Objective sense of the promise

The existence of an agreement does not depend on subjective state of mind but rather what is objectively communicated by words and conduct.

Smith v Hughes
Facts: Seller went to the buyer and said he had good oats for sale, enquired as to interest, and gave the buyer a sample of the new oats. Buyer said I'll let you know. Took the sample away. Buyer responded next day and said he would accept the oats at 34 shillings. Seller delivered them.
Held: The buyer did not intend to buy new oats (he wanted old oats) but his manifested words and actions made it appear that he intended to buy new oats. If the parties are not in agreement on the terms then there is no contract. If one party is aware that the other does not intend to contract on what the apparent words are then they cannot hold them to that contract. Both parties should agree to the same thing in the same sense.

Raffles v Wichelhaus
Facts: Vendor intended to sell goods leaving on ship Peerless in December, and purchaser intended to buy goods leaving on ship Peerless in October. There happened to be two ships called Peerless sailing from Bombay within a similar time frame (October for one, December for the other).
Held: Each party was contemplating a different ship and so they were not in agreement and therefore there was no contract. Court said that the timing of the sailing went to the description of what was being sold – cotton sailing from Bombay in October is a different product than cotton sailing from Bombay in December.

Offer and acceptance

Offer – an expression of willingness to be contractually bound by the promises contained in the offer if the counterparty accepts.

Bilateral vs unilateral contracts
Unilateral – only one side is making a promise. The other side will earn the right to enforce the promise if it does the requested act (but they are not bound to do the act because they have not promised to do so).
Bilateral contract – buyer promises to pay, seller promises to sell product for that price. Each side undertakes to do something.

Spencer v Harding
Facts: Plaintiffs inspected the goods and put in a tender and were the highest tender. The goods were not sold to them as the highest tender. They sued for breach and argued that the advertisement constituted an offer that would sell the stock to the highest tender. They said that they accepted the offer by making the highest tender.
Held: Statement that goods are to be sold is not an offer because it does not demonstrate a willingness to be bound to the promise. The advertisement was not an offer, it was a preliminary negotiation (invitation to treat).

Payne v Cave
Facts: Mr Cave had made the highest bid for a good in an auction. But then, Mr Cave changed his mind and he withdrew his bid before the auctioneer brought down his hammer.

(1) This section applies to a promise contained in a deed or contract that confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract.
(2) The promisor is under an obligation, enforceable by the beneficiary, to perform the promise.
(3) This section applies whether or not the person referred to in subsection (1) is in existence when the deed or contract is made.

Performance of an existing legal duty

- Performance of an existing duty imposed by law
- Performance of an existing duty imposed by a contract with a third party
- Performance of an existing contractual duty owed to the promisor

Performance of an existing duty imposed by law
Legal duties owed not under law of contract but duties owed under the general law – maybe a tort, or under statute.

Collins v Godfroy
Facts: Defendant had promised to pay plaintiff money if plaintiff would give expert evidence in a trial. Plaintiff was already under a legal obligation to give this evidence because he had been summoned to do so under a subpoena.
Held: because plaintiff had only done what he was already required by law to do, he had not provided any consideration and could not enforce the promise to pay him.
If in performing your existing legal duty you do so in such a way that you exceed that existing duty, then that will amount to good consideration.

Glasbrooke v Glamorgan County Council
Facts: Mine workers striking. Police under legal duty to attend in case of escalating violence. Owners of the mine request extra Police officers and promised to pay.
Held: Police had gone above and beyond their existing legal duty, and thus this is good consideration.

Ward v Bayam
Facts: Father of illegitimate child promised to pay mother $1 per week maintenance provided she could prove child was well-looked after and happy. When mother remarried father stopped paying.
Held: the mother in looking after the child is only doing what she was legally bound to do. Judges said that making the child happy was going above and beyond this legal duty and was good consideration.

Performance of an existing contractual duty owed to a third party.
Shadwell v Shadwell
Facts: Uncle promised to pay nephew $150 per year if he married his fiancée. Nephew did marry his fiancée.
Held: this is good consideration. The nephew may have relied on the promise of payment to his detriment. Karen disagrees with this reasoning, and also the fact that the consideration was not causally related to the promise, ie the nephew did not get married because of the uncle's promise.

Oscar Chess Ltd v Williams
Facts: Defendant individual traded his car for a newer car. He told the plaintiff that his car was a 1948 Morris based on the registration book. On that basis the plaintiff allowed a certain trade in value. Later the plaintiff discovered the car was a 1939 model and thus worth less.
Held: statement about age of car was not a term. It would have been obvious to the parties that the seller had no personal knowledge of the year the car was made and was relying on the registration book. The plaintiffs were experts and in a position to check the manufacturing date themselves.

Routledge v McKay 1954
Facts: Defendant sold motorbike to plaintiff and incorrectly stated it was a 1942 model when it was actually a 1930 model. Written memo of agreement made no mention of age of vehicle.
Held: statement of age was not a term. A written document does not preclude the inclusion of an oral term but makes it more difficult to prove.

Misrepresentation damages
Misrepresentation damages = reliance-based measures
Breach of contract damages = expectation-based measures

35 Damages for misrepresentation
(1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),—
(a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and
(b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.
(2) Subsection (1) applies to contracts for the sale of goods—
(a) despite sections 197 and 201(2); but
(b) subject to section 34.

Requirements of s35:
- A misrepresentation
- Made to A
- By B or on behalf of B
- Which induced A to enter into the contract

Antimarloch Joint Venture Ltd v Moorhouse
The distinction between misrepresentation and a term is still important even though the damages are now the same.
Misrepresentation = a false statement of past or existing fact. Must distinguish from mere puff, statements of opinion, statements of intention, and statements of future fact.
Mere puff = laudatory or commendatory statements in extravagant and colourful language that reasonable individuals would identify as mere sales talk not intended to be taken literally.

Dimmock v Hallet
Facts: Sale of land via auction where land was described as ‘fertile and improvable’.
Court: this description is mere puff.

Held: despite the *Jarvis* case, the general principle is that you get no damages for inconvenience. Compensation is contract is only awarded for pecuniary loss resulting from a breach.

Addis v Gramophone Co Ltd
Facts: managing director was dismissed as a result of company reconstruction. Plaintiff is entitled to $750 salary. Was also entitled to a performance based commission. He was capable of being dismissed with 6 months' notice. His dismissal was immediate. The bank was told about the reconstruction before Addis. He was humiliated that everyone knew before him. Addis claimed for breach of contract. Defendants accepted that they were in breach by dismissing him without 6 months' notice.
Held: no right to give damages for injured feelings or inconvenience or distress as the result of a breach of contract. The figure of $600 is not defensible because the lower courts had clearly given damages for hurt feelings as part of their damages figure. Even if the hurt feelings had been contemplated by the parties it is still not recoverable. *Hamlin* principles are correct. No such things as punitive damages in breach of contract.

Ruxley Electronics and Construction v Forsyth
Facts: Forsyth (client) agreed with builder that a pool should be built at 7'6". In breach of contract, the pool built was only 6'9". Forsyth claimed to recover the cost of repairing the pool to provide a minimum depth of 7'6" as he had been promised.
Findings of fact: end product was safe for diving. Pool was of the same value as the pool which ought to have been built (economic value), so no economic loss suffered by the plaintiff. The only way to make the pool deeper was to start all over again and rebuild the pool, costing $21k. If Forsyth was given the money to rebuild the pool he would not do so. To spend $21k on a new pool would be unreasonable since the cost would be wholly disproportionate to the advantage gained by building a new pool.
Trial Judge: Forsyth was entitled to $2500 for 'loss of amenity'. "Where the contract is for the provision of a pleasurable amenity, such as a swimming pool, it is entirely proper to award a general sum for the loss of the amenity."
CoA: award for $2500 was wrong (flew in the face of *Addis*). In substance, the choice was between two measures of loss available:
1 – give the cost to cure ($21k), or
2 – difference in value between pool as it was and as it should have been ($0). So to compensate the plaintiff the only option is to give $21k.
Court acceded to Forsyth's argument and awarded $21.5k – alternative is to grant nothing.
HoL: general principle – entitled to cost to cure. Exception – if it is unreasonable because end result is to leave the plaintiff in a position where you are not improved but the cost is substantial, then there is an exception to cost to cure rule.

Chaplin v Hicks
Facts: Newspaper offered a contest to the winners to get employment contracts. Contestants sent in photos, readers picked who they liked, top 50 got interviews, 12 contestants would get 3-year contracts. Plaintiff was successful. She was potentially one of the 50. Claim was for her not having been provided a sufficient opportunity to compete because they did not give adequate notice of the interview time.
Held: plaintiff was awarded damages for loss of chance. Because she came first in her area, she did have a real chance of winning, and therefore there is a causal link between breach and loss. Identify the obligation and prove causation between the breach of that obligation and the loss. Court must then try to remedy this.

Isabella Shipowner SA v Shagang Shipping Co ("The Aquafaith")
Lord Reed's qualification in *White and Carter* is upheld. Election to continue will only be struck down if it is perverse or extremely unreasonable.

Waiver of condition

Peter Turnball (Australia)
Facts: essential term in contract that buyer nominate a ship on which oats were to be loaded. It was a condition precedent to seller's obligation to load that buyer nominate ship by certain date.
Seller agreed to sell and buyer to buy 750T oats to be loaded on a ship to be nominated by buyer at Sydney for Feb shipment. Buyer had to nominate ship 14 days before final date for shipment. Last day was 13 Feb then.
Condition of seller's duty to load that buyer nominate ship by 13 Feb. Seller not obliged to deliver oats until buyer nominates vessel (condition precedent).
Seller repudiated agreement in late Jan because he had no oats in Sydney but might have some in Melbourne.
Buyer wanted contract to work. Did not nominate a ship to load in Sydney though because there was no point, no oats in Sydney. Because buyer never nominated the ship, the seller never tendered the goods. Buyer bought other oats on market. Buyer brought a claim for actual breach (failure to deliver goods). Seller defended claim with the condition precedent argument.
Held: Accepted buyer's argument that condition precedent was waived because it was useless. Plaintiff may be dispensed from performing a condition if the counterparty intimates that doing the condition would be useless. This is a case of actual breach. Waiver principle is important in law of discharge by breach. Seller's repudiation was a continuing intimation that the condition need not be observed.

Damages recoverable on anticipatory repudiation
Buyer entitled upon actual breach to difference between market price of oats at date of breach and agreed contract price.
Where there is anticipatory repudiation, buyer is not obliged to mitigate immediately. They can hold the contract open (refuse repudiation). On the breach date (when the goods would have been delivered), the buyer must the mitigate (ie go buy different oats). Damages are assessed at breach date.
If buyer accepts repudiation, they are expected to mitigate from date of acceptance of repudiation because from that time contract is terminated and there is an actual breach.

Jansen
Facts: vendor agreed to sell land to purchaser. Sunset clause: provided that either party was entitled to cancel once 13 June had come and gone. 13 June did pass and after that date the vendor sent an invoice to the company for extras. It also communicated that settlement would occur. Clear election to affirm the contract.
Held: Vendor did have a right to terminate under clause 2 but had affirmed the contract. Could not go back now and cancel the contract. Once the choice is made you are bound by it.

Jolly v Palmer

Issue – did the court have jurisdiction to make an order?
Held: Yes, this falls under s24(1)(a)(3). Each party had a mistaken impression about what land was to be bought/sold. Purchaser believed it was 4 lots, a mistake. Vendor believed he was only buying 3 lots, a mistake. Their respective decisions to enter into written contract were influenced by mistaken belief on one side that was different from the mistaken belief on the other side. Both mistakes were about the size of land to be bought and sold. This is a case of divergent intentions. The facts provide a classical example of a situation which was intended to be covered by the Act. S24(1)(a)(3) should be interpreted broadly.

Paulger v Butland Industries
Facts: plaintiff was founder of company which was not doing well. Company agreed to sell business assets. Plaintiff wrote to all creditors personally guaranteeing all money owed. Said that payments could not be made until after the asset sales were finalised. Money would be paid within 90 days. Banks got nervous and put in a receiver which took the assets so the deal could not go through. The other creditors did not get paid therefore. Creditor waited the 90 days then sued Paulger personally because he guaranteed the money would be paid.
Paulger claims that he never intended to assume personal liability for the debts.
Credit claimed it fell under s24(1)(a)(3) and therefore the court should grant relief.
Held: S25 prevents Paulger from arguing for mistake at all because this is a mistake in the interpretation of an agreement (contract formed when Paulger made the statement in the letter and the creditor relied on it).
Two points:
1 – ordinary effects of transaction law were given effect to. Distinction between ordinary effects of transaction in common law (objective view, Paulger was liable) and seeking relief under the Act. If you are not seeking relief under the Act then the normal principles apply. Objective interpretation of written agreements still apply per s25.
2 – s24(1)(a)(3) does not cover divergent intentions. If parties intended to contract on different terms.

Mechenex Pacific Services v TCA Airconditioning (New Zealand)
Facts: buyer needed to refer to schedule for performance. Buyer ordered coils. Bound by quotation.
Held: Objective principle survives the Act even though the Act says it applies to mistakes as to terms.
Hardie Boys J – rejected the argument that divergent intentions could apply because the defendant was not mistaken at all. Parties must be ad idem – viewed objectively.
Affirms *Paulger* and s25 analysis.

Rectification
= a type of mistake which occurs when parties have made an agreement but record it incorrectly.
Can get rectification if the mistake was a common mistake.
3 requirements under *Dundee Farms*.
Unilateral mistake cannot get rectification, must fit into the mistakes section of the CCLA.

Dundee Farms v Bambury Holdings
Facts: agreement for sale and purchase of the Bombay farm. Written agreement included the sale and purchase of a house 12 miles away as well.