Frustration is used as a defence for a claim for breach. A frustrating event is supervening, unforeseeable event (*Amalgamated Investment v John Walker*), at no fault of either party (*The Eugenia),* that renders the contact either impossible, illegal or radically different (*Davis Contractors v Fareham UDC*). Contract ended by operation of the law, all future obligations discharged. There used to be a rule of absolute obligations (*Paradine v Jane*) and implied term theory 'artificial' (*Taylor v Caldwell),* but the modern day approach is 'radical difference' theory (*Davis Contractors v Fareham UDC).***IMPOSSIBILITY**Unavailability of a thing or person necessary to perform the contract.1.Destruction of the thing –*Taylor v Caldwell; Appleby v Myers*2.Unavailability of thing – A matter of degree - *Jackson v Union Marine Insurance Co; FA Tamplin v Anglo-Mexican*; *Bank Line v Arthur Capel; Edwinton Commercial Cooperation Tsavrilis Russ, The Sea Angel.* In latter case, the 20 days charter hire had been pretty much completed before the 3 month delay kicked in when authorities impounded the ship illegally. As the purpose of the contract had been achieved, the court held that no frustration occurred, although it was stated that had there been much of the purpose still to achieve this could have potentially frustrated the contract.3.Unavailablity of person – incapacity (*Morgan v Manser*); death (*Stubbs v Holywell Railway Co*)**SUPERVENING ILLEGALITY -** *Fibrosa v Fairbairn**A contract to do what has become illegal to do cannot be legally enforceable – *Denny, Mott, Dickson v Fraser***FRUSTRATION OF PURPOSE/NON-OCCURRENCE OF EVENT***Must be common purpose of both parties. The 'Coronation cases' – *Krell v Henry; Chandler v Webster;* cf *Herne bay Steamboat v Hutton* (were is was not held to be frustrated as the purpose has not been wholly affected by incident)**GOVERNMENT INTERVENTION –** *Metropolitan Water Board v Dick Kerr***CAN LEASES BE FRUSTRATED?***Generally never – *Paradine v Jane,* but the HL was split in *Cricklewood Property v Leighton's Investment Trust*. In *National Carriers v Panalpina*, it was again decidedit was not frustrated but in principle it could be, in rare circumstances. They would consider the unavailability of property against the length of lease, or a short lease for specific purpose.**NO FRUSTRATION WHERE…*Contract made merely more onerous –** Commercial impractibility insufficient (*Tsakiroglou v Noblee Thorl; The Eugenia; Davis Contractors v Fareham UDC*)***Event is self-induced –** If party exercised a choice and it is your fault then no frustration - *Maritime National Fish v Ocean Trawlers; The 'Super Servant Two'*. Burden of proof on other party – *Joseph Constantine Steamship line v Imperial Smelting Corporation*.***Event is foreseeable** – *Walton Harvey Ltd v Walker & Homfrays Ltd*. The less that an event is foreseeable, the more likely it is to lead on to frustration – *The Sea Angel*.**CONSEQUENCES OF FRUSTRATION***All future obligations discharged, by operation of law, from date of frustrating event. The doctrine is "not lightly to be invoked" as per Lord Roskill in *The Nema*.**COMMON LAW – ORIGINAL POSITION***If total failure of consideration, money paid under the contract can be recovered – *Fibrosa v Fairbairn*. Partial failure of consideration – *Chandler v Webster*. Either way no recovery of expenses. Only applies now where Act excluded.**LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943**The Act now applies unless excluded.*S1(2) – Money paid before frustrating event is recoverable AND money payable before frustrating event ceases to be payable.*S1(2) – Expenses recoverable up to limit of money paid/payable before frustrating event – *Gamerco SA v ICM/Fair Warning**S1(3) – 'Valuable benefit' – non-monetary 'end product', benefiting party may have to pay 'just sum' – *BP Exploration v Hunt*. Must be tangible.*S2(3) – Parties can contract out of act.*S2(4) – Multiple obligations eg leases*S2(5) – Contracts excluded from act eg carriage of goods by sea insurance contracts.

REMEDIES - MEASURESLIQUIDATED DAMAGES (fixed sum): planning for breach – certainty (liquidated), privacy, cost effective, amicable (commercial relationship preserved). The party subject to LDC may argue that it is in fact a penalty clause, which are struck out of the contract.**The Test for a Penalty Clause –** *Dunlop Pneumatic Tyre v New Garage**Terminology inconclusive*Penalty clause is 'in terrorem'*Based on construction of particular contract, judged at time of contractingValid LDC = genuine pre-estimate of loss set at the time of contracting.Penalty clause if:1.Stipulated sum is extravagantly greater than the greatest possible loss conceivable on breach.2.Breach is non-payment of money and stipulated sum is greater.3.A single lump sum is payable on any of several possible breaches were some are serious but others trivial.4.Even though loss impossible to precisely pre-estimate, sum stipulated may still be a genuine pre-estimate.*If PC do UTCC regs 1999 apply? It will if consumer contract, not if two businesses.**Not a Penalty Clause***Estimate does not coincide with actual loss – *McAlpine Capital Porjects v Tilebox**Acceleration of payment clause – *The Angelic Star**Deposits generally no-recoverable – *Workers Trust v Dojap Investments***UNLIQUIDATED DAMAGES (unknown amount).***Damages assessed by the court*Compensation NOT punishment – *The Golden Victory***NATURE OF COMPENSATION<u>Expectation</u>** (placed in the same situation as if the contract had been performed)– *Robinson v Harman**3 alternative measures:1.Differnce in value2.Cost of cure (defective performance has taken place)3.Loss of amenity (can only claim this if the contract is for enjoyment) –***Ruxley Electronics v Forsyth****Application of *Ruxley* is seen in *Farley v Skinner (No2*), cf where the cts looked at the intention of the parties claiming amenity - *Birse Construction ltd v Eastern Telegraph Co Ltd, McGlinn v Waltham Contractors***<u>Reliance</u>** (puts c in position as it had not contracted)– *Anglia Television v Reed**C has unfettered choice between reliance and expectation loss – *CC films v quadrant films*. The burden of proof is on party paying to prove otherwise.*Except where trying to escape a bad bargain – *c & p haulage v middleton**If expectation damages too speculative – *McRae v Commonwealth Disposals**Pre-contractual expenses available – *Anglia TV v Reed***<u>Restitution</u>** (where D has wrongly enriched himself. It prevents unjust enrichment, but there is no loss to c)– *AG v Blake.**Account of profits are available where: exceptional circumstances, damages inadequate, c has legitimate interest in preventing the d's profit-making activity*Successful application of *AG v Blake* was seen in *Esso v Niad;* cf with *AB Corp v CD Co* (damages were adequate), *Experience Hendrix v PPX Enterprises* (not exceptional circumstances), *WWF v WWF* (not exceptional circumstances)**<u>Other awards:</u>***Generally there is no damages for mental distress – *Addis v Gramophone Company Ltd; Johnson v Unisys Ltd**Contract for pleasure/relaxation/peace of mind – *Jarvis v Swans Tours* (whole purpose); *Farley v Skinner* (major object)*Loss of reputation (*Malik v BCCI*) and loss of chance (*Chaplin v Hicks*) both fall within expectation loss*Quantum meruit – *Sumpter v Hedges*

LIMITING FACTORS -CAUSATION – must be a causal link between breach and loss. *Galoo Ltd v Bright Grahame Murray* states that it must be an effective cause. Is there a novus actus interveniens? *(Lambert v Lewis)* OR is it likely to happen? (*Monarch Steamship Co v A/B Karlshamns*)**REMOTENESS –** *Hadley v Baxendale* Damages must be either: 1.Arising naturally in the usual course of things -imputed knowledge (normal losses). OR2.Reasonably in the contemplation of the parties (ie in special circumstances) – actual knowledge (abnormal losses). Confirmed in *Jackson v Royal* [illegible] discuss repercussions of breach at time of contracting.*Application of the test: *Victoria Laundry v Newman Industries; Heron II* (the loss was not unlikely due to the [illegible] action/breach)*; Balfour Beatty v Scottish Power* (the specific type of loss was unrecoverable as not foreseeable by d)*; The Achilleas* **MITIGATION***Technically no obligation to mitigate but losses resulting from failure to mitigate is not recoverable.What is required for mitigation?*Reasonable steps – *British Westinghouse v Underground Electric**Mitigation party not expected to embark on litigation – *Pilkington v Wood**May have to accept breach if cost effective – *Payzu v Saunders**Mitigating party's conduct not weighed in'nice scales' – *Bank of Portugal v Waterlow & Sons*.**CONTRIBUTORY NEGLIGENCE** [illegible] Law Reform (Contrib Neg) Act 45*Contrib [illegible] generally not available but it may be where there is: breach of contractual duty to take care AND the breach [illegible] also a tort – *Vesta v Butcher*. Also *B*[illegible] *Bank plc v Fairclough* **EQUITABLE REMEDIES***Specific performance is an order of a court which requires a party to perform a specific act– *Co-operative Insurance Society ltd v Argyll stores (holdings) ltd**Injunction (requires a party to do or refrain from doing specific acts)– *Evening Standard v Henderson**Rescission (bringing parties back to position in which they were before entering into the contract, if possible)*Rectification (ct corders change in a written doc to reflect what it ought to have said in the first place).

AGENCY The common law principle in operation is usually represented in *qui facit per alium, facit per se*, i.e. *the one who acts through another, acts in his or her own interests* and it is a parallel concept to vicarious liability and strict liability in which one person is held liable in criminal law or tort for the acts or omissions of another. An agent who acts within the scope of authority conferred by his principal binds the principal in the obligations s/he creates against third parties. There are essentially three kinds of authority recognised in the law: actual authority (whether express or implied), apparent authority, and ratified authority.**HOW DOES AN AGENCY AGREEMENT ARISE?*Necessity –** *Great Northern Railway v Swafffield;* cf *Sachs v Miklos* (has to be some type of emergency)***Ratification –** principal confirms the agency after the contract has been entered into - *Borvigilant (owners) v owners of the romina; kelner v baxter***ACTUAL AUTHORITY:*Express agreement –**an agent has been expressly told s/he may act on behalf of a principal (*Ireland v Livingstone*). *Chaudry v Prabhaker.* Depends on the express words used by P – a matter of evidence.***Implied agreement –** can be inferred by virtue of a position held by an agent eg an agent may have implied authority to do what is usual or customary for an agent in his particular trade or profession eg company directors/secretaries – *Hely-Hutchinson v Brayhead Ltd****Usual or customary authority –** A has the authority which a person in his position usually or customarily has. This type of authority can either expand scope of A's actual or apparent authority or be seen as an independent head of authority.**APPARENT/OSTENSIBLE AUTHORITY: -**exists where the principal's words or conduct would lead a reasonable person in the third party's position to believe that the agent was authorized to act, even if the principal and the purported agent had never discussed such a relationship.**Agency by Estoppel –** If a principal creates the impression that an agent is authorized but there is no actual authority, third parties are protected so long as they have acted reasonably.****Freeman & Lockyer v Buckhurst Park Properties*** - the principal will be estopped from denying the grant of authority if third parties have changed their positions to their detriment in reliance on the representations made.* *Rama Corporation Ltd v Proved Tin and General Investments Ltd* - cannot call in aid an estoppel unless you have three ingredients:**(i)** there must be a representation that the agent has authority – express or implied eg from dealings or from conduct.**(ii)** that representation must come from someone with authority, usually, though not always, the principal – *Freeman & Lockyer v Buckhurst Park Properties* – the board of directors had actual authority to act on behalf of the company. It was the board of directors which made the representation, by allowing the director to act as de facto managing director.**(iii)** that representation must be relied upon by the third party reliance and changed their position as a result. Entering into a contract with the agent will be sufficient. C must therefore know of the rep. Constructive notice is insufficient. C cannot claim to have relied on the rep if he knows the rep is false. BUT it may be determined that C ought to be aware of A's lack of authority – *Overbrooke Estates Ltd v Glencombe Properties Ltd**NB ***Watteau v Fenwick*** - Even if the agent does act without authority, the principal may ratify the transaction and accept liability on the transactions as negotiated. This may be express or implied from the principal's behavior, e.g. if the agent has purported to act in a number of situations and the principal has knowingly acquiesced, the failure to notify all concerned of the agent's lack of authority is an implied ratification to those transactions and an implied grant of authority for future transactions of a similar nature.