such breach deprives aggrieved party of “**substantially the whole benefit**” (**Hong Kong Fir, Diplock LJ**).

Hong Kong Fir – ‘**seaworthiness**’ is an innominate term which could have been breached in various way – ‘seaworthiness’ **did not go to the “root of the contract”**

The Hansa Nord – “**shipment to be made in good condition**” – citrus pellets damaged by overheating – SGA not breached because goods were still of merchantable quality (different from Singapore SGA) – re-purchased by buyers for the same purpose that it was intended for – **no anticipatory breach**

The Nanfri – “**claused” bills of lading instead of bills with “freight pre-paid**” – innominate term – renunciation **going to “root of contract”, depriving charterers of substantially the whole benefit**

Affirmed in Singapore in **Alliance Concrete** and **Cousins Scott Willian**.

4. Aggrieved party’s election to terminate

General

Even where innocent party has a right to terminate the contract because of a breach by the defaulting party, contract does not come to an end automatically. Innocent party may elect to **1) terminate the contract** and treat it as discharged for breach, to be communicated in a **clear and unequivocal manner** (**Vitol SA**) or **2) affirm the contract** and treat it as still in existence (**Hartley v Hymans** – affirmation by reminder letters). It appears that there might be yet a third

option of choosing to 3) “wait and see”, where the aggrieved party has a reasonable period of time in which to decide whether to terminate or affirm (Stoczna).

Termination

Termination is prospective in nature (Photo Production) and not retrospective – certain vested rights may remain such as arbitration clauses (Heyman v Darwins) or confidentiality clauses (Campbell v Frisbee) while future obligations to perform are discharged. Once a contract has been terminated by aggrieved party’s election, it cannot be revived even by the parties’ agreement. Instead a fresh agreement may constitute a new contract (Orix Capital).

What about The Kanchengjunga?

Affirmation

There may be an exception to the rule that an election to affirm, once exercised, is irrevocable. In cases of **continuing repudiatory conduct** by defaulting party, the aggrieved party who has elected to affirm the contract after the first breach may be able to treat the continuing non-performance as a fresh act of repudiation (Johnson v Agnew), and thus is allowed to terminate a contract, notwithstanding earlier affirmation.

If innocent party affirms the contract, he must be ready to perform his contractual obligations (Fercometal).

“Wait and see”

In electing to “wait and see”, aggrieved party **runs the risk of the following scenarios**:

- 1) risk of the law treating him as having affirmed if he waits too long;
- 2) risk of another event occurring which prejudices his rights e.g. **frustration** or **even his own breach**; or
- 3) risk of party in repudiation resuming performance of contract, thus **ending his right to election**.

In *Allen v Robles*, insurers had lost their right to election after failure to affirm or terminate policy after 4 months and were thus required to indemnify breaching party fully instead of just against personal injuries (and not property damage).

Exceptions

1. Where both parties are in breach, the principle is that a **breach of a conditional precedent cannot be relied upon for repudiation** (Alliance Concrete Singapore; Jet Holding; Lidl).
2. Where breaching party is persistently late in payment for goods received, aggrieved party has no right to terminate as time for payment is not a condition, nor is it serious enough to go to the root of the contract (Decro-Wall International).
3. Where 1) innocent party can complete contract unilaterally and 2) has legitimate interest in performance of contract, duty to mitigate does not apply to aggrieved party’s right to terminate contract (White and Carter v McGregor).
 - a. Affirmed in *MP-Bilt*
 - b. Criticism: by allowing advertiser to insist upon performance is allowing him to do something that Df no longer wants, resulting in **wastage**.
 - c. Risk: Entire contract must be **indisible**

Remedies

The object of contract damages is to **put the parties into the position they would have been in had the contract been fully performed, as far as money can do**. This approach is to be found in *Robinson v Harman* and has been affirmed by the Court of Appeal of Singapore in *Gunac Enterprises*. The claimant is therefore allowed to recover compensation for benefits that would have flowed from the contract. This is referred to as allowing the claimant to recover the **‘expectation’ interest**. In some situations, however, damages based on expenditure (**the ‘reliance’ interest**) or recovery of property transferred (**‘restitution’**) may be used.

Damages

On performance interest

Generally, it will suffice to award damages based on expectation interest because most contracts are **profit-based**. But in the modern world, parties frequently enter into contracts for reasons other than to make a profit e.g. enhance **leisure time** (repair roof, build swimming pool) or to **provide services to third parties** (fire service). Recognition of ‘consumer surplus’ in *Ruxley* is an open acknowledgement of the need for a broader perspective which takes account of the wide range of purposes which contracting parties have in mind when entering into contracts. But 1) **commitment of law** to protection of claimant’s interest in performance (seen as not receiving bargain Pf had contracted for) is rather weak and 2) specific performance is traditionally seen as **secondary remedy** and there is often greater reluctance to compel specific performance.

Expectation measure

1) Cost of cure, diminution in value (+ loss of amenity)

Two possible measures could put the claimant in the position which he would have been in had the contract been performed according to its terms. The first is the **diminution in value**, which is the difference in value between what the claimant has received and what he expected to receive (*Raffles Town Club v Tan Chin Siong*), and the second is **cost of cure**, which is the cost of putting the claimant into the position which he would have been in had the contract been fully performed (*Ruxley*; *Farley v Skinner*; *Yap Book Keng Sonny*).

On adequacy of damages, diminution in value may at times be zero or minimal (e.g. small building works performed on residential property) while cost of cure might not accurately reflect the loss which the innocent party had suffered either. To the argument that there were only two measures of damages, *Lord Mustill in Ruxley* replied that there was only one, namely **“the loss truly suffered by the promisee”**. Sometimes, this loss can be reflected in terms of losses of amenity (if it is non-pecuniary).

On choosing which approach to award damages under, factors relevant are **1) reasonableness** and **2) ‘common sense’**. In *Ruxley*, cost of cure was disproportionate (cost of carrying it out disproportionate to benefit Pf would have received). However, it is possible if there were **considerable benefit** as per *Lord Jauncey*, who stated that, “if a building is constructed so defectively that it is of *no use for its designed purpose* the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing”. What if cost of cure had been lower? Would it be **‘out of proportion’** to the benefit to be obtained by Df? Proportion to be measured is with reference to diminution in value together with loss of amenity because courts endeavor to measure loss innocent party has suffered. So if it is not out of proportion, cost of cure is possible.

On role of intention in assessment of damages: only relevant if intent is negative, but that doesn't mean an action can arise just because intent is positive. Seen as factor to be weighed, along with other factors such as test of reasonableness (**control device**, thus arguably HL has created a flexible framework to ensure fair outcome)

2) *Non-pecuniary losses*

Non-pecuniary losses bring out the idea of performance interest because it goes beyond the financial into the mental. Damages for mental distress caused by breach of contract are generally non-recoverable (*Addis v Gramophone* – dismissed without requisite 6-month notice, affirmed in *Arul Chandran* – vice president wrongfully dismissed) because 1) it is speculative, 2) subject of frivolous claims, 3) not directly related to economic effect of breach, and 4) not within reasonable contemplation of party in breach (esp in commercial contracts where contract breaking is to be treated as incident of commercial life). However, this is subject to certain exceptions. Such damages were first allowed where purpose of contract is to provide enjoyment or peace of mind, or to prevent distress (*Jarvis v Swan Tours* - holiday). The exception was subsequently widened in *Ruxley* where the concept of 'consumer surplus', defined by Lord Mustil in *Ruxley* to represent "a personal, subjective and non-monetary gain", is recognized. Rule was further relaxed in *Farley v Skinner* (quiet country residence) such that it suffices that provision of pleasurable amenity is an important object of contract (previously it had to be main object). This was followed in the Singapore case of *Kay Swee Pin v SICC* (wrongful suspension of membership) where loss of mental enjoyment and mental distress was claimable and that courts awarded \$40,000 for it, which is more than the \$32,000 awarded for deprivation of physical enjoyment and deprivation of membership rights and privileges.

3) *Time for assessing loss (can be seen as a factor in limiting damages)*

Damages are generally assessed at the date of breach, but court power to fix such other date as may be appropriate in the circumstances if it would give rise to injustice (*Johnson v Agnew*). These exceptions include: 1) where breach was not discoverable till later (*The Hansa Nord* – citrus pellets overheating, finding out only at time of delivery), and 2) where there is injustice (*The Golden Victory* – where allowing owners to seek damages beyond Gulf War would award them with compensation exceeding the value of contracting benefit that they were deprived of). In *The Golden Victory*, the **minority** judgements argued that this would lead to **uncertainty** (incentive to lengthen litigation process to see if any risk will actualize) but **majority** reasoned that **certainty is merely a desirable outcome and not a principle of law**, unlike the compensatory principle.

Reliance measure

Reliance loss refers to **expenses incurred in preparing to perform or in part performance of the contract**, which in the circumstances have been rendered useless by breach (puts you back to neutral position). It is arguable that reliance measure protects **performance interest** as it is the next best thing when loss cannot be proved or is too speculative. Principal situations in which a claim for reliance losses may be attempted: 1) claim for pre-contractual expenditure (*Anglia Television v Reed* – play lead role in television play; *Van Der Horst Engineering* – disputes arose out of SOA); 2) where loss of profit is speculative or where value of lost bargain cannot be accurately ascertained (*McRae* – oil tanker on Jourmaund Reef, expectation too speculative to be ascertained; cf *Chaplin*, where there was attempted valuation to loss of chance; *CCC (London) Films* applied); and 3) where innocent party has entered into a bad bargain (*C&P* – fixture installed would become part of property; Df has to prove bad bargain). With regards to election between expectation loss and reliance loss, the general rule is that there is **unfettered choice** (don't have to justify), with the exception of Pf trying to escape **bad bargains**.

Loss of chance

Loss of chance is generally recoverable as long as chance of gain is real and substantial and not speculative. The gain itself **need not be proven on a balance of probabilities** (Chaplin - candidate in theatre competition, mistake by organisers). This has been affirmed in Singapore in the case of *Asia Hotel Investments*. However, strong dissent from *Yong CJ* who cited *Allied Maples* and stated that where chance of gain is contingent on third party's hypothetical actions, then Pf must first prove on balance that he would have taken steps to put himself on course for the chance of gain.

Factors limiting damages

1. Proof of loss

It must be shown that there is a factual link between contractual breach and loss (*Robertson Quay* – delay in construction project resulting in additional interest incurred on loan).

2. Remoteness

The starting point for remoteness in contract is set out in the landmark case of *Hadley v Baxendale*, where the courts held that 1) losses arising in the “usual course of things” from the breach, or those that were in the 2) “reasonable contemplation” of the parties at the time of the contract as the probable result of the breach, are recoverable. The rule was subsequently applied in *Victoria Laundry*, where business losses arising in the “usual course of things” were recoverable but not those relating to the ministry contracts.

The Heron II highlighted the 1) difference between remoteness of damages in torts and contract – while foreseeability remains the underlying principle for both, **contract requires contemplation**, which is a higher standard of foreseeability. The reason is that in contracts there is **freedom to allocate risk** and, therefore, it is up to the defendant who knows about the risk to insert exclusion/limitation clause or increase contractual price to protect himself. It was also held that if 2) type of damage is reasonably contemplated by the parties, extent of damage is immaterial.

In Singapore, the courts in *Robertson Quay* affirmed the *Hadley v Baxendale* principles (imputed knowledge – natural loss; actual knowledge – non-natural loss, special circumstances, communicated at time of formation).

3. Mitigation

Mitigation is the rule that prevents a claimant from simply allowing losses to accumulate when action could have been taken to limit them (*British Westinghouse*). If a party in breach makes a reasonable offer of substitute performance, this should normally be accepted (*Payzu v Saunders*). However, **duty to mitigate does not apply** where innocent party has the option to terminate the contract on anticipatory breach (*White and Carter v McGregor*; affirmed in Singapore in *MP-Bilt*). Lord Reid in *White and Carter* also mentioned that performance should only be continued if there is a legitimate interest. An example of legitimate interest is when the contract is part of a chain of contracts (also arguable that because it is a part of a chain of contracts, may have to terminate and get another source asap) (*MP-Bilt*).

4. Contributory negligence

Damages may be reduced if there was contributory negligence on the innocent party's party under s 3(1) of [Contributory Negligence and Personal Injuries Act](#). [Forsikringsaktieselskapet Vesto v Butcher](#) as well as the Singapore cases of [Fong Maun Yee](#) and [Jet Holding](#) have held that contributory negligence can only be invoked [where concurrent duties in tort and in contract exist](#).

5. Liquidated damages

Nature of liquidated damages is to [protect the innocent party](#). Don't confuse it with exception clauses.

Liquidated damages clauses fix the amount to be paid on a breach of contract, representing a [genuine pre-estimate of the loss](#) that would occur upon such breach ([Dunlop Pneumatic Tyre](#)). Penalty clauses provide for payment of a sum of money stipulated *in terrorem* of the offending party to force him to perform the contract. Liquidated damages clause is [unenforceable if it is penal in nature](#). [Lord Dunedin's 4 rules of construction of penalty clauses](#) in [Dunlop](#) is instructive: 1) sum stipulated for is [extravagant and unconscionable](#) in amount in comparison with the greatest loss resulting from breach that could be proven; 2) sum stipulated is a [sum greater](#) than the sum which ought to have been paid; and 3) [single lump sum](#) for all occasions even when consequences may vacillate between serious and trifle; but 4) [impossibility](#) of precise pre-estimation of damage does not automatically classify it as a penalty.

The Dunlop rule was applied in [Philips Hong Kong v AG of Hong Kong](#), where the court held that the LD clause was enforceable and not penal because a [sensible and objectively reasonable approach](#) was used to ascertain loss that was impossible to calculate (formula). It was also held that where [commercial parties](#) are concerned, the threshold would be raised higher when showing that there was **asymmetrical bargaining power** and **extravagant terms**. Both points were affirmed in the Singapore case of [CLAAS Medical Centre v Ng Boon Ching](#). In another Singapore case, [Hong Leong Finance](#), however, the LD clause was extravagant and unconscionable (6% - 18%, hawker stores) and was thus considered a penalty clause, which made it unenforceable.

Liquidated damages may possibly satisfy [performance interest](#) of the innocent party as it allows for innocent party to be satisfied on his own determination of loss.

? Assumption of responsibility

[Lord Hoffman](#) in [The Archilleas](#) considered assumption of responsibility as an additional test to remoteness. This has since been **unequivocally rejected** by [Singapore Court of Appeal](#) in [MFM Restaurants v Fish & Co Restaurants](#), which held that 1) the existing approach under [Hadley](#) [already embodies concept of assumption of responsibility](#) and that 2) the [same result](#) in [The Archilleas](#) can be arrived at using [Hadley](#) principle. Additionally, it was [not the ratio decidendi](#) of [The Archilleas](#) and that introducing additional tests will only result in [greater uncertainty in litigation](#).

Specific remedies

Damages must be shown to be an inadequate remedy before specific performance will be considered. It is [not a common law right](#) like damages and thus it is often considered a "[secondary remedy](#)".

A) Action for an agreed sum

Claim for an agreed sum is for the contract sum or payment of a debt, and not a claim for damages for breach of contract. Need not be shown to be a genuine pre-estimate of victim's losses and will be upheld as parties chose to allocate risks they foresaw. Rules of remoteness and mitigation are also irrelevant. In *White*, Df were made to pay for advertisement services even though they did not want it. Likewise in *Stansfield*, contractual term required student to pay amount of school fee even though he decided not to complete the course.

B) Specific performance

Specific performance is a **discretionary, equitable remedy** which is not available as of right, but granted at the court's discretion. It is often considered a **secondary remedy** and courts are reluctant to grant it. **Bars to specific performance** are 1) undue hardship (*Patel v Ali* – contracted to sell house – after which, husband went to prison, she bore two children and leg got amputated because of cancer – friends living in area helped her out with day to day chores – illustrates discretionary nature of remedy in order to achieve justice even where specific performance is a usual remedy for sale of immovable property); 2) constant supervision (*Argyll Stores* – settled practice of court in not granting specific performance of maintaining a business – commercial nature of contract would impose unnecessary burden on Df in running of business); 3) contracts for personal services; and 4) unclean hands.

C) Injunction

Courts are generally unwilling to grant mandatory injunctions as it involve a positive act. They are more willing to grant prohibitory injunctions (*Warner Bros Pictures; Tullet Prebon* – interlocutory injunctions granted to prevent employee from tendering resignation till end of proceedings – final prohibitive injunction awarded to restrain employee from working for any other employer).

D) Deposits

Deposit is a sum of money paid to guarantee performance. This is distinguished from **advance payment**, which is merely payment of part of the price (*Dies v British*).

In general, a contractual provision which requires one party, in the event of his breach, **to pay or forfeit a sum of money to the other party is unlawful as being a penalty**, unless such provision can be justified as being a payment of liquidated damages, being a genuine pre-estimate of loss innocent party would incur upon breach. Special treatment afforded to deposits for land, **customarily at 10%** as a form of earnest money (*Workers Trust* – **25% not considered deposit but penalty** – have to return all).

In *Tan Wee Fong*, the Court held that it is still an open question whether relief from forfeiture might be granted in contracts unconnected with any interest in land in Singapore. Earlier decisions have not been consistent, and caution is understandable given the uncertainty in the scope of equity's power to grant relief and the need to observe contractual sanctity and certainty in business.

Restitutionary Remedies

Aim of restitutionary remedies is not to compensate claimant for losses but rather to deprive plaintiff of gains he has made from breach of contract (*Friis v Casetech Trading*). It is generally claimable where 1) victim has supplied goods or rendered services to defendant and defendant voluntarily accepts (*Sumpter v Hedges* – incomplete building with

materials left on site) or where 2) there is a total failure of consideration (Fibrosa). It becomes more complex when it deals with the 3) situation where defendant has committed a wrong in breaching the contract and made profits from such conduct.

In Wrotham Park, policy considerations of avoiding wanton wastages and shortage of housing led to the awarding of **restitutionary damages** (5% of profits). This is distinguished from AG v Blake where an **account of profits** (disgorgement of profit) is awarded instead. However, the situation has to be **sufficiently exceptional**, governed by several guidelines: 1) damages alone are inadequate and 2) there is legitimate interest in depriving defendant of all his profits. The Singapore case of ABB Holdings identified the distinction between Wrotham Park and AG v Blake but also noted the similarity that both employed restitutionary remedies where it was appropriate and just (policy).