contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'....

English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

J Lauritzen AS v Wijsmuller BV ("The Super Servant Two")

[1990] 1 Lloyd's Rep 1 (CA)

FACTS A drilling rig named the Dan King was to be delivered by one of two boats, Super Servant One or Super Servant Two. The transportation company decided to allocate SSII to the job, and use SSI to fulfil other contracts. When SSII sank, the transportation company claimed the contract had been frustrated.

ISSUE Was the contract frustrated? Did it depend on whether the owners of the SSII were negligent?

HELD This case is an example of the doctrine of self induced frustration. If the alleged frustration was caused partially by the decisions of one of the parties, it is not due to a supervening event, and therefore not frustration at all.

The Court of Appeal considered whether the transportation company could cancel the contract under the force majeure clause, and found it could in the event that there was no negligence. However, if there was negligence, or if they proceeded on the grounds of frustration, they could not succeed. This is because even after the sinking they could still use SSI to fulfil the contract, therefore there could be no frustration as this would bring the contract to an end immediately.

This case also demonstrates that a party at fault will not normally be entitled to invoke the doctrine of frustration. On the point of the allocation of SSI, this point is a narrow one, as clearly it would be difficult to allocate SSI to all jobs without breaching some contract or other. However, this case demonstrates the importance of parties using force majeure clauses to protect against liability.

POLICY The case contained the following example of a wide force majeure clause:

> "Wijsmuller has the right to cancel its performance under this Contract whether the loading has been completed or not, in the event of force majeure, Acts of God, perils or danger and accidents of the sea, acts of war, warlike-operations, acts of public enemies, restraint of princes, rules or people or seizure under legal process, quarantine restrictions, civil commotions, blockade, strikes, lockout, closure of the Suez or Panama Canal, congestion of harbours or any other circumstances whatsoever, causing extraordinary periods of delay and similar events and/or circumstances whatsoever, causing extraordinary periods of delay and similar events and / or

> circumstances, abnormal increases in prices and wages, scarcity of fuel and similar events, which reasonably may impede, prevent or delay the performance of this contract."

Note that, the clause did not cover negligence on the part of Wijsmuller. The courts are unlikely to conclude, in the absence of explicit wording, that a force majeure clause can be utilised by the negligence of the party relying on it. See s 7 of the Control of Exemption Clauses Ordinance (Cap 71) for the HK court's approach to exemption clauses regarding liability for negligence.

Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd

[1990] 1 HKLR 317, [1989] 2 HKC 156 (CA)

FACTS Jan Albert, an importer-exporter agreed to buy from Shu Kong, a mainland manufacturer, unisex ski turtle neck pullovers, to be shipped direct to Germany. Quotas dictated quantities of different goods allowed to be imported in Germany, and the parties agreed to use category 4 – knitted under vests, under the letter of credit. However, Shu Kong found out that China would classify the goods as category 83, knitted out wear. Shu Kong asked Jan Albert to amend the letter of credit, but Jan Albert refused as that quota was already full.

ISSUE Was the agreement frustrated and therefore void? Was there a common mistake and therefore the agreement was void ab initio?

HELD **Hunter JA**: On the issue of common mistake:

Before common mistake could be considered, the contract must be examined to see if there was an expressed or implied condition precedent as to who would bear the risk of the mistake. Only if the contract was silent on the point, would there be scope for invoking mistake: ***Associated Japanese Bank International Ltd v Credit du Nord*** [1989] 1 WLR 255. The contract in the present case was not silent and provided the export risk from China was to be borne by Shu Kong:

> "I have already read the material provisions of this contract. It is plainly not silent. It is precise in its terms. The contracting parties were well aware of these quota requirements. They were a necessary evil with which they had to live. They carefully apportioned responsibility and risk between themselves: it might be said with the result that the import into German risk was to be carried by the plaintiff, the export from the PRC risk was to be carried by the defendant."

The mistake must also render the subject matter of the contract essentially and radically different from the subject matter which they parties believed to exist. The subject matter of this contract was 'unisex, ski, turtle-neck pullovers'. Whether the goods were in category 4 or 83, they remained identical. A mistake of this nature was insufficient to bring about the conclusion reached by the lower court. ***Bell v Lever Brothers*** [1932] AC 161.

On the issue of frustration:

The true test of frustration was 'the construction test', Lord Reid says in ***Davis Contractors Ltd v Fareham Urban District Council*** [1956] AC 696 "The question is whether the contract which they made is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end". The contract in this case made precise provision for the changed situation as discussed above.

In ***National Carriers v Panalpina*** [1981] AC 675, Lord Simon said: "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 …". This was a case of an existing risk and not of a supervening event. The contract was made with full knowledge of and in the face of the existing licensing requirements: ***Maritime National Fish Ltd v Ocean Trawlers Ltd*** [1935] AC 524.

Jones v Padavatton
[1969] 1 WLR 328

FACTS Mother promised here daughter that if she would give up her well-paid job in Washington and come to England to study for the bar, mother would pay 200 dollars a month until she completed her studies. Daughter bought a house for the mother.

ISSUE Was there a contract and what were the terms. Mother claimed possession of house and daughter claimed unpaid money owing.

HELD Majority – per **Danckwerts** and **Fenton Atkinson LJJ** – no binding contract as no intent to create legal relations. **Danckwerts LJ** discussed the way this principle is extended: "***Balfour v Balfour*** was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother."

Dissent – per **Salmon LJ** – binding unilateral contract to pay for a certain period of time.

POLICY Compare ***Parker v Clark*** a similar case with an opposite legal outcome.

Jorden v Money
(1854) 5 HLC 185; 10 ER 868

FACTS Money borrowed £1,200 from Jorden's brother, for an unsuccessful financial venture. Jorden's brother died, leaving the right to secure payment to Jorden. Jorden often stated he would not enforce the claim, believing Money to have been unfairly treated regarding the securities.

Money prepared to marry and the parents in law wanted assurance he was free from liability in respect of the debt. Because of Jorden's assurances, the marriage took place. Money brought an action to have it declared that he was released from the bond.

ISSUE Had the assurance of Jorden not to enforce the debt in future led to Money being released from the debt?

HELD **Lord Cranworth LC (Lord Brougham agreeing, Lord St Leonards dissenting):** Jorden had not abandoned and had not positively promised never to enforce the debt. If a person makes a false representation to another, and that other acts upon the false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood. However a statement of future intent (for example not to enforce a debt in future) cannot be a contract.

Kensland Realty Ltd v Whale View Investment Ltd
[2002] 1 HKLRD 87, [2002] 1 HKC 243 (CFA)

FACTS Kensland Realty agreed to sell to Whale View a shop in Mong Kok for $55M. Whale View at settlement was required to present cheques or cashier's orders payable to persons decided by Kensland. The agreement gave no deadline for when Kensland must give notice, but time was of the essence. Settlement was 1pm, 2 September 1997. Kensland provided the final split payment information at 11.48 am. Whale View asked for an extension but Kensland refused. The cheques were presented just after 1pm and the cashier orders at 1.06 pm. Kensland treated Whale View's lateness as repudiation and claimed the 15% deposit.

ISSUE Was the contract repudiated by the late payment, and could Kensland keep the deposit?

HELD **Bokhary PJ**: "Failure on a vendor's part to give the requisite split payment information within time is a breach of contract on his part. Where such failure results in a completion deadline being missed, the purchase is not limited to treating such failure as an anticipatory breach with repudiatory effect. He may instead, if he so chooses, treat the contract as alive and tender split payment as soon as he reasonably can having regard to when he was given split payment information…. the principle laid down by Sir Edward Coke that a man shall not be allowed to take advantage of a condition which he himself brought about."

Ribeiro PJ: Applying the 'prevention principle' a person is not permitted to take advantage of his own wrong. There is an implied term that the purchaser's solicitor will provide a split cheque direction, and Kensland is prevented from asserting rights or claiming benefits arising in consequence of the breach.

Kincheng Banking Corp v Kao Yu Kuei
[1986] 1 HKC 212 (CA)

FACTS Kincheng bank made claims against two parties which had made various promises. The first defendant had promised to repay an overdraft, and the bank claimed to enforce that undertaking.

The second defendant guaranteed that the first defendant would repay the sum, and the bank claimed against him for this undertaking by the first defendant.

The second defendant claimed that he did not understand the content of

Denning LJ: The notice did not form part of the contract. People relying on a contract to exempt themselves from common law liability must prove that contract strictly. The terms must be proved and the intention to be legally bound must also be proved. "The best way of proving it by a written document signed by the party to be bound. Another way is by handing him before or at the time of the contract a written notice specifying its terms and making it clear to him the contact is on those terms. A prominent public notice which is plain for him to see when he makes the contract or an express oral stipulation would, no doubt, have the same effect. But nothing short of one of these three ways will suffice."

Oscar Chess v Williams

[1957] 1 WLR 370

FACTS Williams' mother acquired a second had car thinking it was a 1948 model. In May 1955 Williams bought a new care on hire purchase from Oscar Chess, who took the Morris in part exchange. They offered £290 as trade-in price. Eight months later they discovered it was a 1939 model, for which £175 was an appropriate trade-in price.

ISSUE Could Oscar Chess recover the difference, or set aside the contract? Did the representation that the car was a 1948 model become a term of the contract? If so, was it a condition or a warranty? Is the respective knowledge of the parties an important factor?

HELD **Denning LJ (Hodson LJ concurring, Morris LJ dissenting):** finding it was a mere innocent misrepresentation.

Denning found that both parties were mistaken about a matter of fundamental importance. If the dealer had promptly reverted to its rights, it could have set aside the transaction in equity: ***Solle v Butcher*** (but note the law now in ***Great Peace***). They did not do so and it is now too late: ***Leaf v International Galleries***. Therefore the only remedy is damages.

Denning considered whether the representation that the car was a 1948 model was a term. Williams did not contractually promise the car was a 1948 model, he merely said he believed it to be, and showed the registration book. Therefore it was a mere innocent misrepresentation, not a term of the contract entitling damages upon breach. It was unnecessary therefore to consider whether it was a condition or warranty.

[Note – at present HK law, under s 3(2) of the Misrepresentation Ordinance, the court can now offer damages in lieu of rescission even for an entirely innocent misrepresentation.]

Morris LJ disagreed, saying Williams' statement was a condition of the contract, as it was an item in the description of what was being sold.

POLICY **Denning LJ** on the relevance of relative party knowledge and speed of action:

"It seems to me clear that the motor-dealers who bought the car

relied on the year stated in the log-book. If they had wished to make sure of it, they could have checked it then and there, by taking engine number and chassis number and writing to the makers. They did not do so at the time, but only eight months later. They are experts, and, not having made that check at the time, I don not think they should now be allowed to recover against the innocent seller who produced to them all the evidence he had, namely, the registration book."

OT Africa Line Ltd v Vickers Plc

[1996] 1 Lloyd's Rep 700

FACTS A typing error meant that $155,000 actually appeared as £150,000 in the final contract.

ISSUE Was this a snapping up case under unilateral mistake and therefore void?

HELD Mance J held that the contract was binding because the offer made sense in the circumstances in which it was made. There was nothing in the claimants' conduct making it inequitable for them to hold the defendants to the contract. The rules relating to mistake are clearly heavily influenced by the circumstances surrounding the contract and each case will have to be decided on its own particular facts. This area of law can affect online suppliers, for example where a person is seeking the goods of one company and mistakenly visits the website of another company with a confusingly similar domain name or, as in the case above, a typing error occurs. Mance J referred back to ***Raffles v Wichelhaus*** (1864) 2 H&C 906 as a case in which offer and acceptance, although verbally identical, could, objectively regarded, have referred to different things. This is because, without the assent of both parties, in most cases each party will look as though they are assenting to the proposed terms; so the objective test will preclude any party from denying an agreement. This would include cases in which the party refrained from making inquiries or failed to make inquires when these were reasonably called for, but first there must be a real reason to suspect a mistake.

Pao On v Lau Yiu Long

[1980] AC 614 (PC)

FACTS The Paos owned Shing On Ltd. The Laus were majority shareholders in Fu Chip Ltd. Shing On owned a building that the Laus wanted. The Paos wanted to sell the property by selling all the shares in Shing On in exchange for 4.2 million shares of $1 each in Fu Chip. The market value of each share was declared as $2.50.The Paos agreed not to transfer before April 1974 and of the shares, as this would depress the value of the Fu Chip shares.

However, the Paos realised this exposed them to any drop in value of the shares. To reduce the exposure, they entered a subsidiary agreement where the Laus agreed to buy back the shares on or before end April 1974 at $2.50 per share. The Paos then realised this would

mean if the value rose, they would only get $2.50 per share. They informed the Laus they would not perform the main agreement unless the subsidiary agreement was cancelled and replaced with the guarantee which only came into operation if the share price fell below $2.50.

Because the Laus were anxious to complete the deal, they agreed. The price of Fu Chip then slumped.

ISSUE Was the new guarantee supported by consideration? Was the subsidiary agreement procured through economic duress?

HELD **Lord Scarman:** *On consideration (third party duties)*

There was good consideration for the new guarantee. Scarman (p 632) discovered a contract can be formed by a promise of a pre-existing obligation:

> "Their Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration. In ***New Zealand Shipping Co Ltd v AM Sattherwaite & Co Ltd (The Eurymedon)*** [1975] AC 154 at 168 the rule and the reason for the rule were stated as follows:
>
> > "An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration: ... the promise obtains the benefit of a direct obligation... This proposition is illustrated and supported by ***Scotson v Pegg*** (1861) 6 H & N 295 which their Lordships consider to be good law'"

On past consideration

The court also had to consider whether the consideration was "past" ie not co-extensive with the promise. An act done before the giving of a promise to make a payment or to confer some other benefit could be consideration for the promise where 1) the act was done at the promisor's request, 2) the parties understood that the act was to be remunerated either by payment or the conferment of a benefit, and 3) the payment or conferment of benefit was legally enforceable.

On duress

There was not duress by the Paos, however the court recognised economic duress could be a category of duress.

> "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in ***Occidental Worldwide Investment Corporation v Skibs A/S Avanti*** [1976] 1 Lloyd's Rep 293, 336 that in a contractual situation commercial pressure is not enough....
>
> In their Lordships' view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into

was not a voluntary act."

Partridge v Crittenden

[1968] 1 WLR 1204

FACTS On the 13th April 1967 an advertisement by the appellant (Arthur Robert Partridge) appeared in the periodical "Cage and Aviary Birds", under the general heading "Classified Advertisements" which contained, amongst others, the words Quality British A.B.C.R... Bramblefinch cocks, Bramblefinch hens 25s. each.

In no place was there any direct use of the words "offer for sale". Thomas Shaw Thompson wrote to Partridge asking him to send him an ABCR Bramblefinch hen (a brambling) and enclosed a cheque for 30s.

On the 1st May 1967 Partridge dispatched a brambling, which was wearing a closed-ring around its leg, to Thompson in a box.

Thompson received the box on 2nd May 1967 and was able to remove the ring from the bird's leg without injuring it.

Partridge was charged by Anthony Ian Crittenden, on behalf of the RSPCA, with illegally offering for sale a wild life bird which was not a close-ringed specimen, bred in captivity, against s 6(1) and Sch 4 of the Protection of Birds Act 1954.

The magistrates decided that the advertisement was an offer for sale and that the ABCR Bramblefinch hen was not a close-ringed specimen bred in captivity, because it was possible to remove the ring from the bird's leg.

Partridge was convicted, was fined £5 and ordered to pay £5 5s. advocate's fee and £4 9s. 6d. witnesses' expenses.

Partridge appealed against conviction.

ISSUE Was Partridge 'offering for sale' in the advertisement?

HELD The court considered the appellant's advertisement was not a legitimate offer for sale. The court also held that if the only issue were whether the bird was a close-ringed specimen under the Protection of Birds Act 1954, the magistrates' judgement would have been upheld.

Paradine v Jane

(1647), Mich 23 Car Banco Regis, Hil 22 Car Rot 1178, & 1179, Aleyn 26, 82 ER 897

FACTS Prince Rupert was commander of the armies of his uncle, King Charles I. Forces on both sides often looted the estates of the nobles for the purpose of gaining supplies. On July 19, 1642, the Royalist forces, known as the Cavaliers, took possession of land owned by the plaintiff, Paradine, which was under lease to the defendant, Jane. The Royalists held the land for three years, finally relinquishing it in 1646 after the remaining Royalist resistance collapsed. Paradine sued Jane for three years back rent, and Jane defended himself by asserting that he was not in possession of the land for the time in question.

ISSUE Was there any remedy making the lease void?