The attempt to introduce the equitable jurisdiction

_Solle v Butcher_ [1950] 1 KB 671 – rent for a flat agreed at £250 per annum for seven years as both believed that the property was not subject to rent control (the Rent Acts); plaintiff discovered that it in fact was and rent should be £140; basic rent could’ve been increase if statutory notices would’ve been served. Plaintiff sought to recover extra payment for two years and continue the lease at a lower rate; defendant claimed mistake. Plaintiff got a choice of surrendering the lease or continuing on the current rate. Lord Denning introduced a doctrine of mistake equity which made the contract voidable.

_Grist v Bailey_ [1967] Ch 532 – house was thought to be subject to protected tenancy but it wasn’t; purchase contract set aside due to £1400 difference in value which was deemed to be sufficiently fundamental in equity.

_Great Peace Shipping Ltd v Tsavliris (International) Ltd_ [2002] – doctrine of an equitable mistake rejected; no test to distinguish mistakes at law an in equity could be identified.
Potential scope of recovery in tort of deceit is wider: all losses resulting from having made the contract instead of all losses resulting from the fact that the individual representation is false.

Innocent misrepresentation

Innocent misrepresentation is a false statement made neither fraudulently nor negligently. Representee believed that the statement was true and had reasonable grounds for the belief.

A victim is entitled to rescission and indemnity. Misrepresentation Act 1967 s. 2(2) – damages in lieu of rescission may be awarded. For innocent misrepresentation loosing right to rescind also means losing rights to claim damages (for fraudulent and negligent still possible).

Newbigging v Adam (1996) 34 Ch D 582 – innocent misrepresentation was made inducing the entering into the contract. Court said they can either allow rescission or damages.

Whittington v Seal Hayne (1900) 82 LT 49 – people bought the land believing it was sanitary to keep poultry. However, the water was poisoned and the birds died.

Rescission

Rescission restores the parties to a position before the contract was made. Notice has to be given to the other party.

If misrepresentee benefited from the contract, he should return the benefits as well if the contract is rescinded to avoid the unequal enrichment.

Choosing to carry on with the contract (affirm it) still allows to seek damages. Car & Universal Finance v Caldwell [1965] 1 QB 525 – Caldwell sold a car and got a faulty check; as a result of it he notified the police abs the Automobile Association and asked for their help. The rogue then resold the car to the C&UF. Caldwell’s actions were enough to rescind the contract; they preceded the sale and the finance company didn’t require good title; notice may be waived where the party cannot be traced and all necessary steps have been taken to recover the goods.

Bars to rescission: other party needs to know that the contract is being rescinded; affirmation; third party rights intervening; impossibility of restitution; lapse of time.

If the contract is affirmed after discovering the true state of affairs, the right to rescind is lost; affirmation may be by express words or conduct. Long v Lloyd [1958] – plaintiff purchased a lorry that was falsely represented to be in a good condition. On the first journey several faults were discovered and seller offered to pay half the cost for repairs. On the second journey the lorry broke down again with more serious faults. The right to rescind was lost after the second journey which was made with a knowledge that the vehicle was not in a good condition (first journey was a ‘test drive’).

Lapse of time: if misrep is fraudulent, time will run from the time at which the fraud was, or reasonably could have been, discovered; if it’s non-fraudulent (negligent or innocent), time will run from the date of a contract. Leaf v International Galleries [1950] 2 KB 86 – the painting was sold and after 5 years people found out it was not the painter they believed it to be; rescission failed due to the lapse of time; misrep was innocent and the time ran from the date of a contract.

Impossibility of restitution – restitution in integrum. Clarke v Dickson (1858) – nature of the subject matter has been changed; purchase of shares in a company that later was wound up. Halpern v Halpern [2007] – rescission for duress is the same in principle as that for misrep; the documents were destroyed; rescission would be lost if the restitution could not be made. A court is more likely to overlook imperfections in the restoration in fraudulent misrep.

De Molestina v Ponton [2002] – a concept of partial rescission rejected; it might be possible to sever the parts of the contract so that each forms and independent contract that can be rescinded.

Thomas Witter Ltd v TBP Industries [1996] – in the purchase of a business, damages will be a more popular remedy as the business will usually have changed by the time rescission question comes before courts. In Earlson Precision Holdings v Hampson Industries Ltd [2011] the effective date of rescission was the date of notification and the rescission was not barred.
Distinguishing promises that are part of the contract from representations:

- Promise – maker of statement accepts (or appears to accept) to do or not to do something
- Representation – statement asserting a given state of facts is true: *Kleinwort Benson Ltd v Malaysia Mining Corp.* (1989)
- Hierarchy: contractual promises, promises, representations, others (opinions, puffs (advertising), etc.)

1. Term of contract or misrepresentation
2. Is it an actionable misrepresentation
3. What type of misrepresentation it is
4. What remedies are available and is the 2(1), 2(2), tort of negligence… is going to be used
Roger v parish (1987) – new car had a number of defects; required a number of repairs. CA said there was a breach of s. 14, there was no satisfaction of quality; satisfaction of quality is different for the new car than it is for the used one.

Wilson v Rickett, Cockrell (1954) - coal light had explosive fuels in it that were not supposed to be there.

Godley v Perry (1960) – boy bought a defective catapult and he had a claim against the seller and the seller had a claim against a whole-seller (as it didn’t correspond to the sample).

Stevenson v Rogers (1999) – fish and boat are both part of the business, so when selling the boat they were still responsible for the quality.

Supply of Goods and Services Act 1982 (now B2B only) s. 13: implied term with services that there needs to be reasonable care and skill.

Wilson v Best Travel Ltd [1993] – Wilson got injured while on holiday in Greece. The patio doors that he fell through complied with Greece’s standard but not Britain’s. Court said that there was no implied term that all of their accommodation should comply with British standards.

Interpretation principles

Courts must find the intention of the parties (objectively). What a reasonable man would’ve understood the parties to have meant (Rainy Sky SA v Kookmin Bank [2011]).

It is possible to have regard to parties’ negotiations and subsequent conduct.

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] – five interpretation principles (Lord Hoffmann):

- The meaning to a reasonable person with all the background knowledge which would reasonably have been available to the parties at the time of the contract
- Background knowledge of the reasonable person is a “religious” fact; it includes anything that would’ve affected the way in which the language of the document might have been understood by a reasonable person
- Previous negotiations of the parties and subjective intent are excluded (admissible only for rectification)
- When in doubt the ordinary every day meaning is accepted
- If “something has gone wrong with the language”, the business common sense is considered

Bank of Credit and Commerce International SA v Ali [2001] – determining the meaning that the document would convey to a reasonable person having all the background knowledge which would’ve been available to the parties at the time of the contract.

Chartbrook Ltd v Persimmon Homes Ltd [2009] – Persimmon was to pay the total land value and an ‘additional residential payment’ (ARP); parties gave different interpretations to the ARP and its calculation; Chartbrook claimed to have been underpaid. Appeal by Persimmon was allowed on the basis that the context and background indicated that ‘something must have gone wrong with the language; court acknowledged that linguistic mistakes in formal documents are not easily accepted. Interpretation based on ordinary rules of syntax made no commercial sense and would not accord with a reasonable person would’ve understood. An error was corrected through interpretation. Reaffirms objective approach.

Rainy Sky SA v Kookmin Bank [2011] – terms of refund guarantees included a promise that was capable of two meanings; the construction consistent with commercial purpose of the bonds in question was preferable.

The exclusionary rule – pre-contractual negotiations cannot be used to explain the meaning of the contractual document (Prenn v Simmonds [1971]). No guarantee that intention appearing during negotiations remained constant; statements in the negotiations are subjective; it would lead to greater uncertainty and unpredictability; third party rights – third parties rely on document itself.

Pre-contractual negotiations forming part of the factual matrix are admissible (objective facts). They are also admissible for the claim of rectification.

The evidence of prior contracts is admissible.
Frustration

Unforeseeable events that take time after the contract is made and which make the contract impossible / illegal / something very different from what was intended. Frustration is an even which is no-one’s fault.

Mistake – event happens before the contract was signed.

Courts are reluctant to find contracts discharged because of frustration. They don’t want to let out the parties of the bad deals (Davis Contractors Ltd v Fareham UDC (1956)). Contract should include provisions related to unexpected events.

Paradine v Jane (1647) – man had to leave the farm for two years during an invasion of the Price Rupert of Germany. Court held for the landlord; they said he had an obligation to pay and there was no clause in the contract itself (no force majeure clause).

Taylor v Caldwell (1863) – the concert hall was hired to hold concerts. Before the concerts were to take place, the music hall burned down. Claimants brought a case for failing to perform. Judges allowed discharge due to frustration.

Davis Contractors Ltd v Fareham UDC (1956) – DC entered into a contract to build houses and they couldn’t get labour so the price ended up being lower than the work. HoL said there was no frustration as delay and the loss of labour didn’t make the performance impossible; it just became commercially disadvantageous and harder.

National Carriers v Panalpine (Northern) Ltd – theories of doctrine of frustration:

- Implied term / condition
- Total failure of consideration
- Special exception which justice demands
- Frustration of the adventure / foundation of the contract – foundation of the contract is gone
- Construction theory – ‘true meaning of the contract’

Unjust to hold the parties to the literal stipulations.

James Scott & Sons, Ltd v Del Sel (1992) – ‘tiger days excepted’.

Edwinton v Tsavlinis (The Sea Angle) [2007] – had a charge of the ship and something happened. Unlawful detention did not frustrate the contract. The person assumes the delay not by hiring the ship. Delay only cause financial problems. Terms of the contract; context; parties’ knowledge and assumptions as to the risk; the nature of the supervising; event and the parties’ reasonable calculations as to the possibility of the future performance in the new circumstances need to be considered.

CTI Group Inc v Transclear SA [2008] – was not impossible; more expensive and difficult but still possible.

Change of circumstances / force majeure clauses. Chanel Islands

Appleby v Myers (1887) – machinery was destroyed in a fire and some of the work that was already done was gone; couldn’t get paid for the part of the job as the contract was for the full completion.

Asfar v Blundell [1896] – dates were not destroyed but changed; they were still sellable but no longer as the fresh dates.

Personal services contracts:

Cutter v Powell (1795) – Cutter was employed by someone and was to be payed once the ship reached Liverpool; he died before that and the money until that point could not be recovered as it was for the full action.

Morgan v Manser [1948] – musician called into army couldn’t perform; frustration.

Condor v The Barron Knights [1966] – a drummer in the band fainted and was told that he should play 4 days a week instead of seven; there was frustration and the contract still exists.
The Act gives to the court a discretionary power to allow the payee to set off against the sum so paid or payable a sum not exceeding the value of any expenses that the payee has incurred in or for the purpose of performing the contract before the frustration.

*Gamerco SA v ICM/Fair Warning Agency*

Judge considered 3 methods by which the courts should exercise its discretion:

1. Allowing the payee to retain all the expenses incurred as a statutory recognition of the defence of change of position.
2. Equal division of the loss caused by the frustrating event.
3. A broad discretion to do what the court considers is just having regard to all the circumstances of the case (favored by judge).

s1(3): provides for the adjustment of the financial relations of the parties.

The result of this section is that recompense may be awarded in respect of a valuable benefit conferred by either party upon the other party in pursuance of the contract.

In *BP exploration (Libya) v Hunt (No 2)*, the judge pointed out that the subsection must be applied in two distinct stages:

1. Identification and valuation of the benefit.
2. Court assessment of what sum it considers just to award to the party by whom the benefit has been conferred.

There are three situations to be considered with regard to the identification and valuation of the benefit:

1. Where the performance rendered results in the delivery of an item which is unaffected by the frustrating event (benefit is the end product of services rather than the services themselves).
2. Where, although the performance results in the delivery of an item or an end product, the event which frustrated the contract destroys it or renders it useless and of no value to B without delivery of the remainder (benefit refers to the end product and not the services themselves, so the value of the benefit will be nil so no award can be made to A under this subsection).
3. Where the performance rendered is a ‘pure’ service, without any end product, such as gardening or transporting goods (the benefit here is the services themselves and it is these that must be valued).

With regard to the court assessment, the purpose of the award has been said to be to prevent the unjust enrichment of the other party at his expense.

The principles were applied in *BP Exploration (Libya) v Hunt (No 2)*:

- BP entered into a contract to explore and develop an oil concession in Libya owned by H.
- BP was to make initial payments and a transfer of oil to Hunt and in return was to get a 50% share in the concession and ‘reimbursement oil’ calculated by a formula.
- Oil field was discovered and oil was produced and transferred under the contract but the contract was then frustrated when the Libyan Gov. took the land by paying some compensation to H.
- BP claimed under s1(3) of the Act.

Held that, under s1(3), the valuable benefit had to be the end product (enhancement of value of H’s concession) and not the work done.

Effect of the frustrating event was to make this valueless by H and sup-para (b) requires this to be reflected in the valuation of the benefit.

But H had received considerable amounts of oil produced prior to the expropriation, and compensation thereafter, and half the value of this was held to be the benefit obtained from BPs exploration and development (the upper limit of any award).

The just sum was determined by taking account of the cost to BP of the work done for H and the oil it initially transferred to H reduced by the amount of the ‘reimbursed oil’ it had received.
A mandatory injunction compels the positive performance of an act and may be used to restore the situation to what it was before the breach of the contract.

**PI**

Although the grant is discretionary, a PI will normally be granted to restrain the breach of a negative contract or stipulation. A negative contract or stipulation is one whereby a promisor covenants not to do something. A negative stipulation, though not express, may be implied, for example, in the case of an exclusive dealing agreement relating to a particular product, or an agreement to charter a ship to a single person, the PI will be granted to restrain the promisor from buying (or selling) the product elsewhere or chartering the ship to another.

A PI may be granted to restrain the breach of a negative stipulation in a contract even though the court would not order SP of the positive stipulation contained in the same contract.

It has also been granted in cases where its effect may be to enforce performance of the contract, even though the contract is one that the court might not normally specifically enforce (Metropolitan Electric Supply Co v Ginder).

While courts do not grant SP for contracts of personal service, they have accepted that it is possible to do so by means of an injunction to encourage performance in an oblique manner.

*Lucy v Wagner*

- D agreed to sing at P’s theatre and sing nowhere else during the season
- D then made a contract with another theatre and refused to perform her contract with P.

Court refused to order SP of her positive engagement (to sing) at P’s theatre but granted an injunction to restrain the breach of her negative stipulation (not to sing elsewhere) thus encouraging her to keep up to contract with P.

The scope of the case has been confined to two restrictions:

1. Although in certain instances an express positive promise implies a negative undertaking not to do anything that would interfere with the performance of the promise, courts have normally refused in contracts of personal service to enjoin by injunction rather than by an express stipulation not to do some specific thing. There must have been inserted in the contract itself an express negative stipulation and D must have acted in breach of it (Mortimer v Beckett)

2. An injunction will not be granted if its effect will be to compel D to fulfill a contract for personal service or to abstain from any business whatsoever as it would be to compel the contract breaker to choose between SP and starvation (Ehrman v Barthalomeu)

But, if the employment is of a special kind (unlike restriction 2) an injunction may be granted to restrain D from doing similar work of that kind.

*Warner Bros Pictures v Nelson*

- Mrs. Nelson, a film actress, agreed that she would render her exclusive services as an actress to P for 3 years and would not during that period render any similar services to any other person or engage in any other occupation.
- In breach of these stipulations, she entered into an agreement to appear for another film company and so P sought an injunction to restrain her.

Court held that although it was impossible to grant an injunction preventing her from engaging in any other occupation as that would amount to SP, an injunction should be granted to restrain her from working as an actress for any other person for the 3-year period.

The decision has been criticized as implying that nothing short of idleness or starvation is compulsive.

More recent cases have examined the practical realities of granting an injunction and have been more willing to infer compulsion where a longer-term injunction was sought (Warren v Mendy).
MI

MIs are not as readily granted as PIs but the courts will intervene in this way where it is shown that D has deliberately ridden roughshod over the claimants rights or that the claimant would be gravely prejudiced if the remedy were withheld.

At trial, SP, rather than an MI, orders D to perform its positive contractual obligations.

Equitable damages

Since Lord Cairns’ Act 1858, there has been jurisdiction to grant damages either in addition to or in substitution for SP or an injunction and are often referred to as equitable damages and are governed by the same principles as damages at common law.

However, in contrast to common law damages, equitable damages may compensate for an anticipated, rather than just an accrued, cause of action.

Equitable damages can also be awarded where an order for SP has been made and not complied with (Biggin v Minton).
Damages

The basic rule: to put party in the position in which it would’ve been had the contract been performed as agreed.

Damages – legal remedy, common law remedy. Supposed to compensate the person the loss they suffered due to the breach. Expectation interest mainly.

Is the loss too remote? What kind of interest is considered (expectation, reliance, restitution).

Lost expectation: the loss of the expected financial benefit; the loss of subjective benefits.

SGA 1979 s. 51(3) – assessment for non-delivery of goods. Mitigation where there is an open market; loss if the buyer has to pay more for the substitute – extra cost; where the buyer anticipated making profit, the damages are still restricted to the difference.

SGA s. 50(3) – the buyer’s breach, non-acceptance of goods; the buyer should sell the goods in an open market; damages – the difference in price.

Exemplary damages – damages to feelings may be recovered in tort.

Addis v Gramophone Co [1909] – employee was paid a small salary and most of compensation was commission. He was give six months’ notice upon dismissal but didn’t have an opportunity to keep working. Freedom of contract – get what entitled to under the contract but the compensation for hurt feelings cannot be obtained.

Malik v BCCI [1997] – employment contracts were terminated as the bank was terminated. Employers were associated with problematic bank and couldn’t get the job in the bank again. Injury to reputation – BCCI conduct went against their duty of trust and confidence to employers; breach of the duty that meant one couldn’t obtain future employment meant that damages could theoretically be recovered. Lord Nickis – regular damages principles should apply; issue of remoteness; in Malik there were additional losses to the employment. Lord Steyn – loss of reputation’s not caused by the breach of the contract here.

Johnson v Unisys [2001] – man dismissed due to irregularities; it resulted in mental issues, drinking, etc. Johnson said that the dismissal breached the employer’s duty; however, the dismissal caused his mental and health problems. Lord Hoffman – acknowledged the importance of employment to the personal life.

London Borough of Waltham Forest v Omilaju – was no breach in that case.

Exemplary damages:

Eastwood v Magnax Electric Plc and McCabe v Cornwall CC [2004] – claimant that suffers psychiatric injury can bring the claim for the manner of the dismissal but the court can determine if the damages apply based on the individual situation. Damages not allowed here.

Dunnachie v Kingston Upon Hull CC [2004]

Hamilton Jones v David & Snape [2003]

What type of interest is covered; what the party is compensated for?

Expectation interest – where the party would have expected to be if the breaching party would’ve done what it had to do.

Reliance interest – what the interest party expended on the contract in reliance of the promise; profit is too speculative; what has the party lost due to reliance; compensation to the extent the party relied to his detriment.

The restitution interest – restoring the party to the position the party was before the contract was entered into; innocent party wants to deprive the defendant of the gain that he made at the expense of the innocent party; claimant doesn’t necessarily have had to incur any costs.