

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 1. - Introduction



#### General

#### 4-001

In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some "consideration." The purpose of the doctrine of consideration is to put some legal limits on the enforceability of agreements even where they are intended to be legally binding and are not vitiated by some factor such as mistake, misrepresentation, duress or illegality. The existence of such limits is not a peculiarity of English law: for example, in some civil law countries certain promises which in England are not binding for "want of consideration" cannot be enforced unless they are made in some special form, e.g. by a notarised writing. <sup>2</sup> The view was, indeed, at one time put forward in England that consideration was only evidence of the intention of the parties to be bound, and that (at any rate in the case of certain commercial contracts), such evidence could equally well be furnished by writing. <sup>3</sup> But the view that agreements (other than those contained in deeds) were binding without consideration merely because they were in writing was rejected over 200 years ago, <sup>4</sup> though it has been revived as a proposal for law reform. <sup>5</sup> The present position therefore is that English law limits the enforceability of agreements (other than those contained in deeds) by reference to a complex and multifarious body of rules known as "the doctrine of consideration."

#### Informal gratuitous promises

#### 4-002


 The doctrine of consideration is based on the idea of reciprocity: that "something of value in the eye of the law" <sup>6</sup> must be given for a promise in order to make it enforceable as a contract. <sup>7</sup> It follows that an informal gratuitous promise does not amount to a contract. <sup>8</sup> A person or body to whom a promise of a gift is made from purely charitable or sentimental motives gives nothing for the promise; and the claims of such a promisee are regarded as less compelling than those of a person who has provided (or promised) some return for the promise. <sup>9</sup> The invalidity of informal gratuitous promises of this kind can also be supported on the ground that their enforcement could prejudice third parties such as creditors of the promisor. <sup>10</sup>  Such promises, too, may be rashly made <sup>11</sup>; and the requirements of executing a deed or giving value provide at least some protection against this danger.

#### Other promises without consideration

#### 4-003

The doctrine of consideration, however, also struck at many promises which were not "gratuitous" in any ordinary or commercial sense. These applications of the doctrine were brought within its scope by stressing that consideration must be not merely "something of value," but "something of value *in the eye of the law*." <sup>12</sup> The law in certain cases refused to recognise the "value" of acts or promises even though they would, or might, be regarded as valuable by a lay person. This refusal was based on

many disparate policies; so that “promises without consideration” included many different kinds of transactions which, at first sight, had little in common.<sup>13</sup> It is this fact which is the cause of the great complexity of the doctrine; and which has also led to its occasional unwarranted extensions and hence to demands for reform of the law.<sup>14</sup>

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  2. See generally, von Mehren (1959) 72 Harv.L.Rev. 1009.
  3. *Pillans v Van Mierop* (1765) 3 Burr. 1663.
  4. *Rann v Hughes* (1778) 7 T.R. 350n; 4 Bro.P.C. 27.
  5. Law Revision Committee, 6th Interim Report, Cmnd. 5449 (1937), para.29; for comments on this and other proposals in the Report, see Lord Wright, *Legal Essays and Addresses*, p.287; Hamson (1938) 54 L.Q.R. 233; Hays (1941) 41 Col.L.Rev. 849; Chloros (1968) 17 I.C.L.Q. 137; Beatson [1992] C.L.P. 1. In many of the United States, writing is (at least for some purposes) regarded as a substitute for consideration: Farnsworth on Contracts, (4th ed.) para.2.18. For a judicial evaluation of the doctrine of consideration, and a discussion of possible alternatives, see *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] SGCA 3 (Singapore Court of Appeal) at [92]–[118]. In that case, the requirement of consideration was satisfied (see at [80]–[86]).
  6. *Thomas v Thomas* (1842) 2 Q.B. 851, 859; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [79], citing para.3-002 of this book in its 29th edition (para.4-002 in the present edition) with apparent approval.
  7. See, for example, *Ashia Centur Ltd v Barber Gillette LLP* [2011] EWHC 148 (QB), [2011] Costs L.R. 576 at [20] (solicitors held not to be bound by promise not to charge client for work done after a specified date).
  8. *Re Hudson* (1885) 54 L.J. Ch. 811; *Re Cory* (1912) 29 T.L.R. 18; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 19.
  9. cf. Eisenberg, 85 Cal.L.Rev. 821 (1997).
  10.  *Eastwood v Kenyon* (1840) 11 Ad. & E. 438, 451. For legislation giving effect to the similar policy of protecting creditors of a gratuitous transferee of property, see Insolvency Act 1986 s.242, applied in *Joint Administrators of Oceancrown Ltd v Stonegale Ltd* [2016] UKSC 30, 2016 SC (UKSC) 91 at [17] (“received nothing whatsoever”), approving the judgment in the Court below, quoted in [2016] UKSC 30 at [13] (“no party paid anything” for the transfer).
  11. *Beaton v McDivitt* (1988) 13 N.S.W.L.R. 162 at 170. It is often easier to promise to make a gift than actually to make one.
  12. See above, at n.6.
  13. cf. Corbin, *Contracts*, Vol.I, p.489: “The doctrine of consideration is many doctrines.”
  14. See above, n.5.

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### Volume I - General Principles

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#### Section 2. - Definitions

##### Benefit and detriment

##### 4-004

The traditional definition of consideration concentrates on the requirement that “something of value” must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). <sup>15</sup> Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller’s promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer’s promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasised that these statements relate to the consideration *for each promise* looked at separately. For example, the seller suffers a “detriment” when he delivers the goods and this enables him to enforce the buyer’s promise to pay the price. It is quite irrelevant that the seller has made a good bargain and so gets a benefit from the performance of the contract. What the law is concerned with is the consideration *for a promise*—not the consideration *for a contract*.

##### Either sufficient

##### 4-005

Under the traditional definition, it is sufficient if there is either a detriment to the promisee or a benefit to the promisor. Thus detriment to the promisee suffices even though the promisor does not benefit <sup>16</sup>; for example if A guarantees B’s bank overdraft and the promisee bank suffers detriment by advancing money to B, then A is bound by his promise, even though he gets no benefit from the advance to B. <sup>17</sup> One view, indeed, was that “Detriment to the promisee is of the essence of the doctrine, and benefit to the promisor is, when it exists, merely an accident.” <sup>18</sup> But in a number of cases promises have been enforced in spite of the fact that there was no apparent detriment to the promisee <sup>19</sup>; and these cases support the view that benefit to the promisor is (even without detriment to the promisee) sufficient to satisfy the requirement of consideration. <sup>20</sup>

##### Benefit and detriment may be factual or legal

##### 4-006

The traditional definition of consideration lacks precision because the key notions of “benefit” and “detriment” are used in at least two senses. They may mean, first any act, <sup>21</sup> which is of some value, or secondly, only such acts, the performance of which is not already legally due from the promisee. In the first sense, there is consideration if a benefit or detriment is *in fact* obtained or suffered. When the words are used in the second sense this factual benefit or detriment is disregarded, and a notion of what may be called legal benefit or detriment is substituted. Under this notion, the promisee may provide consideration by doing anything that he was not legally bound to do, whether or not it actually occasions a detriment to him or confers a benefit on the promisor; while conversely he may provide

no consideration by doing only what he was legally bound to do, however much this may in fact occasion a detriment to him or confer a benefit on the promisor. The English courts have not consistently adopted either of these senses of the words “benefit” and “detriment.” In some of the cases to be discussed in this chapter, factual benefit is stressed <sup>22</sup> even though legal detriment may also have been present; while in others the absence of legal detriment or benefit has in the past been regarded as decisive. <sup>23</sup> One modern authority <sup>24</sup> regards factual benefit to the promisor as sufficient, even in the absence of a legal benefit to him or of a legal detriment to the promisee; and it is possible (though far from certain) that this approach may spread to at least some <sup>25</sup> of the situations in which the courts have in the past insisted on legal benefit or detriment.

## Other definitions

### 4-007

The traditional definition of consideration in terms of benefit and detriment is sometimes felt to be unsatisfactory. One cause of dissatisfaction is that it is thought to be wrong to talk of benefit and detriment when both parties expect to, and actually may, benefit from the contract. But this reasoning falls, with respect, into the error of looking at the subject-matter of the definition as the consideration *for a contract*, <sup>26</sup> when the definition is actually concerned with the consideration *for a promise*. <sup>27</sup> Another cause of dissatisfaction is the artificial reasoning that is sometimes necessary to accommodate the cases within the traditional definition. Sir Frederick Pollock has, accordingly, described consideration simply as “the price for which the promise is bought.” <sup>28</sup> This statement has been approved in the House of Lords <sup>29</sup>; but if it is to be regarded as a definition of consideration it is defective in being so vague as to give no help in determining whether consideration exists on any given set of facts. A view which leads to even more uncertainty is that consideration “*means* a reason for the enforcement of promises” <sup>30</sup>—that reason being simply “the justice of the case.” <sup>31</sup> But “the justice of the case” is in almost all the decided cases highly debatable, so that the suggested definition provides no basis at all for formulating a coherent legal doctrine. <sup>32</sup> A modification of the suggested definition, describing consideration as “a reason for the recognition of an obligation” <sup>33</sup> is open to the same objection. Of course the traditional definition does not provide complete (or even a very high degree of) certainty. But it does state the doctrine in a way that is broadly consistent with the case law on the subject and that gives some basis for predicting the course of future decisions. The traditional definition also has more support in the authorities than any other definition. For these reasons it will be used in this chapter.

## Performances and promises as consideration

### 4-008

The consideration for a promise may consist either of a performance rendered by the promisee or of a promise to render a performance. The first possibility is illustrated by cases of unilateral contracts <sup>34</sup> where performance by the promisee of the stipulated act or forbearance (e.g. walking from London to York) constitutes the consideration for the promise (usually) to pay a sum of money to the promisee. <sup>35</sup> The second possibility is illustrated by cases in which each party makes a promise to the other, but neither party has yet rendered any performance. The rule that, in such a case, the parties’ mutual promises can amount to consideration for each other has long been settled. <sup>36</sup> Hence if a seller promises to deliver goods in six months’ time and the buyer to pay for them on delivery, there is an immediately binding contract from which neither party has any right to withdraw, though, of course, performance cannot be claimed till the appointed time. An implied, no less than an express, promise is capable of constituting consideration. <sup>37</sup> A promise can, however, only be regarded as consideration for a counter-promise if the performance of the promise would have been so regarded. <sup>38</sup> It is, for example, settled that part payment of a debt by the debtor on or after the due day does not amount to consideration for a promise by the creditor to forgo the balance, <sup>39</sup> and the position would be exactly the same if the debtor, instead of actually making such a payment, simply promised to do so. Similarly, a promise to make a gift of £100 could not be made binding by a counter-promise to accept it since performance of the counter-promise could not conceivably amount to a benefit to the original promisor or to a detriment to the original promisee. Such benefit or detriment can (in such a case) arise only if the subject-matter of the promised gift is onerous property and the donee makes a counter-promise to discharge the obligations attached to it: e.g. to perform the covenants in a lease, <sup>40</sup>

or to pay outstanding mortgage instalments<sup>41</sup> or to pay calls on shares.<sup>42</sup> Of course if the property is worth more than the obligations attached to it there will be an element of gift in such a transaction; and special safeguards are provided by law to ensure that certain categories of third parties (such as creditors of the promisor) are not prejudiced by this aspect of the transaction.<sup>43</sup>

### Mutual promises as consideration for each other

#### 4-009

Some difficulty has been felt in explaining the rule that mutual promises can be consideration for each other. At first sight, it might seem that the mere giving of a promise was not a detriment, nor its receipt a benefit, so as to make the counter-promise binding. It will not do to say that the person making the promise suffers a detriment because he is legally bound to perform it; for if this assumption is made about one of the promises, it must also be made of the other, so that the "explanation" assumes the very point in issue. Probably the reason for the rule is simpler. A person who makes a commercial promise expects to have to perform it (and is in fact under considerable pressure to do so). Correspondingly, one who receives such a promise expects it to be kept. These expectations, which can exist even where the promise is not legally enforceable,<sup>44</sup> are based on commercial morality, and can properly be called a detriment and a benefit; hence they satisfy the requirement of consideration in the case of mutual promises.

### Invented consideration

#### 4-010

Normally, a party enters into a contract with a view to obtaining the consideration promised by the other: for example, the buyer wants the goods and the seller the price. In the United States it has been said that this is essential, and that "Nothing is consideration that is not regarded as such by both parties."<sup>45</sup> But English courts do not insist on this requirement and may regard an act or forbearance as consideration even though the promisee "did not consciously realise that [he was] subjecting himself to a detriment and [was] giving consideration for the [promisor's] undertaking"<sup>46</sup> or even though it was not the object of the promisor to secure it.<sup>47</sup> They may also treat the possibility of some prejudice to the promisee as a detriment without regard to the question whether it has in fact been suffered.<sup>48</sup> These practices may be called "inventing" consideration,<sup>49</sup> and the temptation to adopt one or the other of them is particularly strong when the act or forbearance which was actually bargained for cannot be regarded as consideration for some reason which is thought to be technical and without merit. In such cases the practice of inventing consideration may help to make the operation of the doctrine of consideration more acceptable<sup>50</sup>; but the practice may also be criticised<sup>51</sup> on the ground that it gives the courts a wide discretion to hold promises binding or not as they please. Thus the argument that the promisee *might* have suffered prejudice by acting in reliance on a promise is in some cases made a basis of decision,<sup>52</sup> while in others precisely the same argument is rejected.<sup>53</sup> The practice of "inventing" consideration is, therefore, a source of considerable uncertainty in this branch of the law.

### Motive and consideration

#### 4-011

In *Thomas v Thomas*<sup>54</sup> a testator shortly before his death expressed a desire that his widow should during her life have the house in which he lived, or £100. After his death, his executors "in consideration of such desire" promised to convey the house to the widow during her life or for so long as she should continue a widow, "provided nevertheless and it is hereby further agreed" that she should pay £1 per annum towards the ground rent, and keep the house in repair. In an action by the widow for breach of this promise, the consideration for it was stated to be the widow's promise to pay and repair. An objection that the declaration omitted to state part of the consideration, viz. the testator's desire, was rejected. Patteson J. said: "Motive is not the same thing with consideration. Consideration means something which is of value in the eye of the law moving from the plaintiff."<sup>55</sup>

This remark should not be misunderstood: a common motive for making a promise is the desire to obtain the consideration; and an act or forbearance on the part of the promisee may (unless the court is prepared to “invent” <sup>56</sup> a consideration) fail to constitute consideration precisely because it was not the promisor’s motive to secure it. What Patteson J. meant was that a motive for promising did not amount to consideration unless two further requirements were satisfied, viz.: (i) that the thing secured in exchange for the promise was “of some value in the eye of the law”; and (ii) that it moved from the plaintiff. <sup>57</sup> Consideration and motive are not opposites; the former concept is a subdivision of the latter. The consideration for a promise is (unless the consideration is nominal <sup>58</sup> or invented) always a motive for promising; but a motive for making a promise is not necessarily consideration for it in law. Thus the testator’s “desire” <sup>59</sup> in *Thomas v Thomas* was a motive for the executors’ promise but not part of the consideration for it. The widow’s promise to pay and repair was another motive for the executors’ promise and did constitute the consideration for that promise.

## Consideration and condition

### 4-012

*Thomas v Thomas* <sup>60</sup> also illustrates the difference between consideration and condition: the plaintiff’s remaining a widow was not part of the consideration but a condition of her entitlement to enforce the executor’s promise. On the other hand, in *Re Soames* <sup>61</sup> A promised £3,000 to B if B would set up a school in the running of which A was to have an active part. It was held that, by establishing the school, B had provided consideration for A’s promise. It seems that the distinction between consideration and condition depends, in such cases, on whether “a reasonable man would or would not understand that the performance of the condition was requested as the price or exchange for the promise.” <sup>62</sup> In *Thomas v Thomas* the executors had not requested the plaintiff to remain a widow; while in *Re Soames* a request by A that B should establish the school could be inferred from A’s expressed intention to participate in its management. The distinction is further illustrated by *Carlill v Carbolic Smoke Ball Co* <sup>63</sup> where the claimant provided consideration for the defendants’ promise by using the smoke-ball; but her catching influenza was a condition of her entitlement to enforce that promise. <sup>64</sup>

## Certain limited effects of promises without consideration

### 4-013

A promise that is not supported by consideration may, in spite of having no contractual force nevertheless give rise to certain other legal effects. In particular, English law places certain restrictions on the revocability of a promise where the promisee has acted on it in a way that was intended and could have been anticipated (without having been requested) by the promisor; and it may give a remedy against a promisor who would be unjustly enriched (or otherwise act unconscionably) if he were allowed freely to revoke and did revoke his promise after such action in reliance on it by the promisee. These limited legal effects of promises without consideration are discussed later in this chapter. <sup>65</sup> Here it is necessary only to emphasise that these legal effects do not give such promises the full consequences of a binding contract. Thus the restriction on revocability may be only temporary <sup>66</sup>; breach of the promise may not entitle the injured party to the full loss of bargain damages normally awarded for breach of contract, <sup>67</sup> or may not entitle him to them as of right. <sup>68</sup> Only a promise supported by consideration or made in a deed has these full contractual effects. “Contract” does not exhaust the category of promises having *some* legal effect; it refers, more narrowly, to those promises or agreements leading to the full degree of enforceability accorded by the law to contractual promises. <sup>69</sup> Moreover, while promises without consideration may have some legal effects, the promisee can still gain a number of important practical advantages by showing that he provided consideration. If the promise was supported by consideration, the promisee will not need to show that he had acted in reliance on the promise or that the promisor would be unjustly enriched or would otherwise be acting unconscionably if he went back on the promise; the promise will not be revocable but enforceable according to its terms; and the promisee will be entitled to full loss of bargain damages as of right. The limited legal effects of promises without consideration may have mitigated some of the rigours of the strict doctrine; but they have not eliminated consideration as an essential requirement of a binding contract. <sup>70</sup>



1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
15. *Currie v Misa* (1875) L.R. 10 Ex. 153, 162. See also *Barber v Fox* (1670) 2 Wms.Saund. 134, n.(e); *Cooke v Oxley* (1790) 3 T.R. 653, 654; *Jones v Ashburnham* (1804) 4 East 455; *Bainbridge v Firmstone* (1838) 8 A. & E. 743, 744; *Thomas v Thomas* (1842) 2 Q.B. 851, 859; *Bolton v Madden* (1873) L.R. 9 Q.B. 55, 56; *Gore v Van der Lann* [1967] 2 Q.B. 31, 42; *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] Lloyd's Rep. 67, 75; *Midland Bank & Trust Co Ltd v Green* [1981] A.C. 513, 531; *R. v Braithwaite* [1983] 1 W.L.R. 383, 391; *Johnsey Estates Ltd v Lewis Manley (Engineering) Ltd* [1987] 2 E.G.L.R. 69, 70; *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal B.C.* [1999] Q.B. 215 at 236; *Modahl v British Athletics Federation Ltd* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [50]; cf. at [103].
16. *O'Sullivan v Management Agency & Music Ltd* [1985] Q.B. 428, 459; *Re Dale* [1994] Ch. 31, 38 . cf. *Gill & Duffus SA v Rionda Futures* [1994] 2 Lloyd's Rep. 67 at 82.
17. cf. below, para.4-040.
18. Holdsworth, *History of English Law*, Vol.8, p.11.
19. e.g. below, paras 4-038—4-041, 4-069, 4-127.
20. cf. *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] 2 Q.B. 1270 at [63], referring only to "benefit" (and not to detriment).
21. Or forbearance, or promise to do or to forbear. For the sake of brevity, references in the text are confined to the doing of an act.
22. e.g. in *Bolton v Madden* (1873) L.R. 9 Q.B. 55, below, para.4-041; cf. *R v Att-Gen for England and Wales* [2003] UKPC 22, [2003] E.M.L.R. 24, at [32] ("practical benefit" to promisor).
23. e.g. in some of the existing duty cases discussed in paras 4-069, 4-074, 4-076, below.
24. *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1.
25. e.g. to the variation cases discussed in paras 4-080—4-081; but probably not to the forbearance to sue cases discussed in paras 4-051—4-054.
26. There are traces of this approach in *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 23: "If both parties benefit from an agreement it is not necessary that each also suffered a detriment."
27. Above, para.4-004.
28. Principles of Contract (13th ed.), p.133.
29. *Dunlop Pneumatic Tyre Co Ltd v Selfridge Ltd* [1915] A.C. 847, 855.
30. Atiyah, *Consideration in Contracts: A Fundamental Restatement*, Canberra, 1971, p.60. For an earlier, similar statement, see Llewellyn (1931) 40 Yale L.J. at p.741—"any sufficient justification for court enforcement"; but no attempt is there made to suggest that this actually is the law. For further criticism of Atiyah's views, see Treitel (1976) 50 A.L.J. 439. cf. *Colonia Versicherung A.G. v Amoco Oil Co* [1995] 1 Lloyd's Rep. 570, 577 (affirmed without reference to this point [1997] 1 Lloyd's Rep. 261) where the words "(a) the reason for and (b) ample consideration for" a payment clearly treat these concepts as distinct.
31. Atiyah, loc. cit. pp.52, 58.

- <sup>32.</sup> cf. the description of a similar concept as “potentially very confusing”: *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal B.C.* [1999] Q.B. 215 at 216.
- <sup>33.</sup> Atiyah, *Essays on Contract*, pp.179, 183.
- <sup>34.</sup> Above, para.2-082. See also *Carlill v Carbolic Smoke Ball Co* [1892] 2 Q.B. 484; *Budgett v Stratford Co-operative and Industrial Society Ltd* (1916) 32 T.L.R. 378; *Melhuish v Redbridge Citizens Advice Bureau* [2005] I.R.L.R. 415 at [18].
- <sup>35.</sup> The promisee may accept and provide consideration at an earlier stage: see above, para.2-083 and below, para.4-191.
- <sup>36.</sup> See, e.g. *Pecke v Redman* (1555) 1 Dyer 113a; *Joscelin v Shelton* (1557) 3 Leon. 4; *Manwood v Burston* (1586) 2 Leon. 203; *Harrison v Cage* (1698) 12 Mod. 214; Simpson, *A History of the Common Law of Contract*, pp.459–470; Baker (1980) 43 M.L.R. 467, 468 (reviewing Atiyah, *The Rise and Fall of Freedom of Contract*). But a mere proposal falling short of a promise does not suffice: *The Kaliningrad and Nadezhda Krupskaya* [1997] 2 Lloyd’s Rep. 35, 39.
- <sup>37.</sup> *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd’s Rep. 614, 619; *The Aramis* [1989] 2 Lloyd’s Rep. 213 at 225 (where the claim failed for want of contractual intention).
- <sup>38.</sup> *Re Dale* [1994] Ch. 31, 38.
- <sup>39.</sup> Below, para.4-117.
- <sup>40.</sup> *Price v Jenkins* (1877) 5 Ch.D. 619. In so far as *Thomas v Thomas* (1842) 2 Q.B. 851 (below, para.4-011) is contra, it seems to be inconsistent with *Price v Jenkins* (where the “case which is not reported” mentioned at p.620 closely resembles *Thomas v Thomas*); cf. *Johnsey Estates v Lewis & Manley* [1987] 2 E.G.L.R. 69; *Westminster City Council v Duke of Westminster* [1991] 4 All E.R. 136 (reversed in part on other grounds (1992) 24 H.L.R. 572).
- <sup>41.</sup> *Merritt v Merritt* [1970] 1 W.L.R. 1211.
- <sup>42.</sup> *Cheale v Kenward* (1858) 3 D. & J. 27.
- <sup>43.</sup> Insolvency Act 1986, ss.238, 339; and see below, para.4-019 n.122; *Re Kumar* [1993] 1 W.L.R. 224.
- <sup>44.</sup> cf. *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 at 581; the promise under consideration in this case would now be legally enforceable by virtue of Gambling Act 2005, s.335(1); Vol.II, para.41-011.
- <sup>45.</sup> *Philpot v Gruninger* (1872) 14 Wall. 570, 577; Restatement, Contracts, §75(1): “bargained for and given in exchange for the promise”; Restatement 2d, Contracts, §75(1) and (2); Williston, *Contracts* (rev. ed.), Vol.1, p.320; Corbin, *Contracts*, §172, is more sceptical. The Restatement 2d, §72 also supports the converse proposition that “any performance which is bargained for is consideration,” even though there may be no element of benefit or detriment; but this is subject to important exceptions, especially where the performance bargained for is the settlement of an invalid claim and the performance of an existing duty: see §§73 and 74; as to these topics, see below, paras 4-051—4-076.
- <sup>46.</sup> *Pitts v Jones* [2007] EWCA Civ 1301, [2008] Q.B. 76 at [18].
- <sup>47.</sup> See, for example, below, paras 4-013, 4-016, 4-074, 4-195 and below at n.52; and cf. *Pollwaty Ltd v Abdullah* [1974] 1 W.L.R. 493, discussed by Zuckerman (1975) 38 M.L.R. 384 and Thornely [1975] C.L.J. 26; cf. *Vantage Navigation Corp. v Sahail and Saud Building Materials Co LLC (The Alev)* [1989] 1 Lloyd’s Rep. 138, 147; *Moran v University College Salford (No.2)*, *The Times*, November 23, 1993.
- <sup>48.</sup> e.g. below, n.52.



49. Atiyah, loc. cit. para.4-007, n.30 above, accuses the present editor of having “invented the concept of invented consideration;” but all that the editor can claim to have invented is a phrase for describing what the courts sometimes actually do. The phrase does not imply approval of the practice: see below after n.51. Nor does the phrase necessarily imply inconsistency between decisions, as Atiyah suggests *ibid.*: courts could *consistently* hold that an act or forbearance was consideration although it was not the promisor’s object to secure it. In fact, the decisions on the point are not perfectly consistent with each other: see below at nn.52 and 53; but that is hardly unusual in a common law system.
50. cf. the dictum in *Williams v Roffey Bros & Nicholls Contractors Ltd* [1991] 1 Q.B. 1 (below, para.4-069) at 18 that the courts should “be more ready” to find that there was consideration where such a finding “reflects the true understanding of the parties”; and the reliance on this dictum in *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 (below, paras 4-018 and 4-072) at [88].
51. For criticism, see Holmes, *The Common Law*, p.292. In the United States there is less need for “inventing” consideration because of the existence of a broad doctrine of promissory estoppel: see Restatement, Contracts, §90, and Restatement 2d, Contracts, §90 and below para.4-107.
52. *Shadwell v Shadwell* (1860) 9 C.B.(N.S.) 159, 174: the consideration was said by Erle C.J. to consist of the possibility that the promisor “*may have made a most material change in his position ...*” (italics supplied).
53. In *Offord v Davies* (1862) 12 C.B.(N.S.) 748: the argument of counsel (at 750) that “the plaintiff *might* have altered his position in consequence of the guarantie” (italics supplied) was rejected, Erle C.J. being again a member of the court. cf. also *Collier v P & M.J. Wright (Holdings)* [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643 at [27(ii)]; and see below, para.4-015 n.96 and para.4-016 at n.106 for refusal to “invent” consideration.
54. (1842) 2 Q.B. 851.
55. At 859; cf. *Hadley v Kemp* [1999] E.M.L.R. 589 at 625.
56. Above, para.4-010.
57. Discussion of these requirements forms the bulk of this chapter.
58. In *Thomas v Thomas* the consideration may not have been adequate, but it was not nominal; cf. *Westminster City Council v Duke of Westminster* [1991] 4 All E.R. 136 (*reversed in part on other grounds* (1992) 24 H.L.R. 572); below, para.4-020.
59. After n.54 above.
60. Above, para.4-011 at n.54.
61. (1897) 13 T.L.R. 439; cf. below, para.4-191.
62. Williston, *Contracts* (3rd ed.), §112; cf. *Dickinson v Abel* [1969] 1 W.L.R. 295 (where A had promised to pay £10,000 to B if A succeeded (as he did) in buying Blackacre from X. This was said to be “nothing but a conditional promise without consideration” because B had not been requested to do anything to promote the sale by X to A); see also *Ellis v Chief Adjudication Officer* [1998] 1 FLR 184 where performance of the condition was no doubt requested but the actual decision was that an executed gift of a flat failed because the condition (that the donee should look after her mother there) had not been performed. The agreement in that case lacked contractual force for want of contractual intention: above, para.2-183.
63. [1893] 1 Q.B. 256; stated above, para.2-015.
64. For the purpose of assessing VAT, a wider test (laid down by European Community Law), requiring only a “direct link” between performance and counterperformance, suffices: see

*Rosgill Group Ltd v Customs & Excise Commissioners* [1997] 3 All E.R. 1012, though in that case the English test for what constitutes consideration was also said at 1020 to have been satisfied.

[65.](#) Below, paras 4-082—4-107, 4-130—4-185.

[66.](#) Below, paras 4-097, 4-131, 4-168.

[67.](#) Below, paras 4-172—4-179.

[68.](#) Below, para.4-173.

[69.](#) See below, Chs 26 and 27.

[70.](#) See further, below, paras 4-106, 4-185.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

#### Part 2 - Formation of Contract

#### Chapter 4 - Consideration <sup>1</sup>

#### Section 3. - Adequacy of Consideration

Courts generally will not judge adequacy

#### 4-014

Under the doctrine of consideration, a promise has no contractual force unless *some* value has been given for it. But as a general rule <sup>71</sup> the courts do not concern themselves with the question whether “adequate” value has been given, <sup>72</sup> or whether the agreement is harsh or one-sided. <sup>73</sup> The fact that a person pays “too much” or “too little” for a thing may be evidence of fraud <sup>74</sup> or mistake, or it may induce the court to imply a term as to the quality of the subject-matter or be relevant to the question whether a contract has been frustrated. But it does not of itself affect the validity of the contract, so that (for example) a promise by an employer to make a payment to an employee under a compromise agreement would not be invalid merely because the amount of the payment was irrationally generous. This factor might, indeed, where the employer was a public authority, make such a promise void on the ground that such an authority is “constrained by a general duty arising in public law not to conduct itself in a way which may be described as ‘irrationally generous’.” <sup>75</sup> But the courts are reluctant to allow such a body to rely on its own irrationality “to escape from the coils of a contractual obligation by suggesting that it could not rationally have signed up to it”; and they have given effect to this reluctance by insisting, not only that the burden on the issue of irrationality rests on the authority, but also that this burden is “a heavy one indeed.” <sup>76</sup>

⚠ The principle that the courts are not generally concerned with the adequacy of consideration is also recognised by the Consumer Rights Act 2015, by s.62(1) of which “unfair terms” in a “consumer contract”, <sup>77</sup> i.e. to one between a “trader” and a “consumer” <sup>78</sup> is “not binding” on the consumer.” <sup>79</sup> Our present concern is with s.64(1)(b) <sup>80</sup> by which a term “may not be assessed for fairness under section 62 to the extent that ... the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.” For contracts made on or after October 1, 2015 <sup>81</sup> this provision will replace reg.6(2)(b) of the Unfair Terms in

Consumer Contracts Regulations 1999, <sup>82</sup> ⚠ though the wording of s.64(1)(b) differs in a number of respects from that of reg.6(2)(b) of the 1999 Regulations: in particular reg.6(2)(b) uses the phrase “the adequacy of the price” where s.64(1)(b) refers to “the appropriateness of the price.” The Act is thus less clearly linked (than the Regulations are) to the present discussion of adequacy of consideration; but it is arguable that “adequacy” is an aspect, even if it is not the sole aspect, of “appropriateness.” To this extent, it remains arguable that a term would not be “unfair” within the Act merely because it required the consumer to pay “too much” for what had been supplied to him under the contract; and that judicial discussions of this point under reg.6(2)(b) <sup>83</sup> can be taken into account in cases concerned with the scope of s.64(1)(b). For example, in *Office of Fair Trading v Abbey National plc* <sup>84</sup> terms in contracts between banks and consumers who were current account holders specified the level of charges payable in respect of unauthorised overdrafts. It was held that these terms were protected from challenge under the 1999 Regulations by reg.6(2)(b); and it seems that they could similarly be protected by s.64(1)(b) of the Act from challenge under its s.62(1). The case is also of interest in the context of the *common law* principle that the law does not normally concern itself with the “adequacy” of consideration. Lord Walker S.C.J. said that “the most important element of the consideration” that was “received by the bank” was “the interest foregone by customers whose accounts are in credit since ... they will be receiving a *relatively low rate of interest* ...” <sup>85</sup>; and Lord

Phillips P. similarly said that such customers “reward the bank by allowing it to use the funds standing to their credit without paying interest *at the market* rate.”<sup>86</sup> The phrases here italicised appear to indicate that, where a term was *not* immune from scrutiny by virtue of reg.6(2)(b), then the court could have taken questions of adequacy of consideration into account in assessing the fairness of a term under the 1999 Regulations; and it is submitted that the position is the same under s.64(1)(b) of the 2015 Act. The point is important because, as Lord Walker S.C.J. said, “not every term that is in some way linked to monetary consideration falls within reg.6(2)(b)”<sup>87</sup>; this has, for example, held to be the position where the term in question was “ancillary” to the consumer’s principal obligation.<sup>88</sup>

The general common law rule stated above<sup>89</sup> is subject to a number of exceptions discussed elsewhere in this book.<sup>90</sup> These indicate that the courts are (even where legislation has not intervened) by no means insensitive to the problems raised by unequal or unfair bargains; but in none of them is a promise held invalid merely because adequate value for it has not been given. Some additional factor is required to bring a case within one of the exceptions: for example, the existence of a relationship in which one party is able to take an unfair advantage of the other. In the absence of some such factor, the general rule applies that the courts will enforce a promise so long as *some* value for it has been given: “no bargain will be upset which is the result of the ordinary interplay of forces.”<sup>91</sup>

## Illustrations

### 4-015

It follows from the general common law rule stated in para.4-014 above that acts or omissions of very small value can be consideration. Thus it has been said that there was consideration for a promise to give a man £50 “if you will come to my house”<sup>92</sup>; that the act of executing a deed could be consideration for a promise to pay money although the deed was void<sup>93</sup>; that the execution of a will can be consideration (for a promise to make, and not to revoke, a similar will<sup>94</sup>) even though the will is in its nature revocable<sup>95</sup>; that to give up a piece of paper without reference to its contents was consideration,<sup>96</sup> and even that to show a person a document was consideration.<sup>97</sup> The mere act of conducting negotiations can similarly satisfy the requirement of consideration, even though the act does not commit the promisee to bringing the negotiations to a successful conclusion.<sup>98</sup> Further illustrations of the principle are provided by a case in which a promise to cut back undergrowth was regarded as consideration for the grant of a contractual licence to occupy land<sup>99</sup> and by one in which an employee’s agreement to submit to a temporary change of workplace and to take part in an assessment of his professional competence was held (though it had no easily quantifiable value) to amount to consideration for his employer’s promise not to take disciplinary proceedings against him.<sup>100</sup>

## Objects of trifling value

### 4-016

In *Chappell & Co Ltd v Nestlé Co Ltd*,<sup>101</sup> chocolate manufacturers sold gramophone records for 1s. 6d. plus three wrappers of their 6d. bars of chocolate. It was held that the delivery of the wrappers formed part of the consideration, though the wrappers were of little value to the buyer and were in fact thrown away by the seller. If the delivery of the wrappers formed part of the consideration it could, presumably, have formed the whole of the consideration, so that a promise to deliver records for wrappers alone would have been binding. This case should be contrasted with *Lipkin Gorman v Karpnale Ltd*,<sup>102</sup> where gaming chips supplied by a gaming club to one of its members (and then lost by the member in the course of the gaming) were held not to constitute consideration for the money which the member had paid for them. One reason for this view appears to have been that “the chips themselves were worthless”<sup>103</sup>; but this is equally true of the wrappers in the *Chappell* case. Another seems to have been that the chips “remained the property of the club”<sup>104</sup>; but this again would not of itself be decisive, since it is settled that a transfer of the possession of a thing (no less than that of the ownership of it) can constitute consideration.<sup>105</sup> A third reason for the view that the chips were not consideration for the money may be that the parties did not so regard the transaction: they regarded the chips as merely “a convenient mechanism for facilitating gambling,”<sup>106</sup> and the case may be one

in which the court refused to “invent” consideration <sup>107</sup> (by regarding something as consideration which was not so regarded by the parties) even though this course was technically open to it. This refusal appears to have been based on the context in which the question arose. The issue was not whether the club could sue the member on any promise made by him: it arose because the money paid by the member to the club had been stolen; and the club, which had received the money in good faith, argued that it had given valuable consideration for it, so as to defeat the true owner’s claim for the return of the money. This explanation of the case derives some support from Lord Goff’s discussion of a hypothetical case of tokens supplied by a department store in exchange for cash: he said that “by receiving the money in these circumstances the store does not *for present purposes* give valuable consideration for it.” <sup>108</sup> Yet he also accepted that (in the store example) “an independent contract is made for the chips when the customer originally obtains them at the cash desk.” <sup>109</sup> The question whether a party has provided consideration may thus receive one answer when it arises for the purpose of determining the enforceability of a promise, and a different and narrower one when it arises for the purpose of determining whether a transaction has adversely affected the rights of an innocent third party. <sup>110</sup> It was the desire to protect the victim of the theft which led the House of Lords in the *Lipkin Gorman* case to reject the, no doubt somewhat technical, argument that the chips constituted consideration for the receipt of the money.

#### 4-017

The *Lipkin Gorman* <sup>111</sup> case gives rise to further difficulty because the chips were supplied on the terms that they could be used, not only for gaming, but also to buy refreshments at the club. There was no evidence of their having been used for this purpose, <sup>112</sup> but Lord Templeman said that “neither the power to buy refreshments nor the exercise of that power could constitute consideration for the receipt [by the club] of £154,693.” <sup>113</sup> One possible interpretation of this passage is that the supply of refreshments could not constitute consideration for £154,693 (the sum lost by the member of the club) since the disparity in value was too great; but this would be inconsistent with the principle that consideration need not be adequate. It is submitted that the preferable explanation of Lord Templeman’s statement is that the chips were simply “treated as currency” <sup>114</sup> in the club and could be used for a variety of transactions. The reason why the supply of refreshments was no consideration for the face value of the chips lost at play was simply that these transactions were entirely separate ones.

#### Nominal consideration

#### 4-018

The rule that consideration need not be adequate makes it possible to evade the doctrine of consideration in the sense that a gratuitous promise can be made binding by giving a nominal consideration, e.g. £1 for the promise of valuable property, or a peppercorn for a substantial sum of money. Such cases are merely extreme examples of the rule that the courts will not judge the adequacy of consideration. <sup>115</sup> If, however, it appears on the face of an agreement that the consideration must as a matter of arithmetic be worth less than the performance of the counter-promise, there would seem to be no contract: for example, if A promised to pay B £100 in return for £1 to be simultaneously paid by B to A. It has been said that, in such a case, the apparent contract would amount “in reality to a gift of £99.” <sup>116</sup> It is assumed in the example that both sums are simply to be paid in legal tender. An agreement to exchange a specific coin or coins of a particular description for a sum of money greater than their face value (e.g. 20 shilling pieces bearing the date 1900 for £100) would be a good contract. The same would be true of an agreement to pay a sum in one currency in exchange for one payable in another, and of an agreement to pay a larger sum tomorrow in exchange for a smaller sum paid today. In *Birmingham City Council v Forde* <sup>117</sup> it was argued that the reasoning of the hypothetical case discussed above <sup>118</sup> also applied where solicitors (M) had entered into a conditional fee agreement (CFA 1) with a client (C) and then entered into another such agreement (CFA 2) with C by which C promised to pay M more than was due to M under CFA 1. One reason why this argument was, in this context, rejected was that there was a doubt as to the validity of CFA 1. <sup>119</sup> It should be added that the only arguable *arithmetical* disparity in the *Birmingham* case was between *the performances to be rendered by C* under CFA 1 and CFA 2. In this respect, that case differed from our hypothetical case, in which such disparity exists between *promise and counterpromise*. The question in the *Birmingham* case was whether M’s promise in CFA 2 to do work which M had already undertaken in CFA 1 was consideration for C’s promise of extra

pay and no precise *arithmetical* value could have been placed on the former promise, even on the assumption that there was no doubt as to the validity of CFA 1; and, even if CFA 1 was assumed to have been valid, M's actual performance of the work could have amounted to consideration if it had conferred a factual benefit on C. <sup>120</sup>

#### 4-019

⚠ Where an agreement is legally binding on the ground that it is supported by nominal consideration, the doctrine of consideration does not serve its main purpose, of distinguishing between gratuitous and onerous promises. But the law has no settled policy against enforcing all gratuitous promises. It refuses to enforce only *informal* gratuitous promises <sup>121</sup>; and the deliberate use of a nominal consideration can be regarded as a form used with the intention of making a gratuitous promise binding. In some cases it may, indeed, be undesirable to give promises supported by nominal consideration the same legal effect as promises supported by substantial consideration; but these cases are best dealt with by special rules. <sup>122</sup> Such rules are particularly necessary where the promise can cause prejudice to third parties. For example, the danger that company promoters might use the device of nominal consideration to the prejudice of shareholders is avoided by imposing fiduciary duties on the promoters. <sup>123</sup> ⚠

#### Nominal distinguished from inadequate consideration

#### 4-020

It is not normally necessary to distinguish between "nominal" and "inadequate" consideration, since both equally suffice to make a promise binding. The need to draw the distinction may, however, arise where rules of law treat promises or conveyances supported only by nominal consideration differently from those supported by consideration which is substantial or "valuable" even though it may be inadequate. <sup>124</sup> One view is that a nominal consideration is one that is of only token value, <sup>125</sup> while an inadequate consideration is one that has substantial value even though it is manifestly less than that of the performance promised or rendered in return. A second view is that " 'Nominal consideration' and 'nominal sum' appear ..., as terms of art, to refer to a sum or consideration which can be mentioned as consideration but is not necessarily paid." <sup>126</sup> This view was expressed by Lord Wilberforce (in a speech with which all the other members of the House of Lords concurred) in *Midland Bank & Trust Co Ltd v Green*. <sup>127</sup> In that case a husband sold a farm, said to be worth £40,000, to his wife for £500. It was held that the wife was, for the purposes of s.13(2) of the Land Charges Act 1925, a "purchaser for money or money's worth" so that the sale to her prevailed over an unregistered option to purchase the land, which had been granted to one of the couple's children. <sup>128</sup> It was not necessary to decide whether the consideration for the sale was nominal but Lord Wilberforce said that he would have had "great difficulty" in so holding; and that "To equate 'nominal' with 'inadequate' or even 'grossly inadequate' consideration would embark the law on inquiries which I cannot think were ever intended by Parliament." <sup>129</sup> On the facts of the case the £500 was paid and was more than a mere token, so that the consideration was not nominal on either of the two views stated above. But if the stated consideration had been only £1, or a peppercorn, it is submitted that it would have been nominal even if it had been paid, or delivered, in accordance with the intention of the parties. So to hold would not lead to inquiries as to the adequacy of consideration; for the distinction between a consideration that is a mere token and one that is inadequate (or even grossly inadequate) is, it is submitted, clear as a matter of common sense. Thus where the question was whether a lease amounted to a "disposition ... for a nominal consideration" <sup>130</sup> it was said that "Any substantial value—that is, a value of more than, say, £5 ... will prevent [the] disposition from being for a nominal consideration." <sup>131</sup> Such an approach gives rise to no more difficulty than the concept of a consideration which is "mentioned as a consideration but ... not necessarily paid." This test would presumably make the question whether consideration was nominal turn on the intention of the parties; and in the present context this would be an even more than usually elusive criterion since no guidance could be obtained from the terms of the contract, those terms being in cases of this kind often deliberately drafted so as to conceal the true nature of the transaction.

#### Attitude of equity



## 4-021


Even in equity the validity of a contract could not generally be challenged on the ground that the consideration provided for one party's promise was inadequate.<sup>132</sup> But the equitable remedy of specific performance may be refused on this ground<sup>133</sup> (at least if coupled with certain other factors); and in exceptional cases gross undervalue may even be a ground for more radical forms of equitable relief, such as setting a contract aside or reopening it.<sup>134</sup> Equity also refuses to aid a "volunteer"—so that its remedy of specific performance is not available to a person who has given no substantial consideration but who can nevertheless bring an action on the promise because it is in a deed or supported by nominal consideration.<sup>135</sup> But while the equitable principle restricts the enforceability of gratuitous *promises*, it does not affect the validity of a *completed gift*.<sup>136</sup>

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  71. For exceptional cases, see below, paras 4-018, 8-130, 8-142, 27-038. See also *Bankway Properties Ltd v Penfold Dunsford* [2001] EWCA Civ 538; [2001] 1 W.L.R. 1369, where a provision for rent increase in a shorthold tenancy far beyond the amount which (as the landlord knew) the tenant could possibly pay was held to be unenforceable as being inconsistent with the intention of the parties to create an assured tenancy.
  72. *Haigh v Brooks* (1839) 10 A. & E. 309, 320; *Moss v Hall* (1850) 5 Exch. 46, 49–50; *Westlake v Adams* (1858) 5 C.B.(N.S.) 248, 265; *Gravelly v Barnard* (1874) L.R. 18 Eq. 518; *Wild v Tucker* [1914] 3 K.B. 36, 39; *Midland Bank & Trust Co Ltd v Green* [1981] A.C. 513, 532; cf. *Ball v National and Grindley's Bank* [1973] Ch. 127, 139; *Langdale v Danby* [1982] 1 W.L.R. 1123; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16, 27; *Brady v Brady* [1989] A.C. 755, 775; *Normid Housing Association Ltd v R. John Ralphs* [1989] 1 Lloyd's Rep. 265, 272; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [79], referring to para.3-014 of this book in its 29th edition (para.4-014 in the present edition) with apparent approval; *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 at [84], [90] (as to which see also below, paras 4-018 and 4-072). cf. Barton (1987) 103 L.Q.R. 118.
  73. *Gaumont-British Pictures Corp. v Alexander* [1936] 2 All E.R. 1686. On such facts, provisions of the Consumer Rights Act 2015 cited at nn.77–81 below would not apply.
  74. *Tennent v Tennents* (1870) L.R. 2 Sc. & Div. 6, 9. See also *Rice v Gordon* (1847) 11 Beav. 265; *Cockell v Taylor* (1851) 15 Beav. 103.
  75. *Gibb v Maidstone and Tunbridge Wells Health Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786 at [4]; for a colourful example of such irrationality, see *ibid.*, at [56], discussing *R (Bridgeman) v Drury* [1894] 2 I.R. 489.
  76. *Newbold v Leicester CC* [1999] I.C.R. 1182, at [37], where the defendant authority failed to discharge the burden of showing that the generosity was irrational; cf. the *Gibb* case, above n.75, at [7].
  77. For the definition of this expression, see the 2015 Act, ss.61(3), 76(1).
  78. *ibid.*, s.61(1); for the definitions of "trader" and "consumer", see *ibid.*, s.2(2) and 2(3).
  79. 2015 Act, s.62(1).
  80. This Act is fully discussed in Vol.II, Ch.38; for its s.64(1)(b) see Vol.II, para.38-368.
  81. On the dates of commencement, see s.100 below, Vol.II, para.38-197.

- [82.](#) **!**SI 1999/2083, replaced by Consumer Rights Act 2015, s.75 and Sch.4, para.34. The object of reg.6(2)(b) was to give effect to the EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC), Art.4(2). For the possible legal status, after the completion of “Brexit”, of UK legislation which has been passed to implement EU legal requirements, see above, paras 1-013A—1-013E.
- [83.](#) See *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 A.C. 481 at [12], per Lord Bingham, with whose reasoning all the other members of the House of Lords expressed their agreement. Lord Rodger at [64] said that he had “no concluded view” on the present point, relying on the reference in Recital 19 of the Directive cited in n.81 above to “the price/quality ratio.” The Recital is not easy to interpret, but at least one possible view is that this ratio is *not* relevant to the fairness of the *price* term (first sentence), though it may be relevant to the fairness of *other* terms of the contract.
- [84.](#) [2009] UKSC 6, [2010] 1 A.C. 696. See also the decision of the ECJ in *Kásler v OTP Jelzálogbank Zrt* (C-26/13), [2014] 2 All E.R. (Comm) 443, discussing art.4(2) of the Directive referred to in n.81 above. That case does not directly deal with the point here under discussion (i.e. the “adequacy of the consideration” point), being mainly concerned (in its discussion of art.4) with the question of what constitutes the “main subject-matter of the contract” within art.4(2) (at [43] and [59]). For a full discussion of this case, see below, Vol.II, paras 38-229 to 38-233.
- [85.](#) [2009] UKHL 6 at [42].
- [86.](#) *ibid.*, at [54].
- [87.](#) *ibid.*, at [43].
- [88.](#) A point which Lord Walker illustrated by reference to *Director General of Fair Trading v First National Bank*, above, n.82, where the term in question was one requiring the customer to pay interest on the outstanding amounts even after judgment had been given against him for this principal sum. It was held that this term was not protected from challenge by reg.6(2)(b), though the challenge failed as the term was held not to be unfair.
- [89.](#) At n.72.
- [90.](#) See above, n.71; and Waddams (1976) 39 M.L.R. 393; Tiplady (1983) 46 M.L.R. 601.
- [91.](#) *Lloyd's Bank Ltd v Bundy* [1975] Q.B. 326, 336, per Lord Denning, M.R.
- [92.](#) *Gilbert v Ruddeard* (1608) 3 Dy. 272b (n); cf. *Denton v G.N. Ry.* (1856) 5 E. & B. 860.
- [93.](#) *Westlake v Adams* (1858) 5 C.B.(N.S.) 248; perhaps there was also an element of compromise in this case.
- [94.](#) If such promises are contractually binding, they can be enforced under the doctrine of mutual wills even where the promise sought to be so enforced is established by evidence extraneous to the will: *Charles v Fraser* [2010] EWHC 2154 (Ch), [2010] W.T.L.R. 1489.
- [95.](#) *Re Dale* [1994] Ch. 31. cf. *Re Goodchild* [1997] 1 W.L.R. 1216 where a mere “common understanding” (as opposed to definite mutual promises) did not suffice to make B's promise irrevocable, but some effect to it was given by an order in favour of the intended beneficiary under the Inheritance (Provision for Dependents) Act 1975; *Taylor v Dickens* [1998] 1 F.L.R. 806, the reasoning of which was doubted on other grounds in *Gillett v Holt* [2001] Ch. 210.
- [96.](#) *Haigh v Brooks* (1839) 10 A. & E. 309, 334; cf. *Foster v Dawber* (1861) 6 Ex. 839; *Aspinall's Club Ltd v Al Zayat* [2007] EWCA Civ 1001 at [30].
- [97.](#) *Sturlyn v Albany* (1587) Cro.Eliz. 67; *March v Culpepper* (1628) Cro.Car.70; contrast *Re Charge Card Services* [1987] Ch. 150, 164, affirmed [1989] Ch. 487 (production of charge card

and signature of voucher not consideration for a supply of goods, evidently because such “consideration” would be blatantly “invented”: cf. above, para.4-010).

- [98.](#) *Sepoong Engineering Construction Co Ltd v Formula One Management Ltd* [2000] 1 Lloyd's Rep. 602, 611.
- [99.](#) *Well Barn Farming Ltd v Backhouse* [2005] EWHC 1520, [2005] 3 E.G.L.R. 109 at [45].
- [100.](#) *Palmer v East & North Herefordshire NHS Trust* [2006] EWHC 1997, [2006] Lloyd's Rep. Med 472.
- [101.](#) [1960] A.C. 87.
- [102.](#) [1991] 2 A.C. 548. On facts such as those of this case, consideration for the money paid by the member to the club would now be provided by reason of the fact that the club's promise to the member would be legally enforceable by virtue of s.335(1) of the Gambling Act 2005: Vol.II, para.41-011. But the question whether tokens of very small intrinsic value can constitute consideration can still arise in other contexts, not connected with gambling: see below at n.107.
- [103.](#) [1991] 2 A.C. 548 at 561.
- [104.](#) *ibid.*; and see 575.
- [105.](#) *Bainbridge v Firmstone* (1838) 8 A. & E. 743; below, para.4-198.
- [106.](#) *Lipkin Gorman* case above, n.101 at 575. The reasoning of the *Lipkin Gorman* case on this point continues to apply after the coming into force of the Gambling Act 2005: see *Ritz Hotel Casino Ltd v Al Daher* [2014] EWHC 2847 (QB) at [31]–[32], below, Vol.II, para.41-042 at n.255.
- [107.](#) Above, para.4-010.
- [108.](#) *Lipkin Gorman* case above, n.101 at 577; italics supplied; cf. below, para.4-032.
- [109.](#) *Lipkin Gorman* case above, n.101 at 576.
- [110.](#) Above, para.4-002.
- [111.](#) [1991] 2 A.C. 548.
- [112.](#) *Lipkin Gorman* case above, n.110 at 569.
- [113.](#) *ibid.* at 567. For the effect of s.335(1) of the Gambling Act 2005 on the reasoning of the *Lipkin Gorman* case, see above, para.4-016 n.101.
- [114.](#) *Lipkin Gorman* case above, n.110 at 561.
- [115.](#) Atiyah, *Essays on Contracts*, p.194 argues that there is no logical connection between the two rules, relying on the fact that in many of the United States the courts recognise the principle that consideration need not be adequate, while rejecting the device of nominal consideration. The answer to this argument lies in Holmes' aphorism (*The Common Law*, p.1) that “life of the law has not been logic: it has been experience.” American courts which reject the device of nominal consideration do so on policy grounds which have nothing to do with logic.
- [116.](#) *Birmingham City Council v Forde* [2009] EWHC 12, [2009] 1 W.L.R. 3732 at [90].
- [117.](#) Above, n.115.
- [118.](#) After n.114, above.

- [119.](#) See para.4-072 below.
- [120.](#) See para.4-069 below.
- [121.](#) See above, para.4-002.
- [122.](#) Thus a nominal consideration was disregarded in *Milroy v Lord* (1862) 4 D.F. & J. 264, discussed below, para.19-035; specific performance will not be ordered of a promise supported by only nominal consideration (below, para.27-039) and for the purposes of the Law of Property Act 1925, “valuable consideration does not include a nominal consideration in money”: s.205(1)(xxi).
- [123.](#)  Below, para.10-054. For other ways of protecting third parties from being prejudiced by promises made for inadequate consideration, see Trustee Act 1925, s.13; Law of Property Act 1925, ss.172, 173; Local Government Act 1972, s.123, considered in *R. v Pembrokeshire CC Ex p. Coker* [1999] 4 All E.R. 1007, *Structadene Ltd v Hackney LBC* [2001] 2 All E.R. 225, discussing s.123(2) of the 1972 Act, restricting disposals by local authorities “for a consideration less than the best that can reasonably be obtained” and *R. (On the application of Salford Estates) v Salford City Council* [2011] EWHC 2135 (Admin), [2011] B.L.G.R. 982, discussing the scope of the local authority’s duty under that provision; Inheritance (Provision for Family and Dependents) Act 1975, ss.10(2)(b), 10(5)(b), 11(2)(c); Insolvency Act 1986, ss.238, 239, 423 (applied in *Barclays Bank plc v Eustice* [1995] 1 W.L.R. 1238; *Agricultural Mortgage Corp. plc v Woodward* [1995] B.C.L.C. 1); *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] 1 W.L.R. 143; *Bataillon v Shone* [2016] EWHC 1174 (QB), [2016] B.P.I.R. 829 (transfers from husband to wife at an undervalue set aside as having been made for “no consideration” within s.429(1)(a) of the Insolvency Act 1986). cf. Companies Act 2006, ss.190, 593. See also Charities Act 2011, ss.197(2)(a) and 218(3), requiring “full consideration in money or money’s worth” (a similar requirement, previously contained in s.65(1)(a) of the Charities Act 1993, now repealed by s.354 and Sch.10 of Charities Act 2011, was held not to have been satisfied in *Bayoumi v Women’s Total Abstinence Educational Union Ltd* [2003] EWCA Civ 1548 [2004] Ch. 40 at [46]–[47]).
- [124.](#) Above, para.4-018 at nn.121 and 122.
- [125.](#) This seems to be the sense in which 10 shillings was described as “nominal” consideration (for the assignment of a debt) in *Turner v Forwood* [1951] 1 All E.R. 746.
- [126.](#) *Midland Bank & Trustee Co Ltd v Green* [1981] A.C. 513, 532.
- [127.](#) above n.125.
- [128.](#) For later successful proceedings by that child against the parents for conspiracy, see [1982] Ch. 529.
- [129.](#) [1981] A.C. 513, 532. In other legislative contexts such an inquiry may be intended: e.g. by use of the phrase “full and valuable consideration” in the Inheritance (Provisions for Family and Dependents) Act 1975, s.1(3); cf. Charities Act 2011, ss.197(2)(a) and 218(3), above n.122.
- [130.](#) Within Law of Property Act 1925, s.84(7).
- [131.](#) *Westminster City Council v Duke of Westminster* [1991] 4 All E.R. 136, 146 (reversed in part on another ground (1992) 24 H.L.R. 572).
- [132.](#) See, e.g. *Cheale v Kenward* (1858) 3 De G. & J. 27; *Townsend v Toker* (1866) L.R. 1 Ch. App. 446.
- [133.](#) Below, para.27-038.
- [134.](#) Below; para.8-130; *Pennell v Miller* (1857) 23 Beav. 172; *Butler v Miller* (1867) L.R. 1 Eq. 195, 210; *Tennent v Tennents* (1870) L.R. 2 Sc. & Div. 6, 9.

- [135.](#) *Jefferys v Jefferys* (1841) *Cr. & Ph.* 138; below, para.27-039.
- [136.](#) *T. Choithram International S.A. v Pagarani* [2001] 1 *W.L.R.* 1; *Pennington v Waine* [2002] *EWCA Civ* 227; [2002] 1 *W.L.R.* 2075.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 4. - The Concept of “Valuable” Consideration

“Value in the eye of the law”

#### 4-022

Although consideration need not be adequate, it must be “of some value in the eye of the law,” <sup>137</sup> that is, it must be capable of estimation in terms of economic or monetary value, <sup>138</sup> even though there may be no very precise way of quantifying that value. This is one reason why there is no consideration for a promise made “in consideration of natural love and affection,” <sup>139</sup> and why in *Thomas v Thomas* <sup>140</sup> the testator’s desire that his widow should live in his house was not part of the consideration for the executors’ promise to allow her to do so. The same reasoning may explain the decision in *White v Bluett* <sup>141</sup> that a son had not provided consideration for his father’s promise not to sue him on a promissory note by promising in return not to bore his father with complaints. But in *Ward v Byham* <sup>142</sup> a promise by the mother of an illegitimate child to make it happy appears to have been regarded as part of the consideration for the father’s promise to pay her an allowance. It is by no means clear why the mother’s promise in the latter case was, while the son’s promise in the former was not, thought to have “value in the eye of the law.” <sup>143</sup>

Impossible and illusory consideration

#### 4-023

A contract may be void for mistake if at the time of the agreement its performance is, unknown to either party, physically impossible. <sup>144</sup> In such a case there may nevertheless be consideration, e.g. in the mutual promises of the parties. But if the performance of one party’s promise is known by both to be impossible to perform, it is arguable that the consideration is only illusory and therefore to be disregarded. For example, a promise by A to pay B £100 for all the wine in B’s cellar would probably be regarded as gratuitous if at the time when it was made both A and B knew <sup>145</sup> that there was no wine in the cellar. The position would be different if B’s promise was to deliver the *future* contents of the cellar. In that case, A would be buying the chance of the cellar’s containing wine <sup>146</sup>; and the value of that chance would be illusory only if the question whether any wine was put into the cellar had been left entirely to B’s discretion. <sup>147</sup>

Promisee would have performed anyway

#### 4-024

Consideration may also be said to be illusory where it is clear that the promisee would have accomplished the act or forbearance anyway, even if the promise had not been made. This would be the position if A promised B, who had religious objections to smoking, £10 if B did not smoke for a week. Since “it is no consideration to refrain <sup>148</sup> from a course of conduct which it was never intended to pursue,” <sup>149</sup> B’s forbearance from smoking would not constitute consideration for A’s promise. The burden of proof on this issue is on the promisor. <sup>150</sup> To discharge it, the promisor must show that the promisee would (even if the promise had not been made) definitely have accomplished the act or



forbearance in question; the burden would not be discharged by the promisor's showing no more than that the promisee had simply not given any thought to the question whether or not to accomplish it.<sup>151</sup> Moreover, where the promise provided an inducement for the act or forbearance, the requirement of consideration is satisfied even though there were also other inducements operating on the promisee's mind.<sup>152</sup>

### Discretionary promise

## 4-025

⚠ Consideration would again be illusory where it was alleged to consist of a promise the terms of which left performance entirely to the discretion of the promisor.<sup>153</sup> ⚠ A person does not provide consideration by promising to do something "if I feel like it," or "unless I change my mind." Promises are not often made in this form; but the same principle may apply in analogous cases. Thus a promise may be illusory if it is accompanied by a clause effectively<sup>154</sup> excluding all liability of the promisor for breach.<sup>155</sup> And a promise to pay for "so much coal as I may decide to order" would be an illusory consideration for the seller's counter-promise to deliver, which would therefore not be enforced.<sup>156</sup> On the other hand, if the promise were one to buy "so much of the coal that I require as I may order from you," the court could give reality to the promise by implying a term into it to the effect that at least a reasonable part of any requirements which the promisor actually turned out to have must be ordered from the promisee. Equally the buyer would provide consideration by promising to buy "all the coal I require"; for in such a case, even if the buyer does not promise to have any requirements, he does at least give a definite undertaking not to deal with anybody else.<sup>157</sup> This promise may, it is true, be illegal as being in restraint of trade; but if this makes the whole contract invalid, such invalidity probably rests on grounds of public policy and not on lack of consideration.<sup>158</sup> Similarly, a promise which is subject to cancellation by A may nevertheless constitute consideration for a counter-promise from B where A's power to cancel is limited by the express terms of the promise: e.g. where it can be exercised only within a specified time. Such a limitation on the power to cancel may also be implied, so that (for example) A could not cancel after B had begun to perform his counter-promise. A's promise would then constitute consideration, so that B would be liable if he failed to complete the performance. Finally, the objection that a promise amounts, on the grounds here discussed, only to an illusory consideration can be removed if the promise is performed. Such actual performance can constitute consideration even though the person who has rendered it was not legally obliged to render it.<sup>159</sup>

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

137. *Thomas v Thomas* (1842) 2 Q.B. 851, 859.


138. See *R. v Pembrokeshire CC Ex p. Coker* [1999] 4 All E.R. 1007 where it was held that, for the purpose of Local Government Act 1972, s.123(2), only "those elements of commercial or monetary value to the local authority" (at 1013) were to be taken into account for the purpose of determining whether a disposal by the authority had been made for "a consideration less than the best that could reasonably be obtained."

139. *Bret v J.S.* (1600) Cr.Eliz. 755; *Tweddle v Atkinson* (1861) 1 B. & S. 393, disapproving of *Dutton v Poole* (1677) 2 Lev. 211; cf. *Horrocks v Forray* [1976] 1 W.L.R. 230; *Mansukhani v Sharkey* [1992] 2 E.G.L.R. 125.

140. (1842) 2 Q.B. 851; above, para.4-011.

141. (1853) 23 L.J. Ex. 36.

142. [1956] 1 W.L.R. 496; below, para.4-065.

- [143.](#) *White v Bluett*, above, can perhaps be explained on the ground that the father, in spite of his promise, retained the note.
- [144.](#) Below, Ch.6.
- [145.](#) There could be a good contract if the parties were in doubt on this point: see *Smith v Harrison* (1857) 26 L.J.Ch. 412. In *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 (above, para.4-018, below, para.4-072) Christopher Clarke J. also considered the question whether the consideration consisting of the solicitors' promise to provide additional services in the form of legal representation on appeal was illusory in view of the fact that "the prospect of a council appeal was very remote" (at [84]). The judgment does not in terms answer the question, but it may be that a negative answer can be inferred from the fact that the agreement referred to in paras.4-018 above and 4-072 below as CFA 2 was held to be a binding contract.
- [146.](#) cf. *Brady v Brady* [1989] A.C. 755, 774 ("at the date of the promise").
- [147.](#) Below, para.4-025.
- [148.](#) In *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 (paras 4-018 above and 4-072 below) one reason why the principle stated in the dictum quoted in the text above did not literally apply was that the alleged consideration did "not consist of not doing something but of continuing to act" (at [97]). It is respectfully submitted that, in the present context, there is no reason for distinguishing between inaction and a positive act. The crucial question is whether the promisee's conduct (whether by acting or by forbearing to act) would have been the same as it was, even if the promise for which it was alleged to be consideration, had not been made.
- [149.](#) *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98, 106; cf. *Colchester BC v Smith* [1991] Ch. 448, 489, affirmed without reference to this point [1992] Ch. 421; *Beaton v McDivitt* (1988) 13 N.S.W.L.R. 162. In *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 (paras 4-018 above and 4-072 below) the principle stated in the text above was held not to apply as it was not established that the solicitors would not have continued to act for the client under CFA 1 even if CFA 2 had not been signed: see at [96], and that in any event the client benefited from the certainty, created by CFA 2, that they would so continue: see at [87].
- [150.](#) *Well Barn Farming Ltd v Backhouse* [2005] EWHC 1520, [2005] E.G.L.R. 109, where the promisor failed to discharge this burden (at [47], [48]); cf. below, para.4-158.
- [151.](#) *Pitts v Jones* [2007] EWCA Civ 1301, [2008] Q.B. 706 at [15]–[18].
- [152.](#) *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 490.
- [153.](#)  For another problem arising out of such promises, see above, para.2-185; *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm), 651, 659 (citing a previous edition of this book); *Simpkin v Berkeley Group Holdings PLC* [2016] EWHC 1619 (QB), where it was not disputed that a contract had come into existence and held that an employer's discretion to decide that an employee had been a "good leaver" (and so was to receive benefits under a bonus scheme operated by the employer) must be exercised in good faith and without being "arbitrary, capricious or irrational ..." at [327]. Such restrictions on the exercise of the discretion would also have satisfied the requirement of consideration if an issue of consideration had arisen.
- [154.](#) If the clause were ineffective (e.g. under the Consumer Rights Act 2015, s.63 and Sch.2, paras 3 and 7 (see Vol.II, para.38-360)), this fact would give reality to an otherwise illusory promise.
- [155.](#) *Firestone Tyre & Rubber Co Ltd v Vokins* [1951] 1 Lloyd's Rep. 32, 39; cf. the discussion of *The Cap Palos* [1921] p.458, in the *Suisse Atlantique* case [1967] 1 A.C. 361, 432.
- [156.](#) See *Wickham & Burton Coal Co v Farmer's Lumber Co* 189 Iowa 1183, 179 N.W. 417 (1923);

cf. the discussion in *Cotswold Development Construction Ltd v Williams* [2006] I.R.L.R. 181 of the status of a casual worker. For an exception, see *Citadel Insurance Co v Atlantic Union Insurance Co* [1982] 2 Lloyd's Rep. 543, below para.4-194.

[157.](#) The validity of "requirement" contracts is assumed in such cases as *Metropolitan Electric Supply Co v Ginder* [1901] 2 Ch. 799 and *Dominion Coal Co Ltd v Dominion Steel & Iron Co Ltd* [1901] A.C. 293. Similarly, a contract by a manufacturer to sell his entire output to a particular buyer is binding even though he does not bind himself to have any output: see, e.g., *Donnell v Bennett* (1883) 22 Ch.D. 835 and cf. *Thames Tideway Properties Ltd v Serfaty* [1999] 2 Lloyd's Rep. 110, 127; Howard (1967) 2 U. of Tas.L.R. 446; Adams (1978) 94 L.Q.R. 173.

[158.](#) Below, para.4-186.

[159.](#) *Cambridge Nutrition Ltd v BBC* [1990] 3 All E.R. 523, 528; *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm), 651, 660.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 5. - Past Consideration

#### Past consideration is no consideration

#### 4-026

The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to "past consideration"; and such past acts or forbearances do not in law amount to consideration for the promise. <sup>160</sup> If, for example, a thing is guaranteed by a seller *after* it has been sold the guarantee is not contractually binding on the seller as the consideration for his promise is past. <sup>161</sup> Similarly a promise to make a payment in respect of past services is not contractually binding unless the conditions specified in para.4-030 below are satisfied or some other consideration <sup>162</sup> is provided. For example, a promise to pay money may be made to an employee after his retirement or to an agent after the termination of the agency. If the sole consideration for the promise is the service previously rendered by the former employee or agent, it will be past consideration, so that the promise will not be contractually binding. <sup>163</sup> It will be so binding only if some consideration other than the past service has been provided by the promisee. Such other consideration may consist in his giving up rights which are outstanding (or are in good faith believed to be outstanding) under the original contract, <sup>164</sup> or in his promising to perform or actually performing some other act or forbearance not due from him under the original contract: for example, in his validly promising not to compete with the promisor. <sup>165</sup>

#### When consideration is past

#### 4-027

In determining whether consideration is past, the courts are not, it is submitted, bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive. <sup>166</sup> Where, for example, a contract to erect buildings on land and to grant a lease of that land are substantially one transaction, the expenditure of money on the buildings would not be past consideration for the execution of the lease, even though the lease was not executed until after completion of the buildings. <sup>167</sup> Similarly, where a contract of affreightment (COA) had been made between A and B on August 13, 2008, and a guarantee was given by C to A of B's performance on August 28 in pursuance of B's obligation under the COA to procure such a guarantee (though not from C but from D), it was held that the consideration for the guarantee was not past as the guarantee formed "part and parcel of the single transaction." <sup>168</sup> The same reasoning would apply where a manufacturer's "guarantee" was given to a customer after he had bought the goods: that is, the consideration for the "guarantee" would not, merely on that ground, be past since the sale and the giving of the guarantee will often in substance be a single transaction. This reasoning can, as these guarantee cases show, apply, not only where "the same parties <sup>169</sup> were involved throughout" but also where the guarantee was (as will often be the case) given by a person who was not a party to the original contract. <sup>170</sup>

#### Guarantees given to consumers

## 4-028

Legislation passed for the protection of consumers contains a number of provisions which attach specified legal consequences to “guarantees” given to “consumers” in connection with contracts for the supply of goods, and certain other contracts, between a “consumer” and a “trader”. In such cases, the requirement of consideration can, at common law, be satisfied on the reasoning of para.4-027 above not only where the guarantee was given by the supplier of the goods or other subject-matter, but also by a third person who was not a party to the contract under which the supply was made. Legislation has, however, gone further than this and has dispensed with the requirement of consideration for the enforceability of at least some such guarantees. This was, for example, the effect of a “consumer guarantee” within the Sale and Supply of Goods to Consumers Regulations 2002, which provided that such a guarantee took “effect as a contractual obligation owed by the guarantor” <sup>171</sup>; and where the guarantee so took effect, there was no need for the consumer to show that he has provided consideration for the guarantor’s promise. These Regulations have been revoked by the relevant provisions of the Consumer Rights Act 2015, <sup>172</sup> but s.30 of that Act <sup>173</sup> contains a substantially similar provision which applies when “there is a contract to supply goods; and ... there is a guarantee in relation to the goods”. <sup>174</sup> Section 30(3) provides that such a guarantee “takes effect ... as a contractual obligation owed by the guarantor” to the consumer. <sup>175</sup> As under the 2002 Regulations referred to above, there is no need for a consumer who makes a claim under s.30(3) to satisfy any requirement of consideration. But although s.30(3) provides a satisfactory legal basis for the liability of a guarantor (even of one who is not the supplier of the goods), it provides only a partial solution of the problem here under discussion. This is because in the 2015 Act s.30 is contained in Part 1 Chapter 2, which “applies to a contract for a trader to supply goods to a consumer” <sup>176</sup> and it is worded so as to apply only “where there is a contract to supply goods” <sup>177</sup>. Section 30 therefore does not apply for the purposes of Part 1 Chapter 3, which “applies to a contract for a trader to supply digital content to a consumer”, <sup>178</sup> or for the purposes of Part 1 Chapter 4, which “applies to a contract for a trader to supply a service to a consumer” <sup>179</sup>; nor do Chapters 3 and 4 contain any provision resembling the words of s.30(3), which provide the legal basis for the liability of a guarantor even where he is not a party to the contract to supply goods. Yet the possibility that such a guarantee may be given in relation to a contract for the supply of digital content or of services by a trader to a consumer cannot be ruled out and is indeed implicitly recognised by the 2015 Act in the use it makes of machinery created by earlier legislation.

That earlier legislation is contained in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. <sup>180</sup> These Regulations make use of the concept of a “commercial guarantee”, an expression defined in reg.5 as an undertaking given “by the trader or producer <sup>181</sup> to the consumer <sup>182</sup> ... to reimburse the price paid or replace, repair or service the goods ... if they do not meet the specifications or any other requirement set out in the guarantee statement or in the relevant advertising ...”. When such an undertaking is given by the “trader” to the “consumer”, such a guarantee will no doubt take effect as a term in the “sales contract”, defined in reg.5 as a contract between these parties. But this reasoning cannot apply where the undertaking is given to the consumer by the producer when, as will often be the case, there is no “sales contract” between these parties; and the definition of the “guarantee” in reg.5 contains no words resembling those of s.30(3) of the 2015 Act <sup>183</sup> which provide the legal basis for the producer’s liability to the consumer in respect of statements made by or on behalf of the “producer” when that person is not a party to the contract of sale. It may be possible to account for the absence from the 2013 Regulations of words providing any such legal basis on the ground that these Regulations are not directly concerned with the binding force of a “commercial guarantee” on a guarantor other than the “trader.” They make use of the concept of such a guarantee only in including the existence of the guarantee in the lists of information (here to be called “the information requirements”) which the trader is required <sup>184</sup> to make available to the consumer. It is true that such information is “to be treated as a term of the contract” <sup>185</sup>, but the contract here referred to is that between the *trader* and the consumer, as opposed to any further contract that may arise between the consumer and the *guarantor* where (and even though) the latter is not a party to the “sales contract” <sup>186</sup> between the consumer and the trader. These information requirements are imported into the Consumer Rights Act 2015, which provides that where a trader is required by the above provisions of the 2013 Regulations to provide information to the consumer, the information so provided “is to be treated as included as a term of the contract” <sup>187</sup> and under the Act this rule applies not only to contracts for the supply of goods <sup>188</sup> but also to those for the supply of digital content <sup>189</sup> and for the supply of services. <sup>190</sup> Again these contracts are those between the trader and the consumer <sup>191</sup> and so do not, of themselves provide any legal basis for any

contractual or other liability of the guarantor to the consumer where the guarantor is a person other than the trader. But in the present context the important point is that, by applying the “information requirements” of the 2013 Regulations to contracts for the supply of digital content (s.37(2) and for the supply of services (s.50(3)) the 2015 Act has made the concept of a “commercial guarantee” a part of the law relating to such contracts even though the words of the Act itself do not apply any such concept to them and do not contain any provision resembling s.30(3) of the Act, which in terms makes a third party guarantee legally enforceable by the consumer against the guarantor. The mere fact that the trader must inform the consumer of the existence of the guarantee and that this information is “treated as included in the contract” does not in terms tell us anything about the liability of the guarantor to the consumer since the contract in which the information about the guarantee must be treated as included is the contract between *trader* and consumer, and this contract could not bind the *guarantor*.<sup>192</sup> So one possible view is that, by reason of the absence of express words to that effect in the definition of a “commercial guarantee in reg.5, the guarantee cannot bind the guarantor. But there are, it is submitted, a number of reasons for rejecting this view. For one thing, it would be pointless to require the trader to inform the consumer of the existence of a guarantee which the consumer could not enforce against the guarantor. More seriously, such a requirement would be likely to mislead the consumers and would so, instead of protecting consumers, constitute a trap for them. Finally, if the requirement were interpreted in this way, it would lead to the conclusion that, under the 2015 Act, a guarantee given by a person other than the trader was legally enforceable by the consumer against the guarantor where the guarantee was given in relation to a contract for the supply of goods but not where the contract in relation to which it was given was one for the supply of digital content or one for the supply of services; and there seems to be no justification for such a distinction.<sup>193</sup> For all these reasons, it is submitted that where, in pursuance of the “information requirements” to be imported from the 2013 Regulations into the 2015 Act, the trader informs the consumer of the existence of a “commercial guarantee” as defined by those Regulations, then the legislative scheme of the 2015 Act should be regarded as giving rise to an implication that, in this context, the reference should be to a guarantee which is legally enforceable by the consumer against the guarantor, even where there is no consideration moving from the consumer for the guarantor’s promise. The requirement of consideration continues to apply to a guarantee which is *not* a “commercial guarantee” within the 2013 Regulations or a “guarantee” within s.30(2) of the 2015 Act.<sup>194</sup> In such cases there is, however, nothing in this legislation to prevent the guarantee from taking effect at common law to a collateral contract of the kind described in para.18-005 below provided that the requirements of consideration and contractual intention<sup>195</sup> are satisfied.

#### Wording of promise not decisive

#### 4-029

The question whether consideration is past is one of fact: the wording of the promise is not decisive. Thus in *Re McArdle*<sup>196</sup> a promise made “in consideration of your carrying out” certain work was held to be gratuitous on the ground that the work had already been done. Conversely, a promise made “in consideration of your having today advanced ... £750” has been held to be binding on proof that the advance was made at the same time as the promise.<sup>197</sup>

#### Past act done at promisor’s request

#### 4-030

An act done before the promise was made can be consideration for the promise if three conditions are satisfied.<sup>198</sup> First, the act must have been done at the request of the promisor<sup>199</sup>; secondly, it must have been understood that payment would be made; and thirdly, the payment, if it had been promised in advance, must have been legally recoverable.<sup>200</sup> In such a case the promisee is, quite apart from the subsequent promise, entitled to a quantum meruit for his services. The promise can be regarded either as fixing the amount of that quantum meruit<sup>201</sup> or as being given in consideration of the promisee’s releasing his quantum meruit claim. On the other hand, a past service for which payment was not expected, or one for which payment, though expected, is not legally recoverable, is no consideration for a subsequent promise to pay for it.<sup>202</sup>



## Past promise given at promisor's request

### 4-031

The principle stated in para. 4-030 above can apply not only where the consideration for A's promise consists of a past *act* done by B at A's request, but also where it consists of an earlier *promise* made by B at A's request. Thus in *Pao On v Lau Yiu Long* <sup>203</sup> the claimants had entered into a contract with the X Co for the sale to that company of their shares in another company. Under that contract, the claimants were to be paid by an allotment of shares in the X Co, and they also promised not to sell 60 per cent of these shares for one year. This promise had been made at the request of the defendants, who held most of the shares in the X Co and who were anxious that the value of their holding should not be depressed by a sudden sale of all the shares allotted to the claimants. Later, the defendants gave the claimants a guarantee in which they promised to indemnify the claimants against any loss which they might suffer as a result of a fall in the value during the year of the shares in the X Co <sup>204</sup>. The Privy Council rejected the argument that the consideration for the guarantee was past. <sup>205</sup> The claimants' promise not to sell the shares in the X Co was good consideration for the guarantee; for although that promise had been made before the guarantee was given, it had been made at the defendants' request and on the understanding that the claimants were, in return for making it, to receive some form of protection against the risk (to which their promise exposed them) of a fall in the value of the X Co's shares.

## Antecedent debt

### 4-032

In a number of cases it has been held that the mere existence of an antecedent debt does not constitute "value" for a transfer since it amounts only to past consideration. Accordingly, in *Roger v Comptoir d'Escompte de Paris* <sup>206</sup> it was held that a transfer of a bill of lading by a buyer in consideration of a debt already due from him to the transferee did not deprive the seller of his right of stoppage in transit <sup>207</sup>; in *Re Barker's Estate* <sup>208</sup> a mortgage executed as security for an antecedent debt and not communicated to the creditor was held to be voluntary and hence a fraudulent conveyance in bankruptcy; and in *Wigan v English & Scottish Law Life Assurance Society* <sup>209</sup> an assignment of an insurance policy which was made as security for an antecedent debt and had not been communicated to the creditor was held not to have been made (to him as assignee) "for valuable consideration" within a clause of the policy protecting the rights of such an assignee on the death of the assured by his own hand. These cases are not directly concerned with the question of whether such an antecedent debt can constitute consideration for a later *promise* by the debtor: indeed, in *Wigan's* case such enforceability at common law could hardly have been disputed since the assignment was made in a deed. The cases may, however, be relevant by analogy to the enforceability of a promise made by the debtor to the creditor (e.g. of one to pay higher interest or to pay early); and, in principle, it seems that where the only possible consideration for such a promise is an antecedent debt owed by the promisor to the promisee, then such consideration is past, so that the promise is not contractually binding. <sup>210</sup> In practice, however, the creditor (i.e. the promisee) will often be held to have provided consideration for such a promise if, on the strength of it, he forbears to sue for the debt. <sup>211</sup>

## "Moral" obligation

### 4-033

In the eighteenth and early nineteenth centuries, an attempt was made (originally by Lord Mansfield) to define consideration so as to include certain pre-existing "moral" obligations. In accordance with this theory it was held that an executor was personally liable on a promise to pay a legacy if he had sufficient assets of the deceased in his hands to pay the deceased's debts and legacies <sup>212</sup>; that a promise by a discharged bankrupt to pay a debt contracted before the discharge was binding <sup>213</sup>; and that a promise to pay a statute-barred debt <sup>214</sup> or one contracted during minority <sup>215</sup> was binding. In some of these cases, the consideration for the promise was said to be the "moral" obligation of the

promisor to pay the debt. In this context, the term “moral obligation” was used in a narrow sense. It was restricted to cases in which the promisor’s previous obligation was not legally enforceable (or not enforceable in the particular court in which the action on the promise was brought <sup>216</sup>) because it suffered from some specific legal defect. It did not follow that any “moral obligation,” such as one which might be said to have arisen from the receipt of a past benefit, constituted consideration. Thus in *Eastwood v Kenyon* <sup>217</sup> the guardian of a young girl had raised a loan to pay for her maintenance and education, and to improve her estate. After she had come of age and married, her husband promised the guardian to pay the amount of the loan. In dismissing the guardian’s action on this promise, the court rejected the argument that the defendant’s promise was binding merely because he was under a moral obligation to perform it. Lord Denman C.J. said that this argument would “annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.” <sup>218</sup> The case also shows that the mere existence of an antecedent moral obligation (in the ordinary sense of the phrase) to reimburse the guardian did not amount to consideration for the husband’s promise. From this point of view, the case provides a classic illustration of the requirement that the consideration for a promise must not be past.

### Defective obligations as consideration: present position

#### 4-034

Many of the cases in which promises were held binding under the old “moral obligation” theory <sup>219</sup> would now go the other way. For example, an executor who has assets of the deceased in his hands is no longer personally liable on a promise to pay legacies <sup>220</sup>; a promise by a discharged bankrupt to pay in full debts incurred before his discharge is binding only if supported by fresh consideration <sup>221</sup>; and the same is true of a promise to pay a debt after it has become statute-barred. <sup>222</sup> There is Australian authority in favour of the same rule where a company renewed a note that was originally ultra vires after it had been validated by subsequent legislation. <sup>223</sup> On the other hand, a promise by an adult to pay a debt (or to perform some other obligation) contracted during minority is enforceable <sup>224</sup>; and in *Eastwood v Kenyon* <sup>225</sup> Lord Denman did not purport to overrule the “moral obligation” theory in its original narrow sense, that a promise to discharge an earlier obligation which suffered from some specific legal defect might be binding. In this sense the theory was again recognised by Lord Denman himself in *Flight v Reed*. <sup>226</sup> That case supports the view that a promise to repay a loan made after the repeal of the legislation against usury was not invalid for want of consideration merely because the original loan was usurious. Of course an action on such a promise might, under the modern view of past consideration, fail because the loan was an antecedent debt; but this objection would be overcome if the promisee’s forbearance to enforce the loan could be regarded as consideration for the promise in accordance with the requirements stated in paras 4-058 and 4-060, below.

### Bills of exchange


#### 4-035

⚠ Under s.27(1)(b) of the Bills of Exchange Act 1882, an “antecedent debt or liability” constitutes valuable consideration for a bill of exchange. <sup>227</sup> In many cases, such a consideration would not be past: it could be said to consist in the forbearance of the creditor to sue for the debt <sup>228</sup> ⚠ or in his treating the bill as conditional payment. <sup>229</sup> But s.27(1)(b) could apply even though, for some reason, this analysis were not possible; and in such cases it would constitute an exception to the rule that past consideration is no consideration.

### Acknowledgments of statute-barred debts

#### 4-036

⚠ A further qualification of the past consideration rule is contained in s.29(5) of the Limitation Act 1980. This provides (inter alia) that, where a debtor in a writing signed by him <sup>230</sup> “acknowledges” a



debt,<sup>231</sup>  it shall be deemed to have accrued on and not before the date of the acknowledgment. An “acknowledgment” need not take the form of a promise<sup>232</sup>; but if it does take this form the promise can extend the period of limitation even though the only consideration for it was the antecedent debt, and thus past. Further acknowledgments made within such an extended period or periods have the same effect.<sup>233</sup> But once the debt has become statute-barred the right to sue for it cannot be revived by any subsequent acknowledgment<sup>234</sup>: to this extent, the old “moral obligation” theory, as applied to statute-barred debts,<sup>235</sup> has been reversed.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  160. *Dent v Bennett* (1839) 4 My. & Cr. 269; *Eastwood v Kenyon* (1840) 11 A. & E. 438.
  161. *Thorner v Field* (1612) 1 Bulst. 120; *Roscorla v Thomas* (1842) 3 Q.B. 234. In the latter case an oral warranty was given at the time of sale (see (1842) 11 L.J.Q.B. 214 and 6 Jur. 929) but this was presumably considered at the time to be “void” for want of written evidence.
  162. Such “other consideration” may be provided by “the exchange of one obligation from one party for another from a different party”: *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd’s Rep. 59 at [46], where a contract between A and B required B to provide a guarantee from D and A had instead accepted one from C. The consideration in this case was, for the reason given in para.4-027 below, *not* past.
  163. See the facts of *Simpson v John Reynolds* [1975] 1 W.L.R. 617, where such a payment was held to be voluntary for tax purposes and cf. *Murray v Goodhews* [1978] 1 W.L.R. 499.
  164. e.g. *Bell v Lever Bros. Ltd* [1932] A.C. 1616 (where the value of the rights given up in return for the payment was uncertain in amount since it included not only future salary but also possible future commission).
  165. cf. *Wyatt v Kreglinger and Fernau* [1933] 1 K.B. 793—where the ex-employee’s claim would have succeeded if the restraint undertaken by him had not been invalid (below, para.16-115).
  166. *Thornton v Jenkyns* (1840) 1 M. & G. 166; *Tanner v Moore* (1846) 9 Q.B. 1; *Lictor Anstalt v MIR Steel UK Ltd* [2015] EWHC 3316 (Ch) at [223] (“whole matter can be construed as a single transaction”); cf. the discussion of *Halifax B.S. v Edell* [1992] Ch. 436, below, para.18-016.
  167. *Westminster City Council v Duke of Westminster* [1991] 4 All E.R. 136, 145 (reversed in part on another ground (1992) 24 H.L.R. 572).
  168. *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd’s Rep. 59 at [45], where para.4-027 above is cited at [46] with apparent approval.
  169. *Classic Maritime* case, above n.167 at [46]; in that case, the “same parties” would be A and B; in the manufacturer’s guarantee cases, they would be buyer and seller.
  170. i.e. by C in the *Classic Maritime* case, and by the manufacturer in the manufacturer’s guarantee cases.
  171. SI 2002/3045, reg.15; for definitions of “consumer”, “consumer guarantee” and “guarantor”, see reg.2. Regulation 15(1) required the goods to be “offered with” the guarantee; and these words seem to exclude the case where no mention was made of the guarantee until *after* the supply contract had been made, as in the situation described above in n.160 to para.4-026.
  172. Consumer Rights Act 2015, s.60 and Sch.1, para.53. The Consumer Rights Act 2015 applies to contracts made on or after October 1, 2015; and presumably also to consumer guarantees given on or after that date.

- [173.](#) The 2015 Act is fully discussed in Vol.II, Ch.38; for its s.30, see Vol.II, para.38-491.
- [174.](#) *ibid.*, s.30(1); “guarantee” is defined in s.30(2).
- [175.](#) The words “to the consumer” do not occur in s.30(3), but they do form part of the definition of a “guarantee” in s.30(2), which applies for the purposes of s.30(3).
- [176.](#) Consumer Rights Act 2015, s.3(1), italics supplied.
- [177.](#) *ibid.*, s.30(1).
- [178.](#) *ibid.*, s.33(1).
- [179.](#) *ibid.*, s.48(1).
- [180.](#) SI 2013/3134.
- [181.](#) Italics supplied.
- [182.](#) “Trader” and “consumer” are defined in SI 2013/3134 reg.4.
- [183.](#) Quoted at n.173 above.
- [184.](#) SI 2013/3134, reg.9(3), Sch.1, para.(h); reg.10(1) Sch.2 para.(q); reg.13(1) and Sch.2, para.(q). Regulation 9 specifies the information requirements for “on premises” contracts; reg.10 those for “off-premises” contracts and; reg.13 those for “distance” contracts. These expressions are defined in reg.5. The point to be stressed here is that an “on premises” contract is defined in reg.5 as “a contract ... which is neither a distance contract nor an off-premises contract.” It follows that between them the three categories of contracts must cover all supply contracts covered by the Regulations.
- [185.](#) SI 2013/3134, regs 9(3), 10(5), 13(6).
- [186.](#) As defined by reg.5.
- [187.](#) See at nn.186-188 below.
- [188.](#) s.12(2).
- [189.](#) s.37(2).
- [190.](#) s.50(3).
- [191.](#) ss.3(1), 33(1), 48(1). There is some awkwardness in the idea that the fact of the trader’s informing the consumer of the existence of a guarantee given to the consumer by a third party (the guarantor) can make that guarantee a term of the contract between the trader and the consumer.
- [192.](#) ss.12(2), 37(2) and 50(3) seem to make the *content* of the information to be given by the trader (not the *duty* to give it) a term of the contract and the content of a third party guarantee can scarcely bind the trader since it contains no promise by him; nor does the fact of incorporation of the content of the guarantee in the contract between trader and consumer of itself help to resolve the question whether such incorporation can give rise to a legal relationship between consumer and guarantor.
- [193.](#) By virtue of amendments to the 2013 Regulations by the Consumer Protection (Amendment) Regulations 2014, SI 2014/870, the “information requirements” set out in Schs 1 and 2 of the 2013 Regulations apply to contracts for the supply of goods, services and digital content: SI 2014/870, reg.9(3) and (4).

- [194.](#) e.g. because the designated beneficiary of the guarantee was not an “individual”: see the definitions of “consumer” in reg.4 of the 2013 Regulations and in s.2 of the 2015 Act.
- [195.](#) For these requirements in the present context, see below, paras 18-010, 18-011.
- [196.](#) [1951] Ch. 669.
- [197.](#) *Goldshede v Swan* (1847) 1 Ex. 154. In such cases, the burden of proving that the consideration is not past lies on the person seeking to enforce the promise: *Savage v Uwechia* [1961] 1 W.L.R. 455.
- [198.](#) Paragraph 3-029 of the 31st edition of this book (para.4-030 of the present edition) was cited with apparent approval in *Lictor Anstalt v MIR Steel UK Ltd* [2014] EWHC 3316 (Ch) at [221], where it was held at [224] that none of the three conditions listed in the text above after n.196 was satisfied but that the consideration was, for the reason given in para.4-027 at n.169, not past.
- [199.](#) See *Southwark LBC v Logan* (1996) 8 Admin.L.R. 292 (where this requirement was not satisfied).
- [200.](#) *Re Casey's Patents* [1892] 1 Ch. 104, 115–116; cf. *Lampleigh v Brathwait* (1615) Hob. 105.
- [201.](#) *Kennedy v Brown* (1863) 13 C.B.(N.S.) 677, 740; *Rondel v Worsley* [1969] 1 A.C. 191, 236, 278, 287, as to which, see n.200 below.
- [202.](#) See the authorities cited in the preceding note: promise to pay barrister for past professional services not binding since he could not sue for his fees; see now Courts and Legal Services Act 1990, s.61. In *Arthur J.S. Hall Ltd v Simons* [2002] 1 A.C. 615 the House of Lords disapproved the reasoning of *Rondel v Worsley* above, n.199, so far as it relates to an advocate's immunity from liability for negligence in the conduct of civil or (by a majority) criminal proceedings. This disapproval does not affect the point for which *Rondel v Worsley* is cited in n.199 above i.e. the common law rule that a barrister cannot sue for his fees. Reference to this point is made, perhaps with some scepticism, in the *Arthur J.S. Hall* case at pp.676 and 685. The disapproval in *Jones v Kaney* [2011] UKSC 13, [2011] 2 All E.R. 671 at [46] of another dictum in the *Arthur J.S. Hall* case has no bearing on the point here under discussion. *Jones v Kaney* reverses the former rule that an expert witness was not liable in damages for breach of duty to his own client; but there is no doubt that such a witness can sue for his fees: see *Goulden v Wilson Barca* [2000] 1 W.L.R. 167.
- [203.](#) [1980] A.C. 614.
- [204.](#) This guarantee replaced an earlier agreement (made at the time of the principal sale but subsidiary to it) which was less favourable to the claimants.
- [205.](#) For the further argument that the consideration was no more than the promise to perform an existing contractual duty, see below, para.4-076.
- [206.](#) (1869) L.R. 2 P.C. 393.
- [207.](#) Below, Vol.II, para.44-326.
- [208.](#) (1875) 44 L.J.Ch. 487.
- [209.](#) [1909] 1 Ch. 291.
- [210.](#) e.g. *Hopkinson v Logan* (1839) 5 M. & W. 241 (promise fixing date of payment).
- [211.](#) Below, paras 4-058, 4-060.
- [212.](#) *Atkins v Hill* (1775) 1 Cowp. 284; *Hawkes v Saunders* (1782) 1 Cowp. 289; an alternative

ground for the decision given by Buller J. was that the defendant's equitable (as opposed to "moral") obligation to pay the legacy was consideration for the promise.

- [213.](#) *Trueman v Fenton* (1777) 2 Cowp. 544.
- [214.](#) *Hyeling v Hastings* (1699) 1 Ld.Raym. 389.
- [215.](#) Below, para.9-051, cf. *Lee v Muggeridge* (1813) 5 Taunt. 36 (promise by a woman after her husband's death to pay debt incurred during marriage); for attempts to restrict or define the doctrine, see *Littlefield v Shee* (1831) 2 B. & Ad. 811; *Meyer v Haworth* (1838) 8 A. & E. 467.
- [216.](#) As in *Hawkes v Saunders*, above, n.210.
- [217.](#) (1840) 11 A. & E. 438.
- [218.](#) *ibid.*, at 450.
- [219.](#) Above, para.4-033.
- [220.](#) Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (19th ed., 2007), para.55-80.
- [221.](#) *Jakeman v Cook* (1878) 4 Ex.D. 26; *Re Bonacina* [1912] 2 Ch. 394; *Wild v Tucker* [1914] 3 K.B. 36.
- [222.](#) Limitation Act 1980, s.29(7) (below para.4-036); cf., as to time bars imposed by contract, *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd's Rep. 245, 249.
- [223.](#) *Sharp v Ellis* (1971) 20 F.L.R. 199.
- [224.](#) Minors' Contracts Act 1987, ss.1 and 4, repealing Infants Relief Act 1874, s.2 and Betting and Loans (Infants) Act 1892, s.5.
- [225.](#) (1840) 11 A. & E. 438; above, para.4-033.
- [226.](#) (1863) 1 H. & C. 703; mentioned with approval by Scrutton L.J. in *J. Evans & Co v Heathcote* [1918] 1 K.B. 418, 437.
- [227.](#) Below, Vol.II, para.34-062.
- [228.](#)  See *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm), where forbearance to sue, "both promised and actual" (at [62]) was held to be consideration for two promissory notes. No reliance was placed on Bills of Exchange Act s.27(1)(b) though this provision applies, by virtue of s.89(1) of the 1882 Act, to promissory notes "with the necessary modifications".
- [229.](#) See *Currie v Misa* (1875) L.R. 10 Ex. 153 and cf. below, paras 4-058—4-061.
- [230.](#) Limitation Act 1980, s.30(1). An inscription of a person's name, typed on a telex document, is a sufficient signature for the present purpose: *Good Challenger Navegante SA v Metalexportimport SA (The Good Challenger)* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep. 67 at [20]–[28].
- [231.](#)  Section 29(5) is expressed to apply also to "any ... other liquidated claim" (s.29(5)(a)). In *Barnett v Creggy* [2016] EWCA Civ 1004, [2017] P.N.L.R. 4 a majority of the Court of Appeal held that the words here quoted could include a claim against a trustee for money paid away in breach of his fiduciary duty, but (unanimously) that these words did not apply to the claim for "equitable compensation" since this was "equivalent to a claim for damages" (at [37]) and so not a "liquidated claim" within s.29(5)(a), (at [40], [54], [55]).



[232.](#) *Lia Oil SA v ERG Petroli* [2007] EWHC 505 (Comm), [2007] 2 Lloyd's Rep. 509; an admission of liability suffices: *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 W.L.R. 481; see further *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] 1 W.L.R. 2066, where a debtor's statement that he was not in a position to pay "the outstanding amount due to you" was held to amount to an "acknowledgement within section 29(5)" even though it contained no admission of the amount (or undisputed amount) of the debt; cf. *Re Overmark Smith Warden Ltd* [1982] 1 W.L.R. 1195 ("statement of affairs" by insolvent company). An express *denial* of liability is not an acknowledgement within s.29(5): *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174; and the same is true of a letter from the debtor merely questioning the amount claimed: *Phillips & Co v Bath Housing Co-operation Ltd* [2012] EWCA Civ 1591, [2013] 1 W.L.R. 1479 at [53], [58]. For the analogous question of what amounts to an acknowledgement by an occupier of land of the owner's title for the purposes of Limitation Act 1980, s.29(a), see *O'falue v Bossert* [2009] UKHL 16, [2009] 1 A.C. 290.

[233.](#) Limitation Act 1980, s.29(7).

[234.](#) *ibid.*

[235.](#) Above, para.4-033.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

#### Part 2 - Formation of Contract

#### Chapter 4 - Consideration <sup>1</sup>

#### Section 6. - Consideration must Move From The Promisee

##### Promisee must provide consideration

#### 4-037

The rule that “consideration must move from the promisee” <sup>236</sup> means that a person can enforce a promise only if he himself provided consideration for it. Thus if A promises B to pay a sum of money to B if C will paint A’s house and C does so, B cannot enforce the promise (unless, of course, he procured, or expressly or impliedly undertook to procure, C to do the work). It is, however, not necessary for the promisee to provide the whole consideration for the promise: thus he can enforce a promise part of the consideration for which was provided by his agent or partner or by some other co-promisee. <sup>237</sup>

##### Benefit to promisor sufficient

#### 4-038

The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him: e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without suffering any detriment. This point is illustrated by two rules to be discussed later in this chapter. The first is that performance of an existing contractual duty (or a promise to perform such a duty) can constitute consideration if it benefits the promisor <sup>238</sup>: this benefit is conferred by, and so “moves” from, the promisee in that it is conferred by him, even though it may cause him no detriment <sup>239</sup> in the sense that he was already bound to do the acts in question. The second is that a composition agreement between a debtor and his creditors is binding <sup>240</sup> because it benefits the creditors; and this benefit can be said to “move” from the debtor in that his co-operation is essential to the making and performance of the composition agreement. It could be said that the debtor suffers a legal detriment <sup>241</sup> by signing the agreement when he is not bound to do so. But the rule in question is not in fact based on this invented consideration. <sup>242</sup> It is based on benefit to the promisors. <sup>243</sup>

##### Bar pupillage contracts

#### 4-039

The possibility that consideration may consist in benefit to the promisor is further illustrated by *Edmonds v Lawson*, <sup>244</sup> where the relationship between a pupil barrister and the members of the chambers at which she had accepted an offer of pupillage was held to be contractual even though she had paid no pupillage fee. <sup>245</sup> The requirement of consideration was satisfied in that her (and other pupils’) agreement to accept pupillage “provided a pool of selected candidates who can be expected to compete with each other for recruitment as tenants;” <sup>246</sup> and in that “chambers may see an advantage in developing close relationships with pupils who plan to practise as employed barristers or overseas.” <sup>247</sup> Both these factors stress the benefit to the promisors (the members of the

chambers), moving from the promisee (the pupil barrister) even though no detriment was suffered by her.

#### Consideration need not move to the promisor

#### 4-040

While consideration must move from the promisee, it need not move to the promisor. <sup>248</sup> It follows that the requirement of consideration may be satisfied where the promisee suffers some detriment at the promisor's request, but confers no corresponding benefit on the promisor. Thus the promisee may provide consideration by giving up a job <sup>249</sup> or the tenancy of a flat, <sup>250</sup> even though no direct benefit results to the promisor from these acts. It also follows that the promisee may provide consideration by conferring a benefit on a third party at the promisor's request: e.g. by entering into a contract with the third party. <sup>251</sup> This possibility is illustrated by the case in which goods are bought and paid for by the use of a credit or debit or cheque guarantee card. The issuer of the card makes a promise to the supplier of the goods that the cheque will be honoured or that the supplier will be paid; and the supplier provides consideration for this promise by supplying the goods to the customer. <sup>252</sup> There may also be consideration in the form of the discount allowed by the supplier of the goods or services to the issuer of the card <sup>253</sup>: this is both a detriment to the supplier and a benefit to the issuer of the card.

#### 4-041

In the example given at the end of para.4-040 above, the supplier (i.e. the promisee) suffers a detriment; but the rule that consideration need not move to the promisor also applies where the consideration consists simply of a benefit conferred by the promisee without loss to the promisee, and even though that benefit is conferred, not on the promisor himself, but on a third person at his request. For example, in *Bolton v Madden* <sup>254</sup> the claimant and defendant were subscribers to a charity and entitled to vote on the disposition of its funds. The claimant promised to vote at one meeting for a person whom the defendant wished to benefit, and the defendant promised in return to vote at the next meeting for a person whom the claimant wished to benefit. In an action to enforce the defendant's promise, it was argued that there was no consideration for it as the claimant "incurred neither trouble nor prejudice," <sup>255</sup> but the court rejected this argument and held the agreement binding. Consideration moved from the claimant when he had at the defendant's request conferred a benefit on a third party. It could, of course, be argued that the claimant had suffered a legal detriment <sup>256</sup> by voting in accordance with his promise as he was not previously bound to do so. But this was not the basis of the decision.

#### More than one promisee <sup>257</sup>

#### 4-042

Where a promise is made to more than one person, it is clear that it can be enforced by any of the promisees, even by one who provided only *part* of the consideration. <sup>258</sup> But the further question may arise whether the promise can be enforced by one of the promisees even though he provided no part of the consideration, the *whole* being provided by the other or others. There is no clear answer in the present law to this question; but it is submitted that the position depends on the distinctions drawn in paras 4-043 to 4-045 below.

#### Joint promises

#### 4-043

Where a promise is made to A and B *jointly*, it can be enforced by both of them, even though the whole consideration was provided by A. <sup>259</sup> If this were not so, the promise could not be enforced at all; for, if A tried to sue alone, he would be defeated by the rule that all the joint creditors must be parties to the action. <sup>260</sup> It follows from the doctrine of survivorship (which applies between joint

promisees)<sup>261</sup> that B would be entitled to the entire benefit of the promise after A's death.

### Several promises

#### 4-044

None of the reasoning in para.4-043 above applies where a promise is made to A and B *severally*.<sup>262</sup> Hence it seems that each promisee must provide consideration for what is in theory a separate promise to him.

### Joint and several promises

#### 4-045

It is, however, uncertain which of the rules stated in paragraphs 4-043 and 4-044 above applies to the intermediate case of a promise made to two persons *jointly and severally*. Such a promise may be made under s.81 of the Law of Property Act 1925<sup>263</sup>; but that section appears to contemplate only promises under seal,<sup>264</sup> so that no question of consideration can arise. The common law originally did not recognise the possibility that a promise to a number of persons<sup>265</sup> could be joint *and* several<sup>266</sup>; but the possibility came to be recognised late in the nineteenth century.<sup>267</sup> It may be illustrated by *McEvoy v Belfast Banking Co*,<sup>268</sup> where a father, A, deposited £10,000 in a bank and the deposit receipt stated that this amount had been received from him and his son, B, and that it was payable "to either or the survivor." With reference to these facts, Lord Atkin said obiter that the contract was not by the bank with A for the benefit of B but "with A and B,<sup>269</sup> and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract."<sup>270</sup> Of course after A's death (which in *McEvoy's* case had occurred) B would be entitled to sue on any joint promise under the doctrine of survivorship.<sup>271</sup> But it is harder to see how he could sue on any several promise, for this is *ex hypothesi* an independent promise and on the facts stated no consideration for it moved from B.<sup>272</sup> Indeed, the more probable view of such facts is that the bank makes no promise at all to B but only has authority to pay him. Hence the bank is discharged by paying B but it is not liable to him.<sup>273</sup> The bank would not, however, be discharged by such payment if it were not authorised by its contract with A to pay B. This possibility is illustrated by *Thavorn v Bank of Credit & Commerce SA*<sup>274</sup> where A opened a bank account in the name of her nephew B (who was under age), stipulating that only A should operate the account. It was held that B was a mere nominee and that the bank was not discharged by (or was liable in damages to A for) paying B at the sole request of B and without any instructions from A. There were two reasons why B could not have sued the bank: no promise by the bank had been made to him, and no consideration had moved from him.

### Contracts (Rights of Third Parties) Act 1999

#### 4-046

Under this Act, a term in a contract between A (the promisor) and B (the promisee) is, in specified conditions, enforceable by a third party, C, against A. The Act is more fully discussed in Chapter 18<sup>275</sup>; the only points to be made here are that C is not prevented from enforcing the term by the fact that no consideration for A's promise moved from him,<sup>276</sup> and that C's right to enforce that promise can be described as a quasiexception to the rule that consideration must move from the promisee.<sup>277</sup> It is not a true exception to the rule since in the case put the promisee is B, who must provide consideration for A's promise.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>236</sup>. *Barber v Fox* (1670) 2 Wms.Saund. 134, n.(e); *Thomas v Thomas* (1842) 2 Q.B. 851, 859;

- Tweddle v Atkinson* (1861) 1 B. & S. 393, 399; *Pollway v Abdullah* [1974] 1 W.L.R. 493, 497; cf. *Dickinson v Abel* [1969] 1 W.L.R. 295, and (for VAT purposes) *Customs and Excise Commissioners v Telemed* [1992] S.T.C. 89. In *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] 2 All E.R. 719 (the facts of which are stated in para.18-008 below) the judgments of the Supreme Court contain many references to “third party consideration” (see at [12] and *passim*). This phrase simply reflects the words of Art.11 of the relevant EC Council Directive (95/7 of 10 April 1995) which defines the taxable amount for VAT purposes as “the *consideration* which has been obtained by the supplier from the purchaser or a *third party* for such supplies” (italics supplied). The phrase carries no implication to the effect that the “third party consideration” gives any promise to the force of a binding contract. For criticism of a possibly contrary dictum, see below, para.4-045 at n.268.
- [237.](#) *Jones v Robinson* (1847) 1 Ex.454; *Fleming v Bank of New Zealand* [1900] A.C. 577. For the position where the *whole* consideration is provided by a co-promisee, see below, paras 4-042—4-045.
- [238.](#) Below, para.4-069.
- [239.](#) *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 16. It is not enough for the promisor to obtain a benefit: consideration must also move from the promisee (above, para. 4-037), so that the benefit must result from some act or forbearance on the part of the promisee: see *Ashia Centur Ltd v Barker Gillette LLP* [2011] EWHC 148 (QB) at [20].
- [240.](#) Below, para.4-127; the application of this rule in *West York Darracq Agency Ltd v Coleridge* [1911] 2 K.B. 326 is hard to support, since there the creditors got nothing and so received no benefit. The consideration was said at 329 to be benefit to the debtor, but he was the person to whom the promise was made, and benefit to the promisee is obviously no consideration. If it were, there would be consideration for every gratuitous promise.
- [241.](#) Above, para.4-006.
- [242.](#) Above, para.4-010. The creditors do not bargain for the debtor’s signature but for a dividend. If the debtor’s signature were regarded as the consideration it could equally well be so regarded in a composition with a single creditor, i.e. in a case such as *Foakes v Beer* (1884) 9 App. Cas. 605, below, para.4-117, where it was held that there was no consideration for the creditor’s promise.
- [243.](#) Below, para.4-127.
- [244.](#) [2000] Q.B. 501; see also above, para.2-170.
- [245.](#) But an application for pupillage is not one for “membership” of chambers within Disability Discrimination Act 1995, s.13(1)(c): *Horton v Higham* [2004] EWCA Civ 941, [2005] I.C.R. 292, where *Edmonds v Lawson*, above n.240 is cited at [2].
- [246.](#) [2000] Q.B. 501 at 515.
- [247.](#) *ibid.*
- [248.](#) *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097; cf. *International Petroleum Refining & Supply Ltd v Caleb Brett & Sons Ltd* [1980] 1 Lloyd’s Rep. 569, 594 (below, para.18-010); *Barclays Bank plc v Weeks, Legg & Dean* [1998] 3 All E.R. 213, 220–221.
- [249.](#) *Jones v Padavatton* [1969] 1 W.L.R. 628.
- [250.](#) *Tanner v Tanner* [1975] 1 W.L.R. 1346; contrast *Horrocks v Forray* [1976] 1 W.L.R. 230 where there was no such (nor any other) consideration and no contract, partly for this reason and partly for lack of contractual intention: above, para.2-177; and see *Coombes v Smith* [1986] 1 W.L.R. 808.

- [251.](#) See *International Petroleum Refining Supply Ltd v Caleb Brett & Son Ltd* [1980] 1 Lloyd's Rep. 569, 594, where the promisor benefited indirectly since promisor and third party were associated companies. cf. *Pearl Carriers Inc. v Japan Lines Ltd (The Chemical Venture)* [1993] 1 Lloyd's Rep. 509, 522 (payments made by charterers of ship to the crew regarded as consideration for promise by shipowners to charterers).
- [252.](#) *R. v Lambie* [1982] A.C. 449; *Re Charge Card Services* [1987] Ch. 150, affirmed [1989] Ch. 497.
- [253.](#) *Customs & Excise Commissioners v Diners Club Ltd* [1989] 1 W.L.R. 1196, 1207.
- [254.](#) (1873) L.R. 9 Q.B. 55.
- [255.](#) At 57.
- [256.](#) Above, para.4-006.
- [257.](#) Cullity (1969) 85 L.Q.R. 530; Winterton (1970) 47 Can.Bar Rev. 483.
- [258.](#) Above, para.4-037, at n.233.
- [259.](#) This proposition seems to have been accepted in *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] A.L.R. 385; though the majority of the court held that no joint promise had in fact been made: below, para.18-076.
- [260.](#) *Jell v Douglas* (1821) 4 B. & Ald. 374; *Sorsbie v Park* (1843) 12 M. & W. 146; *Thompson v Hakewill* (1865) 9 C.B.(N.S.) 713.
- [261.](#) *Anderson v Martindale* (1801) 1 East 497.
- [262.](#) In such cases it is not necessary to join all the creditors to the action: *James v Emery* (1818) 5 Price 529; *Keightley v Watson* (1849) 3 Ex. 716; *Palmer v Mallett* (1887) 36 Ch.D. 411; nor did the doctrine of survivorship apply: *Withers v Bircham* (1824) 3 B. & C. 254.
- [263.](#) Re-enacting, with some changes, the Conveyancing Act 1881, s.60. Section 81 of the 1925 Act does not affect the law relating to joint *debtors*: *Johnson v Davies* [1999] Ch. 117, 127; but our present concern is with the case in which there is more than one *creditor*.
- [264.](#) See now Law of Property (Miscellaneous Provisions) Act 1989, s.1(7).
- [265.](#) For promises made by a number of persons, see Ch.17, below.
- [266.](#) *Slingsby's Case* (1588) 5 Co.Rep. 186; *Anderson v Martindale* (1801) 1 East 487; *Bradburne v Batfield* (1845) 14 M. & W. 559, 573; *Keighley v Watson* (1849) 3 Ex. 716, 723 (criticising the rule).
- [267.](#) *Thompson v Hakewill* (1865) 19 C.B.(N.S.) 713, 726; *Palmer v Mallett* (1887) 36 Ch.D. 410, 421.
- [268.](#) [1935] A.C. 24.
- [269.](#) Hence B would not be a "third party" within s.1(1) of the Contracts (Rights of Third Parties) Act 1999 (below, paras 18-090 et seq.).
- [270.](#) [1935] A.C. 24, 43.
- [271.](#) cf. *Aroso v Coutts & Co* [2002] 1 All E.R. (Comm) 241, where the contract expressly so provided.
- [272.](#) S.J.B. (1935) 51 L.Q.R. 419.



- [273.](#) See *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] A.L.R. 385; below, para.18-076.
- [274.](#) [1985] 1 Lloyd's Rep. 529. The Contracts (Rights of Third Parties) Act 1999 would not apply to such a case as it was not the intention of the contracting parties that B should be entitled to enforce the contract: see s.1(2) of the Act, below, paras 18-093, 18-094.
- [275.](#) Below, paras 18-090 et seq.
- [276.](#) Law Com. No.242 (on which the Act is based), para.6.8.
- [277.](#) Below, para.18-102.

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**Section 7. - Compromise and Forbearance to Sue**

**Introductory**

**4-047**

Three situations here call for discussion: in the first a person promises not to enforce a *valid* claim (or performs such a promise); in the second the claim which is the subject-matter of such a promise is *invalid* or *doubtful*; and in the third the person in question simply *forbears in fact* from enforcing a claim, without making any *promise* to forbear. The question in all these cases is whether the promise to forbear (or its performance), or the actual forbearance (without any promise), can constitute consideration for a (counter-) promise made by the other party. <sup>278</sup>

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<sup>1.</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>278.</sup> Our concern in the ensuing discussion is with compromises made otherwise than in legal proceedings. Where legal proceedings have been brought, acceptance of an offer to settle the proceedings under CPR Pt. 36 “may well create a contract and probably does so in the vast majority of cases”: *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 W.L.R. 2953 at [60]. But the obligation that arises from a Pt. 36 settlement agreement “is not primarily contractual. It is sui generis. It is part of the court’s inherent jurisdiction ...” (ibid., at [62]). It may therefore be binding even though it lacks contractual force, e.g. for failure to comply with formal requirements (as in *Orton v Collins*, above) or, presumably, for want of consideration.

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**(a) - Valid Claims**

**Promise not to sue on a valid claim**

**4-048**

A creditor's promise not to enforce a valid claim is normally good consideration for a promise given in return. <sup>279</sup> For example, a creditor to whom a sum of money has become due may promise to give the debtor extra time to pay, in return for the debtor's promise to give additional security or to pay higher interest. In such a case, there is good consideration for the debtor's promise: the creditor suffers a detriment in that he is, at least for a time, kept out of his money, while the debtor benefits by getting extra time to pay. <sup>280</sup> In the case put (of a creditor giving his debtor extra time to pay) there is such detriment and benefit even though the creditor has promised to forbear only for a limited time <sup>281</sup>, if no time is specified in the promise, the court will infer that the creditor undertook to forbear for a reasonable time. <sup>282</sup> A fortiori, the creditor will provide consideration where he promises absolutely not to sue on the claim <sup>283</sup>: this is the position where a valid claim is settled by agreement between the parties. The principles just stated apply not only to a promise not to enforce a claim but also to one to abandon a good defence <sup>284</sup>; and to one to abandon a particular remedy: e.g. to one to abandon arbitration proceedings. <sup>285</sup> Analogous reasoning has been used to support the view that, where a husband is ordered to transfer property to his former wife by way of ancillary relief in divorce proceedings, then the wife provides consideration for the transfer in the sense that the transfer wholly or in part satisfies her claim for ancillary relief. <sup>286</sup>

**Construction of releases**

**4-049**

Although a promise to release a valid claim is thus supported by consideration, the court may protect the party granting the release on other grounds. This possibility is illustrated by *Bank of Credit and Commerce International S.A. v Ali* <sup>287</sup> where an employee, on being dismissed for redundancy, promised, in return for certain payments, to release all claims against the employers "of whatever nature that exist or may exist." At the time of the release, claims for "stigma damages" were believed not to be available to employees for breach of their employment contracts, but the availability of such claims was established by a later decision of the House of Lords. <sup>288</sup> It was held by the House of Lords in the present case that the general words of the release (quoted above) were not sufficiently clear to show "that the parties intended to provide for the release of rights and surrender of claims which they could never have had in contemplation at all." <sup>289</sup> It is implicit in this reasoning that the possibility of releasing such a claim is not ruled out as a matter of law: the court is simply "slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware." <sup>290</sup> The principles of construction applied in this case also "apply to fraud-based claims." <sup>291</sup> Hence only "very clear and specific language in a settlement agreement" <sup>292</sup> will cover such claims.

**Other grounds for relief**

## 4-050

The crucial point in *Ali's* case (above, para.4-049) seems to have been that *neither* party could have been aware of the possibility that the employee might, in law, have had a claim for stigma damages. If the *employer* had been aware of this possibility, it is far from clear that the employee would have succeeded on the issue of *construction*. There is, however, the further possibility that the amount of a settlement may be affected by the fact that “the party to whom the release was given [B] knew that the other party [A] had or might have a claim [beyond the one he thought he was releasing] *and knew also* that the other party was ignorant of this.”<sup>293</sup> B’s taking the release “without disclosing the existence of the claim or possible claim” would then be “unacceptable sharp practice”<sup>294</sup> and there is judicial support for the view that the law should on this ground grant relief to A,<sup>295</sup> i.e. allow him to pursue the claim which he had unwittingly abandoned.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  - <sup>279</sup>. See *Pullin v Stokes* (1794) 2 H.Bl. 312; *Smith v Algar* (1830) 1 B. & Ad. 603; *Morton v Burn* (1837) 7 A. & E. 19; *Coles v Pack* (1869) L.R. 5 C.P. 65; *Crears v Hunter* (1887) 19 Q.B.D. 341; *Greene v Church Commissioners for England* [1974] Ch. 467. See also *Oliver v Davis* [1949] 2 K.B. 727, especially at 743; *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd*, *The Times*, March 8, 1983 (as to which see above para.2-003, n.15); *G.N. Angelakis Co SA v Cie Algérienne de Navigation (The Attika Hope)* [1988] 1 Lloyd’s Rep. 439; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [79].
  - <sup>280</sup>. *Crowther v Farrer* (1850) 15 Q.B. 677. It seems to be immaterial whether the proceedings have been commenced or not: see *Wade v Simeon* (1846) 2 C.B. 548, 565, 567.
  - <sup>281</sup>. *Willatts v Kennedy* (1831) 8 Bing. 5; *Morton v Burn* (1837) A. & E. 19; *Board v Hoey* (1949) 65 T.L.R. 43.
  - <sup>282</sup>. *Payne v Wilson* (1827) 7 B. & C. 423; *Oldershaw v King* (1857) 2 H. & N. 517; *Fullerton v Provincial Bank of Ireland* [1903] A.C. 309, 313.
  - <sup>283</sup>. *Mapes v Sidney* (1624) Cro.Jac. 683.
  - <sup>284</sup>. See *Banque de l’Indochine v J. H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [30].
  - <sup>285</sup>. *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 W.L.R. 925, 933.
  - <sup>286</sup>. *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [39]; the issue in this case was not whether there was any consideration for a *promise* but whether there was consideration for a *transfer* (cf. above, paras 4-016, 4-032). The wife was held to have provided such consideration even though her original claim depended for its quantification on the discretion of the court: *Haines v Hill*, above, at [39], approving the judgment of District Judge Cooke, described at [53] as “a model of lucid erudition”.
  - <sup>287</sup>. [2001] UKHL 8; [2002] 1 A.C. 251.
  - <sup>288</sup>. *Malik v Bank of Credit and Commerce International* [1998] A.C. 20.
  - <sup>289</sup>. *Ali's case*, [2001] UKHL 8 at [19]. This reasoning does not apply to an arbitration clause in a contract since the very purpose of such a clause is “to provide machinery for the resolution of disputes which may arise in the future”: *Capital Trust Investment Ltd v Radio Design TJAB* [2002] EWCA Civ 135; [2002] 2 All E.R. 159, at [50]; cf. on the issue of construction, *Mostcash plc v Fluor Ltd* [2002] EWCA Civ 975, [2002] B.L.R. 411.

- [290.](#) *Ali's case*, [2001] UKHL 8 at [10]. Lord Hoffmann dissented.
- [291.](#) *Saytam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487, [2008] 2 All E.R. (Comm) 465 at [84].
- [292.](#) *ibid.*, at [82].
- [293.](#) *Ali's case* [2001] UKHL 8 at [32], italics supplied.
- [294.](#) *ibid.*, at [32]. In *Ali's case* there was no such knowledge on B's part. The "sharp practice" referred to in the dictum quoted above is that of the person *against* whom the claim was made. In this respect this situation differs from that discussed in the last sentence of para.4-049 above, in which the fraud is that of the person *by* whom the claim was made.
- [295.](#) *Ali's case* [2001] UKHL 8 at [32], per Lord Nicholls. Lord Bingham left the point open: *ibid.*, at [20].

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**(b) - Invalid or Doubtful Claims**

**Claims known to be invalid**

**4-051**

A compromise of a claim which is legally invalid and which is either known by the party asserting it to be invalid or not believed by that party to be valid is not contractually binding. This rule can be explained either on the ground that merely making or performing a promise to give up a worthless claim cannot constitute consideration for the counter-promise, <sup>296</sup> or (preferably) on grounds of public policy. As Tindal C.J. said in *Wade v Simeon* <sup>297</sup>: "It is almost contra bonos mores and certainly contrary to all the principles of natural justice that a man should institute proceedings against another when he is conscious that he has no good cause of action."

**Claims which are doubtful in law**

**4-052**

The compromise of a claim which is doubtful in law is binding as a contract. Making or performing a promise to give up a doubtful claim can constitute consideration for a counter-promise since it involves the possibility of detriment to the person to whom the latter promise is made and that of benefit to the person making it. In *Haigh v Brooks*, for example, <sup>298</sup> it was held that the promisee had provided consideration by giving up a guarantee containing "an ambiguity that might be explained ... so as to make it a valid contract." <sup>299</sup>

**Claims in law invalid but made in good faith**

**4-053**

The rule stated in para.4-052 above applies also if the forbearing party's claim is *clearly invalid* in law, so long as it was a "reasonable claim" <sup>300</sup> (i.e. one made on reasonable grounds) which was in good faith believed by the party forbearing to have at any rate a fair chance of success. <sup>301</sup> Since the claimant would, if he did not forbear, in such a case lose both his action and the costs, it is not easy to see what detriment he suffers by forbearing; one possible argument is that the delay in bringing the action (induced by the other party's promise) will increase the difficulty and costs of bringing it, <sup>302</sup> even though it was bound to fail. It is also arguable that the other party (the promisor) benefits since "instead of being annoyed with the action, he escapes from the vexations incident to it." <sup>303</sup> This may, indeed, also be true where the claim is *known* to be invalid; but the rule that a compromise of such a claim is not binding is, as has been suggested in para.4-051 above, more appropriately based on grounds of public policy than on want of consideration.

**4-054**



Two further conditions must be satisfied by a party who relies on his forbearance to enforce an invalid claim as the consideration for a promise made to him. He must not deliberately conceal from the other party (i.e. the promisor) facts which, if known to the latter, would enable him to defeat the claim. <sup>304</sup> And he must show that he seriously intended to pursue the claim. <sup>305</sup>

### Claims on disputed facts

#### 4-055

The cases considered in paras 4-052 and 4-053 above concern claims the validity of which is doubtful in law. It seems that the same principles can apply where the validity of a claim is in doubt because of a dispute about the facts. A settlement based on a simple *mistake* of fact shared by both parties may be void for mistake. <sup>306</sup> But this would not be the case where both parties knowingly took the risk that the facts might turn out to be different from the facts as they were alleged or supposed to be. A negotiation of a settlement on disputed facts always takes such an element of risk into account.

### Void forbearances

#### 4-056

The forbearance itself (as opposed to the claim forborne) may be void on grounds of public policy, or by statute: for example, where a wife promises her husband not to apply for maintenance in matrimonial proceedings. <sup>307</sup> In such cases the promise to forbear cannot of course be enforced; but, unless the promise is illegal, it may nevertheless constitute consideration for a counter-promise to make a payment in return for it. <sup>308</sup> A fortiori the performance of the promise to forbear may (if the promise was not illegal) be good consideration for a counter-promise <sup>309</sup> even though the promise could not have been enforced.

### Executed compromises

#### 4-057

The discussion in paras 4-051 to 4-056 above is concerned with the enforceability of an agreement to compromise a claim. Different problems can arise after such an agreement has been *performed*, generally by payment of the amount which one party agreed to pay under the compromise. Even if there was, under the rules discussed above, no consideration for that party's promise, he will not be entitled to the return of the payment if it was made "to close the transaction" <sup>310</sup>; in such a case the payment is treated as if it were an executed gift. <sup>311</sup> To give rise to a claim for repayment, it will be necessary to establish other circumstances, such as that the payment was made under duress. <sup>312</sup>

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<sup>1.</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>296.</sup> The position is different if there is also *other* consideration for the promise; see *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep. 293, 334.

<sup>297.</sup> (1846) 2 C.B. 548, 564. See also *Edwards v Baugh* (1843) 11 M. & W. 641, especially at 646; *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449 at 452 ("fraudulent"). It followed that a promise by a bookmaker not to sue his client for lost bets was formerly no consideration for a promise made in return by the client: *Hyams v Coombes* (1912) 28 T.L.R. 413; *Burrell & Son v Leven* (1926) 42 T.L.R. 407; *Poteliakhoff v Teakle* [1938] 2 K.B. 816; *Goodson v Baker* (1908) 98 L.T. 415 (contra) was hard to support. Now that the bookmaker can, subject to exceptions discussed in Vol.II, paras 41-016 et seq., enforce the client's promise by virtue of Gambling Act 2005, s.335(1) (Vol.II, para.41-011), the bookmaker's promise not to sue the client for the amount of

the lost bet will generally constitute good consideration for a promise made in return by the client: see Vol.II, para.41-026.

- [298.](#) (1839) 10 A. & E. 309; for the earlier, contrary view see *Stone v Wythipol* (1588) Cro.Eliz. 126; *Jones v Ashburnham* (1804) 4 East 455 and dicta in *Ex p. Banner* (1881) 17 Ch.D. 480, 490 (these dicta being disapproved in *Miles v New Zealand Alford Estate Co* (1885) 32 Ch.D. 266).
- [299.](#) (1839) 10 A. & E. 309, 334; cf. *Colchester BC v Smith* [1992] Ch. 421; *Colonia Versicherung A.G. v Amoco Oil Co* [1995] 1 Lloyd's Rep. 570, 577 (affirmed without reference to this point [1997] 1 Lloyd's Rep. 261).
- [300.](#) *Cook v Wright* (1861) 1 B. & S. 559, 569.
- [301.](#) *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449. See also *Longridge v Dorville* (1821) 5 B. & Ad. 117; *Cooper v Parker* (1855) 15 C.B. 822; *Cook v Wright* (1861) 1 B. & S. 559; *Ockford v Barelli* (1871) 20 W.R. 116; *Holsworthy UDC v Holsworthy RDC* [1907] 2 Ch. 62; *Re Cole* [1931] 2 Ch. 174; *Freedman v Union Group plc* [1997] E.G.C.S. 28; *Moussaka Inc. v Golden Seagull Maritime Inc.* [2002] 1 Lloyd's Rep. 797 at [14]; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch. 412 at [79]. For a discussion of the English decisions on a Scottish appeal, see *Hunter v Bradford Property Trust*, 1970 S.L.T. 173. Scots law does not require promises to be supported by consideration but distinguishes for certain purposes between gratuitous and onerous promises.
- [302.](#) *Cook v Wright* (1861) 1 B. & S. 559, 569.
- [303.](#) *Callisher v Bischoffsheim*, above n.297, at 452; cf. *Pitt v P.H.H. Asset Management Ltd* [1994] 1 W.L.R. 327 at 322, but in that case it is not clear that the party forbearing in fact believed in the validity of his claim; *Moussaka Inc v Golden Seagull Maritime Inc* [2002] 1 Lloyd's Rep. 797 at [14] ("commercial benefit").
- [304.](#) *Miles v New Zealand Alford Estate Co*, above n.294, at 284; *Colchester BC v Smith* [1992] Ch. 421, 435. The discussion in para.4-050, above, is concerned with the different problem of nondisclosure by the party *against* whom a valid claim is made of facts affecting the extent of that party's liability.
- [305.](#) *Cook v Wright* (1861) 1 B. & S. 559, 569; *Syros Shipping Co SA v Elaghill Trading Co (The Proodos C)* [1980] 2 Lloyd's Rep. 390, 392.
- [306.](#) e.g. *Gloyne v Richardson* [2001] EWCA Civ 716; [2002] 2 B.C.L.C. 669 at [39]; cf. *Grains & Fourrages SA v Huyton* [1997] 1 Lloyd's Rep. 628, where there was no compromise since both parties wished from the start to achieve the same result but were mistaken only as to the effect of the steps they had taken to achieve it.
- [307.](#) Matrimonial Causes Act 1973, s.34, re-enacting Maintenance Agreements Act 1957, s.1, below, para.16-053.
- [308.](#) Below, para.4-189.
- [309.](#) Below, para.4-188.
- [310.](#) *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, 165.
- [311.](#) *ibid.* citing *Maskell v Horner* [1915] 3 K.B. 106, 120.
- [312.](#) Below, Ch.8.

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**(c) - Actual Forbearance**

**Actual forbearance may be consideration**

**4-058**

⚠ A creditor who, without making any express promise, simply forbears from enforcing a debt or other claim may be held to have impliedly promised to forbear. <sup>313</sup> For example, the acceptance of a cheque in payment of a debt may be evidence of a promise not to sue the debtor so long as the cheque is not dishonoured, or at least for a reasonable time. <sup>314</sup> Where the claim is of such a kind that a promise to forbear (or the performance of it) would constitute consideration for a counter-promise, <sup>315</sup> an actual forbearance may also constitute consideration even though the creditor has not made any express or implied promise to forbear. In *Alliance Bank v Broom* <sup>316</sup> the defendant owed £22,000 to his bank, who pressed him to give security. He promised to do so but the bank made no counter-promise not to sue him. It was held that there was consideration for the defendant's promise as the bank had given, and the defendant received, "some degree of forbearance." <sup>317</sup> ⚠ On the other hand, in *Miles v New Zealand Alford Estate Co* <sup>318</sup> a company had bought land and then became dissatisfied with the purchase. The vendor later promised to make certain payments to the company, and it was alleged that the consideration for this promise was the company's forbearance to take proceedings to rescind the contract. A majority of the Court of Appeal held that there was no consideration for the vendor's promise as no proceedings to rescind were ever intended; and Cotton L.J. added that "it must be shown that there was something which would bind the company not to institute proceedings." <sup>319</sup> Bowen L.J. dissented from this proposition, <sup>320</sup> relying on *Alliance Bank v Broom*; but it may be possible to reconcile the two cases by reference to the types of claim forborne. A bank to which £22,000 is owed is virtually certain to take steps to enforce its claim, but a dissatisfied purchaser of land is much less certain to take proceedings for rescission. It may, therefore, be reasonable to say that mere forbearance will amount to consideration in relation to the former type of claim, but that a promise to forbear is necessary where it is problematical whether the claim will ever be enforced. A promise to forbear is also, of course, necessary where that is what the debtor bargains for.

**Time for which creditor must forbear**

**4-059**

Where the consideration consists of a promise to forbear which specifies no time the creditor must forbear for a reasonable time. <sup>321</sup> There is no such requirement where the consideration consists of actual forbearance: here it is enough that the debtor had "a certain amount of forbearance." <sup>322</sup>

**Relation between actual forbearance and the promise made in return for it**

**4-060**


Where the consideration is alleged to consist of an actual forbearance, that forbearance must be causally connected with the debtor's promise. A creditor does not give consideration <sup>323</sup> merely by forbearing to enforce an antecedent debt. <sup>324</sup> In *Wigan v English & Scottish Law Life Assurance Society* <sup>325</sup> a debtor executed an assignment of an insurance policy by way of mortgage in favour of his creditor. Parker J. held that the creditor, who knew nothing of the mortgage, had given no consideration for it <sup>326</sup>; but he added that the creditor would have provided consideration if he had been told of the mortgage and if, "on the strength of" <sup>327</sup> it, he had actually forborne to sue for the debt.

#### Express or implied request of debtor necessary

### 4-061

❗ The crucial question, therefore, is whether the creditor has forborne "on the strength of" the debtor's promise. He will clearly have done so where the debtor has expressly requested the forbearance. <sup>328</sup> But such an express request is not necessary. In *Alliance Bank v Broom* <sup>329</sup> the bank's forbearance was held to constitute consideration even though the defendant had not expressly requested it. Lord Macnaghten later explained the case on the ground that the debtor had impliedly requested forbearance. <sup>330</sup> ❗ It seems that an actual forbearance which is not induced by either the express or the implied request of the debtor is no consideration. In *Combe v Combe* <sup>331</sup> a husband during divorce proceedings promised to pay his wife an annual allowance. In an action to enforce this promise, the wife argued, inter alia, that she had given consideration for it by forbearing to apply to the court for a maintenance order. But it was held that there was no consideration as the wife had not forborne at the husband's request. <sup>332</sup>

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  - <sup>313</sup>. *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097; *Thornton Springer v NEM Insurance Co Ltd* [2000] 2 All E.R. 489 at 516.
  - <sup>314</sup>. *Baker v Walker* (1845) 14 M. & W. 465; *Elkington v Cooke-Hill* (1914) 30 T.L.R. 670; contrast *Hasan v Wilson* [1977] 1 Lloyd's Rep. 431, where the debt in respect of which the cheque was given was that of a third party.
  - <sup>315</sup>. e.g. not if the claim is known to be invalid: above, para.4-051.
  - <sup>316</sup>. (1864) 2 Dr. & Sm. 289; *R v Att-Gen for England and Wales* [2003] UKPC 22, [2003] E.M.L.R. 24 at [31].
  - <sup>317</sup>. ❗ (1864) 2 Dr. & Sm. 289 at 292; cf. *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm) at [62], quoted above, para.4-035.
  - <sup>318</sup>. (1886) 32 Ch.D. 267; cf. *Hunter v Bradford Property Trust Ltd*, 1970 S.L.T. 173.
  - <sup>319</sup>. (1886) 32 Ch.D. 267, 285.
  - <sup>320</sup>. ibid. at 291; his view was approved by Lord Macnaghten in *Fullerton v Provincial Bank of Ireland* [1903] A.C. 309, 314.
  - <sup>321</sup>. Above, para.4-048.
  - <sup>322</sup>. *Alliance Bank v Broom* (1864) 2 Dr. & Sm. 289, 292.

- [323.](#) Or, which comes to the same thing, gives only past consideration.
- [324.](#) Above, para.4-032.
- [325.](#) [1909] 1 Ch. 291; cf. *Hopkins v Logan* (1839) 5 M. & W. 241.
- [326.](#) Above, para.4-032.
- [327.](#) [1909] 1 Ch. 291 at 298.
- [328.](#) *Crears v Hunter* (1887) 19 Q.B.D. 341, 344.
- [329.](#) (1864) 2 Dr. & Sm. 289; above, para.4-058.
- [330.](#)  *Fullerton v Provincial Bank of Ireland* [1903] A.C. 309, 313. For the sufficiency of an implied request from the debtor for the creditor's forbearance, see also *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm) at [60].
- [331.](#) [1951] 2 K.B. 215.
- [332.](#) Quaere whether such a request should not have been implied. On the question whether a "request" is necessary, see A.L.G. (1951) 67 L.Q.R. 456; Smith (1953) 69 L.Q.R. 99. It seems that in the present type of case, involving a forbearance to sue, a request is necessary, whether or not this is true of unilateral contracts generally. As to this, see *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 C.L.R. 424, especially at 457–460.

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**General**

**4-062**

Much difficulty arises in determining whether a person who does, or promises to do, what he is already in law bound to do thereby provides consideration for a promise made to him. One possible view is that, as he was already legally bound to do the thing in question, his doing, or promising to do, it has no "value in the eye of the law" <sup>334</sup>; hence it cannot amount to a legal detriment to him, or to a legal benefit <sup>335</sup> to the person already entitled to performance. On the other hand the actual performance of the legal duty may amount to a factual detriment or benefit: it may be a detriment to the party performing the duty since actual performance may be more troublesome to him than the payment of (or the risk of being sued for) damages; while the other party may benefit in the sense of finding his legal remedy for breach of the duty less beneficial than its actual performance. Denning L.J. has therefore said that the performance of an existing duty, or the promise to perform it, was always good consideration. <sup>336</sup> This radical view has not been accepted; but the requirement of consideration in this group of cases has been mitigated by recognising that it can be satisfied where the promisee has conferred a factual (as opposed to a legal) benefit on the promisor. <sup>337</sup>

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<sup>1</sup>. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>333</sup>. Reynolds and Treitel (1965) 7 Malaya L.Rev. 1; Aivazian, Trebilcock & Penny (1984) 22 Osgoode Hall L.J. 173; Hooley [1991] J.B.L. 195; Halson (1991) 107 L.Q.R. 649.

<sup>334</sup>. *Thomas v Thomas* (1842) 2 Q.B. 851 at 859; above, para.4-002.

<sup>335</sup>. Above, para.4-006.

<sup>336</sup>. *Ward v Byham* [1956] 1 W.L.R. 496, 498; *Williams v Williams* [1957] 1 W.L.R. 148, 151.

<sup>337</sup>. Below, para.4-069.



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**(a) - Public Duty**

**Where the promisee is under a public duty**

**4-063**

It has been held that a person cannot recover money promised to him in return for his performance of, or promise to perform, a duty imposed by law. In *Collins v Godefroy*, <sup>338</sup> an attorney had been subpoenaed to give evidence on the defendant's behalf and alleged that the defendant had promised to pay him a guinea a day for his loss of time incurred in such attendance. It was held that, as the promisee was under a duty imposed by law to attend, the defendant's promise was given "without consideration." But this reasoning is hard to reconcile with some of the cases to be discussed below, <sup>339</sup> holding that promises of rewards for information leading to the arrest of criminals could be enforced; and other "public duty" cases are more readily explained on grounds of public policy: it has, for example, been held that a public officer cannot enforce a promise by a private citizen to pay him money for doing his public duty <sup>340</sup> and that a person cannot enforce a promise made in consideration of his forbearing to engage in a course of conduct that is criminal. <sup>341</sup> To uphold such promises would encourage undesirable forms of extortion; and this, rather than want of consideration, accounts for most of the authorities which establish the present rule. It is arguable that, when there are no such grounds of public policy against enforcing the promise, an action on it will not fail for want of consideration merely because the performance rendered in return was already due under a public duty from the promisee. Before 1968 a person who knew that a felony had been committed and had information which might lead to the arrest of the felon was bound to communicate the information to the police: if he failed to do so he was guilty of misprision of felony. <sup>342</sup> Yet promises to pay rewards for such information could be enforced, even by police officers giving the information. <sup>343</sup> Public policy was not offended by such offers, as they might induce people to look for the information and so promote the interests of justice. The term "felony" is now obsolete in English law <sup>344</sup> and the mere failure to disclose information which might lead to the arrest of a criminal is no longer an offence <sup>345</sup> or a breach of a duty imposed by law. But the old reward cases show that an act may constitute consideration even though there is a public duty to do it.

**Promisee doing more than public duty**

**4-064**

A person who is under a public duty can provide consideration for a promise by doing (or promising to do) more than he was by law obliged to do. In *Glasbrook Brothers Ltd v Glamorgan County Council* <sup>346</sup> the owners of a coal mine, who feared violence from strikers, asked, and promised to pay, the police for a greater degree of protection than the police reasonably thought necessary. It was held that the police had provided consideration for this promise by providing the extra protection, and that accordingly the promise was enforceable. The position in cases of this kind is now regulated by statute. Section 25(1) of the Police Act 1996 provides that payment can be claimed for "special police services" rendered at the "request" of the person requiring them. Such a request can be implied from conduct: e.g. where a person organises an event which cannot safely take place without such

services. On this reasoning, a football club has been held liable to the police authority for the cost of policing matches played on its ground.<sup>347</sup> Such liability arises irrespective of contract.<sup>348</sup>

#### 4-065

In *Ward v Byham*<sup>349</sup> the father of an illegitimate child wrote to its mother, from whom he was separated, saying that she could have the child and an allowance of £1 a week if she proved that the child was “well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you.” The father refused to continue the payments after the marriage of the mother to another man. It was held that the mother was entitled to enforce the father’s promise even though she was under a statutory duty to maintain the child. One ground for the decision is that the mother had provided consideration by showing that she had made the child happy, etc.: in this way, she could be said to have done more than she was required by law to do,<sup>350</sup> and to have conferred a factual benefit on the father<sup>351</sup> or on the child,<sup>352</sup> even though she may not have suffered any detriment. But if a son’s promise not to bore his father is not good consideration,<sup>353</sup> it is hard to see why a mother’s promise to make her child happy should, for the present purpose, stand on a different footing. There is, with respect, force in Denning L.J.’s view that the mother provided consideration by merely performing her legal duty to support the child. There was certainly no ground of public policy for refusing to enforce the promise.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  - <sup>333</sup>. Reynolds and Treitel (1965) 7 Malaya L.Rev. 1; Aivazian, Trebilcock & Penny (1984) 22 Osgoode Hall L.J. 173; Hooley [1991] J.B.L. 195; Halson (1991) 107 L.Q.R. 649.
  - <sup>338</sup>. (1831) 1 B. & Ad. 950. See also *Willis v Peckham* (1820) 1 Br. & B. 515; *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd’s Rep. 614, 619. For contracts to pay fees to expert witnesses, see *Goulden v Wilson Barca* [2000] 1 W.L.R. 167.
  - <sup>339</sup>. At n.339 below.
  - <sup>340</sup>. *Wathen v Sandys* (1811) 2 Camp. 640; *Morris v Burdett* (1808) 1 Camp. 218; *Bilke v Havelock* (1813) 3 Camp. 374; cf. *Morgan v Palmer* (1824) 2 B. & C. 729, 736 (where the actual decision was that money paid to the official was recoverable by the payee as having been extorted from him colore officii: see *Woolwich Equitable B.S. v I.R.C.* [1993] A.C. 70, 155, 165, 181, 198).
  - <sup>341</sup>. *Brown v Brine* (1875) L.R. 1 Ex.D. 5 (forbearance to commit criminal libel).
  - <sup>342</sup>. *Sykes v D.P.P.* [1962] A.C. 528.
  - <sup>343</sup>. *England v Davidson* (1840) 11 A. & E. 856; *Smith v Moore* (1845) 1 C.B. 438; *Neville v Kelly* (1862) 12 C.B.(N.S.) 740; *Bent v Wakefield and Barnsley Union Bank* (1878) 4 C.P.D. 1. Contrast *Maryland Casualty Co v Matthews* 209 F.Supp. 822 (1962) where a similar claim by a detective failed on grounds of public policy.
  - <sup>344</sup>. Criminal Law Act 1967, s.1.
  - <sup>345</sup>. The offence of concealing an arrestable offence created by s.5(1) of the Criminal Law Act 1967 is much narrower in scope than the former offence of misprision of felony; the statutory offence is committed only if the person withholding the information accepts or agrees to accept some consideration (other than making good the loss) for not disclosing it. For the definition of “arrestable offence,” see now Police and Criminal Evidence Act 1984, s.24; as amended by Police Reform Act 2002, s.48.
  - <sup>346</sup>. [1925] A.C. 270. cf. *Thoresen Car Ferries v Weymouth Portland BC* [1997] 2 Lloyd’s Rep. 614 (A’s promise to make use of B’s services for which he was under a legal duty to pay held to

constitute consideration for B's counterpromise).

- [347.](#) *Harris v Sheffield United F.C. Ltd* [1988] Q.B. 77. Contrast *Reading Festival Ltd v West Yorkshire Police Authority* [2006] EWCA Civ 524, [2006] 1 W.L.R. 2005 where a similar claim against the promoters of a music festival failed, principally on the ground that they had not made any "request" for the police services in respect of which the claim was made.
- [348.](#) Dicta in the *Reading Festival* case, above n.343, emphasise that a claim under subsection 25(1) of the Police Act 1996 can succeed only if there has been a "meeting of the minds" between the police authority and the promoter (at [54]) and add (at [20]) that the subsection had not "added to or altered the common law position" as stated in the *Glasbrook* case, above n.342. But it was also said that the police "had the last word on charges" (at [20]) and that "how the police provide the services must always be a matter for them" (at [21]). It is respectfully submitted that an agreement for services which left such a broad discretion to the provider of the services as to what services were to be provided and what the recipient of the services was to pay for them would not normally be sufficiently certain to give rise to a binding contract (see above, para.2-119).
- [349.](#) [1956] 1 W.L.R. 496.
- [350.](#) This may be what Morris and Parker L.JJ. had in mind when saying at 499 that the mother had provided "ample consideration" for the promise.
- [351.](#) See *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 13; below, para.4-064.
- [352.](#) Consideration need not move to the promisor: above para.4-040.
- [353.](#) Above, para.4-022.

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#### Section 8. - Existing Duties as Consideration <sup>333</sup>

#### (b) - Duty Imposed by Contract with Promisor

##### Contractual duty to promisor

#### 4-066

When A was bound by contract with B to do, or to forbear from doing, something, the law at one time took the view that A's performance of that duty (or his promise to perform it) was no consideration for a new promise by B. Later authority has qualified that view, but the extent of the qualification is uncertain. The cases fall into three groups. <sup>354</sup>

##### Cases in which there was no consideration

#### 4-067

The view that there was no consideration for B's new promise is usually traced back to *Stilk Myrick*. <sup>355</sup> In that case two of the crew of a ship had deserted during the voyage for which they had contracted to serve and the master promised to divide the wages of the deserters amongst the other nine if replacements for the deserters could not be found (as turned out to be the case). The court rejected a claim brought by one of the promisees against the master for a share of the extra wages promised by the master. According to one of the reports, <sup>356</sup> the claim was rejected on grounds of public policy stated in an earlier similar case, <sup>357</sup> viz. that the enforcement of such promises might lead sailors to refuse to perform their contracts unless they were promised extra pay. But according to the other report <sup>358</sup> (which has been said to have "the better reputation") <sup>359</sup> the court doubted that reasoning and based its decision instead on the ground that the nine crew members had provided no consideration by doing what they were already bound by their contracts to do; and it is on this ground that the case is now generally explained. <sup>360</sup> On the same principle, a promise to pay more than the originally agreed freight for the carriage of goods to the agreed destination cannot be enforced by the carrier <sup>361</sup>; and, where a debt is already due in full, a promise by the debtor to pay it in stated instalments is no consideration for the creditor's promise not to take bankruptcy proceedings in respect of the debt. <sup>362</sup>

##### Bases of the rule

#### 4-068

The public policy explanation of the rule, stated in para. 4-067 above, <sup>363</sup> was always open to the objection that it was based on a danger that was no more than hypothetical: in the cases on seamen's wages, <sup>364</sup> for example, there was no evidence of any refusal on the men's part to perform their original contracts. Even where there is such evidence, the public policy argument is much reduced in importance now that the law has come to recognise that such a refusal may amount to economic duress. <sup>365</sup> Where the refusal does amount to duress, a promise induced by it can be avoided (and money paid in pursuance of it be recovered back) on that ground. <sup>366</sup> This is true even where the

promise *is* supported by consideration: for example, where the promisee has undertaken not merely to perform his duties under the original contract, but also to render some relatively small additional service. <sup>367</sup> If, on the other hand, the promisee's refusal to perform the original contract does *not* amount to duress, the promise cannot be impugned merely on the ground that the refusal amounted to an abuse by the promisee of a dominant bargaining position. <sup>368</sup> To allow a promise to be invalidated on this ground even though there was *no* duress would introduce an intermediate category of promises unfairly obtained; and this would (in the words of Lord Scarman) "be unhelpful because it would render the law uncertain." <sup>369</sup> The now more generally held view is that the new promises in the present group of cases are unenforceable for want of consideration; and the reason for this view seems to have been that the promisee suffered no legal detriment <sup>370</sup> in performing what was already due from him, nor did the promisor receive any legal benefit in receiving what was already due to him. But this reasoning takes no account of the fact that the promisee may in fact suffer a detriment: for example, the wages which a seaman could earn elsewhere might exceed those due to him under the original contract together with the damages which he would have to pay for breaking it. Conversely the promisor may in fact benefit from the performance which he receives in consequence of the new promise: in *Stilk v Myrick* the master got the ship home, and this may well have been worth more to him than any damages that he could have recovered from the crew.

### Factual benefit to promisor

#### 4-069

❗ The forgoing discussion shows that a new promise by B in consideration of A's performing his duty to B under an earlier contract between them is not necessarily obtained by duress; and that A's performance of the duty may in fact benefit B. Where both these conditions are satisfied, it has been held that A can enforce B's new promise. In *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* <sup>371</sup> B had engaged A as carpentry sub-contractor, for the purpose of performing a contract between B and X to refurbish a number of flats. The amount payable by B to A under the subcontract was £20,000 but B later promised to make extra payments to A, who undertook no additional obligation in return. <sup>372</sup> B made this new promise because B's own surveyor recognised that the originally agreed sum of £20,000 was too low, and because B feared that A (who was in financial difficulties) would not be able to complete his work on time, and so expose B to penalties for delay under his contract with X. It was held that B's promise to make the extra payments to A was supported by consideration in the shape of the "practical benefits" <sup>373</sup> obtained by B from A's performance of his duties under the original contract between them. <sup>374</sup> Since no allegation of duress on A's part had been made by B, the new promise by B to pay extra could not be avoided on this ground. There had been no threat by A to break his original contract; indeed, the initiative for the agreement containing the promise of extra pay seems to have come from B.

#### 4-070

❗ The consideration for B's promise in the *Williams* case appears to have been the factual benefit obtained by B from A's actual performance of his earlier contract with B. This element of factual benefit has been regarded as consideration where a person performs or (promises to perform) a contractual duty owed to a third party <sup>375</sup>; and the *Williams* case is to be welcomed in bringing the two-party cases in line with those involving three parties. <sup>376</sup> But it is by no means clear how the case is, from this point of view, to be reconciled with *Stilk v Myrick* and the line of more recent decisions which have followed that case. <sup>377</sup> As has been suggested above, the master in *Stilk v Myrick* also obtained a factual benefit (in getting the ship home); and such a factual benefit will very often be obtained by B where he secures actual performance from A (as opposed to having to sue him for non-performance of the original contract). In the *Williams* case, *Stilk v Myrick* was not overruled; indeed Purchas L.J. described it as a "pillarstone of the law of contract." <sup>378</sup> But he added that the case might be differently decided today <sup>379</sup>; while Glidewell L.J. said that the present decision did not "contravene" but did "refine and limit" <sup>380</sup> the principle of the earlier case; and Russell L.J. said that the "rigid approach" to consideration in *Stilk v Myrick* was "no longer necessary or desirable." <sup>381</sup> ❗ The conclusion which may tentatively be drawn from these statements is that the factual benefit to B in securing A's performance of the earlier contract normally suffices to constitute consideration. The

insistence in the earlier cases on the stricter requirement of legal benefit or detriment is no longer justified (if it ever was) by the need to protect B from the undue pressure that A might exert by refusing to perform his original contract; for this need can now be met by the expanding concept of duress. <sup>382</sup> This provides a more satisfactory solution of the present problem since it invalidates promises only where actual duress is established. Where this is not the case, and the promisee has in fact conferred a benefit on the promisor by performing the original contract, then the requirement of consideration is satisfied and there seems to be no good reason for refusing to enforce the new promise. <sup>383</sup> !

### Increase in promisee's performance

#### 4-071

The promisee may provide consideration for the new promise by doing, or promising, more than he was bound by the original contract to do. Thus in one case <sup>384</sup> a seaman was promoted during the course of the voyage and undertook additional duties: these were held to constitute consideration for a promise to pay him extra wages. The same principle was applied where shipbuilders claimed an increase in the agreed price for a supertanker on the ground that the currency in which that price was to be paid had been devalued. The contract provided for the giving by the builders of a performance guarantee, and it was held that they had provided consideration for the prospective owners' promise to pay the price-increase by making corresponding increase in their performance guarantee. <sup>385</sup>

#### 4-072

! The promisee may similarly provide consideration where, before the new promise was made, circumstances have arisen which justify the promisee's refusal to perform the original contract. Thus members of the crew of a ship may be justified in refusing to complete the contractual voyage because so many of their fellows have deserted that its completion will involve hazards not originally contemplated. If they are induced to go on by a promise of extra pay, they do something which they were not bound by the original contract to do and so provide consideration for that promise. <sup>386</sup> The same principle applies if the original contract has been brought to an end for some other reason: for example, by lapse of time or by notice or by mutual consent. Thus the parties to a contract could rescind it and then make a new agreement providing for the payment of higher wages. Factual difficulties can no doubt arise in distinguishing between: (1) a rescission followed by a new agreement; and (2) a mere variation. But in principle the distinction is clear <sup>387</sup>: in the first of these situations, the original contract is brought to an end and replaced by a new one in respect of which the requirement of consideration is satisfied, <sup>388</sup> while in the second the original contract continues, so that each party is still bound by it and the promisee who seeks to enforce the variation of it provides no consideration merely by performing his obligations under it. <sup>389</sup> This reasoning would not apply where the original contract was void, or voidable at the option of the promisee, or unenforceable against him, so that in such cases performance by him of the work specified in it would, it seems, be consideration for a promise of extra pay; and if the original contract was in fact good but was believed to be defective, the new promise might still be binding on the analogy of the rule that forbearance to litigate an invalid claim may amount to consideration. <sup>390</sup> Similar reasoning can apply where a doubt as to the validity is raised by a third party with an interest in the point. This possibility is illustrated by a case <sup>391</sup> where solicitors (M) agreed in CFA 1 to represent a client (C) in litigation against D who, in a dispute as to costs, challenged the validity of CFA 1. <sup>392</sup> A second agreement (CFA 2) was then made between M and C by which C promised to pay an additional amount to M (by way of a success fee) for the same services <sup>393</sup> as those undertaken by M under CFA 1. It was held that "[t]he provision of an enforceable obligation [in CFA 2] to provide services in place of one which D asserted to be unenforceable was consideration for a fresh promise to pay." <sup>394</sup> Two further possibilities call for discussion. The first is that the original contract might provide for revision of pay scales, <sup>395</sup> ! often after negotiations conducted, in accordance with machinery established by the contract, between the employer and the employees (or persons acting on their behalf). With reference to such a situation, it has been said <sup>396</sup> that, where, in the context of such negotiations, "increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim <sup>397</sup> and the continuation of the same employee in the same employment." <sup>398</sup> The employer's promise would thus be binding at common law even where it was not matched by



a counter-promise by the employees of higher productivity.<sup>399</sup> The second possibility is that a contract may give a party the right to terminate it by notice. That party may then, by forbearing to exercise this right, provide consideration for a promise made to him by the other party to induce that forbearance.<sup>400</sup>

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  333. Reynolds and Treitel (1965) 7 Malaya L.Rev. 1; Aivazian, Trebilcock & Penny (1984) 22 Osgoode Hall L.J. 173; Hooley [1991] J.B.L. 195; Halson (1991) 107 L.Q.R. 649.
  354. For these groups see (i) paras 4-067 to 4-078 below; (ii) paras 4-079 to 4-080 below and (iii) 4-071 to 4-072 below.
  355. (1809) 2 Camp. 317; 6 Esp. 129. See also *Harris v Carter* (1854) 3 E. & B. 559; *Sanderson v Workington BC* (1918) 34 T.L.R. 386; *Swain v West (Butchers) Ltd* [1936] 1 All E.R. 224.
  356. (1809) 6 Esp. 129.
  357. *Harris v Watson* (1791) Peake 102.
  358. (1809) 2 Camp. 317; in *Harris v Carter* (1854) 3 E. & B. 559, both public policy and want of consideration are relied on to explain the rule.
  359. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705, 712, where the rule in *Stilk v Myrick* was recognised as being still good law, though held inapplicable for reasons stated in para.4-068, below; Coote [1980] C.L.J. 40; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676, [2005] 1 Lloyd's Rep. 128 at [107], as to which case see also below, paras 4-070, 4-080.
  360. *Harrison v Dodd* (1914) 111 L.T. 47; *Swain v West (Butchers) Ltd* [1936] 3 All E.R. 261; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705, 712; *Pao On v Lau Yiu Long* [1980] A.C. 614, 633; *Sybron Corp. v Rochem Ltd* [1983] I.C.R. 801, 817; *Vantage Navigation Corp. v Suhail and Saud Building Materials LLC (The Alev)* [1989] 1 Lloyd's Rep. 138, 147; *Hadley v Kemp* [1999] E.M.L.R. 586, 626. In *WRN Ltd v Ayrís* [2008] EWHC 1080 (QB), [2008] I.R.L.R. 889 at [46] it was likewise accepted by counsel for both parties that "a promise to perform an earlier contract [between the same parties] ... cannot in law constitute consideration."
  361. *Syros Shipping Co SA v Elaghill Trading Co Ltd (The Proodos C)* [1980] 2 Lloyd's Rep. 390; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] 1 Q.B. 833.
  362. *Vanbergen v St. Edmunds Properties Ltd* [1933] 2 K.B. 223.
  363. At n.353.
  364. para.4-067, at nn.351–353.
  365. Below, Ch.8; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] 1 Q.B. 833.
  366. This would have been the result in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)*, above, n.355, if the victim of the duress had not affirmed the contract. For cases in which recovery was allowed on this ground, see *Universe Tankships Inc v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 A.C. 366; *B. & S. Contracts & Designs v Victor Green Publications Ltd* [1984] I.C.R. 449; and *T. A. Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* [1956] 56 S.R. (N.S.W.) 323. See also *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep. 653 where a seller of goods refused to deliver the full agreed quantity and demanded an increased price in

circumstances amounting to economic duress (see at [62], [94] and para.8-035 below) and the buyer was held to be entitled to restitution in respect of the extra payment made to the seller, whose “promise to perform a contractual obligation to which it was already subject accompanied by a threat of non-performance which amounted to economic duress” was “not good consideration” (at [118]).

[367.](#) e.g. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705; below, para.4-071; *Vantage Navigation Corp. v Sahail and Saud Building Materials LLC (The Alev)* [1989] 1 Lloyd’s Rep. 138, 147.


[368.](#) *Pao On v Lau Yiu Long* [1980] A.C. 614, 632.

[369.](#) *ibid.*, at 634. This statement was made in a case involving three parties, but is of general application: *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 15.

[370.](#) Above, para.4-006.

[371.](#) [1991] 1 Q.B. 1; *Adams and Brownsword* (1991) 53 M.L.R. 536; *Chen-Wishart* (1991) 14 N.Z.U.L.R. 270; *Hird and Blair*, [1996] J.B.L. 254.

[372.](#) The payments under the original contract were found to be due in unspecified instalments while those under the new promise were due as each flat was completed, but no attempt was made to argue that this change in the times when payment was due *might* have been to A’s disadvantage and therefore provided consideration. There is perhaps a hint to this effect in *Russell L.J.’s* judgment at 19.

[373.](#)  [1991] 1 Q.B. at 11; cf. *ibid.* at 19, 23, followed in *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No.2)* [1990] 2 Lloyd’s Rep. 526, where “promisor” and “promisee” appear to have been transposed in a passage at 545; *Lee v GEC Plessey Communications Ltd* [1993] I.R.L.R. 383 at [118]–[119], below, para.4-072; *Simon Container Machinery Ltd v Emba Machinery Ltd* [1998] 2 Lloyd’s Rep. 428 at 435; *Stevensdrake Ltd v Hunt* [2016] EWHC 1111 (Ch) at [61]; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604, discussed below, para.4-119A. The same reasoning may account for the view, expressed in *Attrill v Dresdner Kleinwort Ltd* [2011] EWCA Civ 229, [2011] I.R.L.R. 613 at [35], that employees had, by continuing to work under their contracts of employment, provided consideration for their employer’s promise to establish a minimum bonus pool. The purpose of this promise was said to retain staff and the fact that in this respect the promise had been “largely successful” (at [35]) can be regarded as a “practical benefit” to the employer; for this case, see also para.4-072 below; for similar reasoning in further proceedings in the *Attrill* case, above, see [2012] EWHC 1189 (QB), where the requirement of consideration was held to have been satisfied by (1) the practical benefit obtained by the employer (at [180]–[184], following the *Williams* case); and (2) the fact that the employees had remained in the employment of the employer; affirmed [2012] EWCA Civ 394 where *Elias L.J.* at [95] referred with evident approval to the reasoning of the court below on the issue of consideration. In *WRN Ltd v Ayris* [2008] EWHC 1080 (QB), [2008] I.R.L.R. 889 (above, para.4-067 n.356) no attempt seems to have been made to argue that the promisor had obtained a “practical benefit” so as to satisfy the requirement of consideration on the principle discussed in the text above.

[374.](#) In fact, B did not secure the whole of this benefit, but this was because B’s wrongful failure to make the extra payments justified A’s refusal to continue with the work.

[375.](#) Below, para.4-076.

[376.](#) See below, para.4-075.

[377.](#) Above, para.4-067. The difficulty of reconciling the *Williams* case with *Stilk v Myrick* and the cases which have followed it is discussed in *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd’s Rep. 128 at [107]–[109]. *Colman J.*, although accepting that the *Williams* case appeared to have introduced “some amelioration”, said that he

would not have followed it, if it had not been a decision of the Court of Appeal. He regarded the decision as “inconsistent with the ... rule that consideration must move from the promisee” (at [108]); but it is respectfully submitted that this requirement can be (and in the *Williams* case was) satisfied by the promisee’s conferring a benefit on the promisor even though the promisee, in doing so, suffers no detriment (see above, para.4-038). The *Williams* case was discussed with apparent approval in *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 at [86]–[89]; for this case, see above, para.4-018, below para.4-072.

378. [1991] 1 Q.B. 1, 20.

379. *ibid.*, at 21. But he was not prepared to accept the American case of *Watkins v Carrig* 21 A. 2d 591 (1941), where a contractor who had agreed to do excavating work unexpectedly struck hard rock and was held entitled to enforce a promise to pay nine times the originally agreed sum. The case was said not to represent English law in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705, 714. It was cited with apparent approval in *Compagnie Noga D’Importation et D’Exportation SA v Abacha* [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915 at [54] but on the point that the requirement of consideration was satisfied by rescission of the original contract, followed by the making of a new one: below, paras 4-072, 4-080. No mention was made in the *Compagnie Noga* case, above, of the more sceptical references to *Watkins v Carrig* in the *Williams* case and in *The Atlantic Baron*, cited earlier in this note.

380. [1991] 1 Q.B. 1, 16.

381. *ibid.*, at 18. A passage in the judgment of Arden L.J. in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [79] could be said to support the view that the decision in *Stilk v Myrick* (1809) 2 Camp. 317, para.4-067, might now go the other way on the ground that the master of the ship had obtained a “practical benefit” which would constitute consideration within the reasoning of the *Williams* case [1991] 1 Q.B. 1, see Vol.I, para.4-069; but there is no express reference to *Stilk v Myrick* (above) in the *MWB* case, above.

382. The actual decision in the *South Caribbean* case (above n.373) seems to be explicable on the ground that the promisee’s “threat of non-compliance” with the original contract was “analogous to economic duress” (at [108]); though the words “analogous to” give rise to some difficulty insofar as they suggest that there was no actual duress: see above, para.4-068 at n.365.


383. *The above sentence is cited with apparent approval by Arden L.J. in MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [80]. The question whether in that case the requirement of consideration was satisfied is discussed below, para. 4-119A.

384. *Hanson v Royden* (1867) L.R. 3 C.P. 47; cf. *Turner v Owen* (1862) 3 F. & F. 176. Semble, such extra pay is recoverable notwithstanding failure to comply with the formal requirements now prescribed by Merchant Shipping Act 1995, s.25.

385. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705. See also *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 (paras 4-018 above and 4-072 below) where solicitors in their new contract (CFA 2) with a client (C) undertook a duty to represent C on appeal, when no such undertaking had been contained in their original contract (CFA 1) with C. One reason why the requirement of consideration was satisfied in relation to C’s promises in CFA 2 was that “CFA 2 provided an additional benefit to [C] which CFA 1 did not” (at [83]).

386. *Hartley v Ponsonby* (1857) 7 E. & B. 872. See also *O’Neil v Armstrong Mitchell & Co* [1895] 2 Q.B. 418; *Palace Shipping Co v Caine* [1907] A.C. 386; *Liston v SS. Carpathian (Owners)* [1915] 2 K.B. 42.

387. *Compagnie Noga D’Importation et D’Exportation SA v Abacha* [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915 at [57].

- [388.](#) *ibid.*, at [44–61]; below, para.4-080.
- [389.](#) Below, para.4-080; this was the reasoning of *Stilk v Myrick in (1809) 2 Camp. 317*.
- [390.](#) Above, para.4-053; *E. Hulton & Co v Chadwick Taylor Ltd (1918) 34 T.L.R. 230, 231*.
- [391.](#) *Birmingham City Council v Forde [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732*.
- [392.](#) *ibid.*, at [59].
- [393.](#) For the further point that the requirement of consideration was satisfied by M's undertaking to provide *additional* services see above, para.4-071 n.380.
- [394.](#) *[2009] EWHC 12 (QB)* at [82]. For rejection of challenges to the validity of CFA 2 on grounds other than want of consideration, see [98]–[163].
- [395.](#)  *cf. Finland SS Co Ltd v Felixstowe Dock & Railway Co [1980] 2 Lloyd's Rep 287; Lombard Tricity Finance Ltd v Paton [1989] 1 All E.R. 918* (contract providing for increase in interest rates to be made by lender). See also *Amey Wye Valley Ltd v Hertfordshire DC [2016] EWHC 2368 (TCC), [2016] B.L.R. 698* (contract for highway maintenance providing for inflationlinked increases in contractor's charges. The case was concerned with the interpretation of this provision; there was no reference in the judgment to the requirement of consideration).
- [396.](#) *Lee v GEC Plessey Communications Ltd [1993] I.R.L.R. 383* at [118], applied in *Hershaw v Sheffield City Council [2014] UK EAT 00333, [2014] I.C.R. 112* at [13]; Freedland, *The Personal Employment Contract* (2003) 254–255.
- [397.](#) The principle referred to in these words appears to be analogous to that stated in para.4-048 above.
- [398.](#) The words quoted above after n.392 may be hard to reconcile with *Stilk v Myrick (1809) 2 Camp. 317*, above para.4-067, but they are consistent with *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 Q.B. 1*, above, paras 4-069 to 4-070, which is the authority cited in the *Lee* case, above, n.391, at [119] in support of the view that the requirement of consideration was satisfied in that case as the “employer had both secured a benefit and avoided a detriment”.
- [399.](#) e.g. *Pepper & Hope v Daish [1980] I.R.L.R. 13*. Perhaps it was for this reason that the argument of want of consideration was not raised in *Universe Tankships Inc v International Transport Workers' Federation (The Universe Sentinel) [1983] 1 A.C. 366*.
- [400.](#) This is a possible reason (in addition to that given in para.4-069 n.369 above) for the decision in *Attrill v Dresdner Kleinwort Ltd [2011] EWCA Civ 229, [2011] I.R.L.R. 613*, above, para.4-069. For reference to the requirement of consideration in later proceedings in the *Attrill* case, see *[2012] EWHC 1189 (QB), affirmed [2013] EWCA Civ 394, [2013] 3 All E.R. 607* at [95].

**Chitty on Contracts 32nd Ed.**  
**Consolidated Mainwork Incorporating Second Supplement**  
**Volume I - General Principles**  
**Part 2 - Formation of Contract**  
**Chapter 4 - Consideration <sup>1</sup>**  
**Section 8. - Existing Duties as Consideration <sup>333</sup>**  
**(c) - Duty imposed by Contract with a Third Party**

Introductory <sup>401</sup>

#### 4-073

Two problems arise under this heading. The first is whether, if A is under a contractual duty to B, the *performance* of this duty can constitute consideration for a promise made to A by C. The second is whether A's *promise* to perform his contractual duty to B can constitute consideration for a counterpromise made to A by C.

**Performance of the duty**

#### 4-074

It is now generally accepted that actual performance of a contractual duty owed to a third party can constitute consideration. <sup>402</sup> Two mid-nineteenth century cases which support this view are not wholly conclusive, since in each of them the promisee did, or may have done, more than he was bound under the earlier contract to do, and so have provided additional consideration. <sup>403</sup> But it is harder to find any such additional consideration in *Shadwell v Shadwell*. <sup>404</sup> An uncle wrote to his nephew: "I am glad to hear of your intended marriage with Ellen Nicholl; and as I promised to assist you at starting, I am happy to tell you that I will pay you £150 yearly during my life ...". A majority of the Court of Common Pleas held that the nephew had provided consideration for the uncle's promise by marrying Ellen Nicholl. It was said that there was a detriment to the nephew in that he "may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments" <sup>405</sup>; and that there was a benefit to the uncle in that the marriage was "an object of interest to a near relative." <sup>406</sup> This reasoning simply ignores the nephew's previous contractual obligation to marry Ellen Nicholl, <sup>407</sup> under which he was legally bound to suffer the alleged detriment. It could perhaps be argued that he forbore from trying to persuade his fiancée to postpone the wedding or to put an end to the engagement <sup>408</sup>; but it is doubtful whether his forbearance to attempt to persuade her to do this can be regarded as consideration in the absence of any suggestion that he contemplated the possibility. <sup>409</sup> The argument that the uncle benefited fares little better, for the benefit described by the court was a purely sentimental one. It is, moreover, very doubtful whether, on the true construction of the uncle's letter, the nephew's marriage to Ellen Nicholl was intended to be the consideration for the uncle's promise, or only a condition. <sup>410</sup> Byles J., who dissented, treated it as a condition and also thought that the uncle's promise was not made with any contractual intent. His view was subsequently approved, <sup>411</sup> so that the correctness of the actual decision in *Shadwell v Shadwell* is very much in doubt. But for what the decision is worth, it does support the view that the performance of a contractual duty owed to a third party can be good consideration for a promise. More recent authorities also support that view. <sup>412</sup>

#### 4-075



In *The Eurymedon*,<sup>413</sup> A (a firm of stevedores) had unloaded goods from B's ship. Some of these belonged to C who, for present purposes,<sup>414</sup> may be taken to have promised A not to sue him for damaging the goods. It was held that A had provided consideration for this promise by unloading the goods<sup>415</sup> even if he was already bound by a contract with B to unload them. This conclusion seems to be based on the fact that such performance conferred a benefit on C<sup>416</sup>; and the benefit may be regarded either as factual (in the sense that C secured the actual delivery of his goods) or as legal<sup>417</sup> (in the sense that C was not legally entitled to the performance of A's duty to unload, this duty being owed only to B). It would, of course, be open to C to avoid liability if he could show that his promise had been obtained by duress.<sup>418</sup> It is arguable that this defence is less likely to succeed in a three-party than in a two-party case<sup>419</sup>; but this is not invariably the case. Sailors in a case like *Stilk v Myrick*<sup>420</sup> could exert economic duress on the captain whether their original contract was with him or with a third party.<sup>421</sup> In both types of cases, it is now recognised that performance of a prior contractual duty can constitute consideration for a subsequent promise if that performance amounts to a benefit to the promisor.<sup>422</sup> The promise is therefore binding in the absence of a legally recognised vitiating factor, such as duress.

## Promise of performance

### 4-076

There was formerly some support for the view that a promise to perform a contractual duty owed to a third party (as opposed to the actual performance of the duty) could not constitute consideration for a counter-promise. Thus in *Jones v Waite*<sup>423</sup> it was said that a promise by A to C that A would pay a debt which A owed to B was no consideration for a promise made by C to A. This view seems to be based on the idea that A suffers no (legal) detriment by promising to pay a debt that he was already bound to pay; nor did it appear that C gained any benefit as a result of the promise. But C may gain such a benefit: for example, where B is a company in which C has an interest. This was the position in *Pao On v Lau Yiu Long*<sup>424</sup> where the claimants, having entered into a contract with a company, refused to perform it unless the defendants, who were shareholders in the company, guaranteed them against loss which might be incurred as a result of the performance of one of the terms of that contract. The guarantee was given in consideration of the claimants' promise to perform their pre-existing contractual obligations to the company; and was held binding<sup>425</sup> on the ground that "A promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration."<sup>426</sup> This view seems, with respect, to be preferable to that expressed in *Jones v Waite*; for, where a shareholder makes a promise to induce a person to perform a contract with the company, the promise is certainly not gratuitous in a commercial sense. It will, of course, be open to the promisor to avoid liability if he can show that the promisee's refusal to perform the contract with the company amounted to duress<sup>427</sup> not merely with regard to the company, but also with regard to the promisor himself.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

333. Reynolds and Treitel (1965) 7 Malaya L.Rev. 1; Aivazian, Trebilcock & Penny (1984) 22 Osgoode Hall L.J. 173; Hooley [1991] J.B.L. 195; Halson (1991) 107 L.Q.R. 649.

401. See A. G. Davis (1937) 6 Camb.L.J. 202.

402. The above view, as expressed in para.3-073 the 30th edition of this book (para.4-074 in the present edition) is cited with apparent approval in *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2013] EWCA Civ 184, [2013] 2 Lloyd's Rep. 38 at [34]. For the contrary view, see *McDevitt v Stokes* 192 S.W. (1917). In *Pfizer Corp. v Ministry of Health* [1965] A.C. 512 Lord Reid said that there was no contract where a chemist supplied drugs to a patient under the National Health Service in return for a prescription charge, because the chemist is "bound by his contract with the appropriate authority to supply the drug ..." (at 536). But it seems from the context that Lord Reid was considering whether the relationship was consensual and was not thinking of the problem of consideration.



- [403.](#) *Scotson v Peg* (1861) 6 H. & N. 295; *Chichester v Cobb* (1866) 14 L.T. 433. The question in these cases was whether A provided consideration for C's promise by performing a contractual duty owed by A to B. There is no doubt that C's promise to perform a duty owed by B to A (or the performance of such a promise) can constitute consideration for a promise (express or implied) by A to C: see, e.g. *Brandt v Liverpool, etc. S.N. Co* [1924] 1 K.B. 575; *The Aramis* [1989] 1 Lloyd's Rep. 213, 225 (where C's claim failed for want of contractual intention: above para.2-190).
- [404.](#) (1860) 9 C.B.(N.S.) 159.
- [405.](#) *ibid.*, at 174.
- [406.](#) *ibid.*
- [407.](#) If the facts recurred now, the nephew's promise to marry Ellen Nicholl would no longer give rise to a contractual obligation: Law Reform (Miscellaneous Provisions) Act 1970, s.1. This section applies to an agreement to marry made between two persons of the same sex: Marriage (Same Sex Couples) Act 2013, s.11 and Sch.3, para.1. An agreement to enter into a civil partnership likewise has no contractual force: Civil Partnership Act 2004, s.73.
- [408.](#) cf. *De Cicco v Schweitzer* 221 N.Y. 413, 117 N.E. 807 (1917).
- [409.](#) Above, para.4-024.
- [410.](#) cf. above, para.4-012.
- [411.](#) *Jones v Padavatton* [1969] 1 W.L.R. 328, 333.
- [412.](#) See above at n.397; below paras 4-075 and 4-076 at n.421.
- [413.](#) *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154, 168; followed in *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 W.L.R. 138 and *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The Antwerpen)* [1994] 1 Lloyd's Rep. 213; *The Mahkutai* [1996] A.C. 650, 664.
- [414.](#) See further para.15-051, below.
- [415.](#) A question may arise as to whether A has indeed performed or begun to perform his contract with B: see *Lotus Cars Ltd v Southampton Cargo Handling plc (The Rigoletto)* [2000] 2 Lloyd's Rep. 532, 542–545, where it was assumed that performance of a contract with a third party would constitute consideration.
- [416.](#) *The Eurymedon*, above, n.408 at 168 (“for the benefit of the shipper”, i.e. of C).
- [417.](#) See above, para.4-006.
- [418.](#) cf. above, para.4-068.
- [419.](#) Goodhart, (1956) 72 L.Q.R. 490.
- [420.](#) Above, para.4-067.
- [421.](#) In *Stilk v Myrick* the distinction between two- and three-party cases was ignored; no one asked whether the original contract was with the captain (the promisor) or the shipowner, if these were separate persons. The report in 6 Esp. 129 makes it clear that the *action* was against the captain. cf. also *Turner v Owen* (1862) 3 F. & F. 176, where improper pressure may have been the ground for the jury's verdict even before the law recognised the concept of economic duress; and *B. & S. Contractors & Designs v Victor Green Publications Ltd* [1984] I.C.R. 419.

- [422.](#) Above, para.4-069; above, n.411; cf. below, para.4-076 (in the case of a *promise* to perform a duty to a third party).
- [423.](#) (1839) 5 Bing.N.C. 341 affirmed without reference to this point (1842) 9 Cl. & F. 101. A dictum in *Pfizer Corp. v Ministry of Health* [1965] A.C. 512, 536 could be interpreted to support the same view but appears (from the context) to be based on lack of contractual intention: see above, para.4-074, n.397.
- [424.](#) [1980] A.C. 614.
- [425.](#) For rejection of the argument that the consideration was past, see above, para.4-031.
- [426.](#) [1980] A.C. 614, 632. In *The Eurymedon*, above, n.408, it was said at 168 that a promise to perform a contractual duty owed by a third party was consideration because it was a *benefit to the promisee*. This is at first sight puzzling, since consideration must be a detriment to the promisee or a benefit to the promisor. The reference, however, was to a case in which A's promise to C was said to be consideration for C's *counter-promise* to A and it was the consideration for that counter-promise which was in issue. In relation to that counter-promise, C was the promisor and the benefit that C got from A's promise satisfied the orthodox test of consideration for C's counter-promise. cf. above para.4-075.
- [427.](#) cf. above, para.4-068.

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**Introduction**

**4-077**

The parties to a contract may agree to rescind it or to vary its terms. This subject is discussed in Chapter 22, but it is necessary in the present chapter to say something of the problems of consideration to which such agreements give rise. Indeed one aspect of the matter has already been discussed, for cases such as *Stilk v Myrick* <sup>428</sup> and *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* <sup>429</sup> raise a problem of consideration arising from the variation of an existing contract. In those cases, the question was whether the performance by A of his obligations under the old contract could be consideration for a new promise from B. Our present problem is whether there is consideration for a promise by B to accept, in discharge of A's obligations, some performance other than that originally undertaken by A, <sup>430</sup> or to grant A a total release from his obligations under the original contract. Even if there is no such consideration, B's subsequent promise may, nevertheless, have some limited legal effect. <sup>431</sup>

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<sup>1.</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>428.</sup> (1809) 2 Camp. 317; 6 Esp. 129; above, para.4-067.

<sup>429.</sup> [1991] 1 Q.B. 1, above, para.4-069.

<sup>430.</sup> The issue discussed in *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [107]–[112] seems to have been of this kind: see below, para.4-080.

<sup>431.</sup> Below, paras 4-082—4-101, 4-130—4-138.

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### Section 9. - Discharge and Variation of Contractual Duties

### (a) - Rescission

#### Agreements to rescind where each party has outstanding rights

#### 4-078

The parties to a contract may agree to rescind it at a time when each has outstanding rights under the contract against the other. They most obviously have such rights where the contract is wholly executory and neither party is in breach: for example, where a contract for the sale of goods to be delivered and paid for on a future day is rescinded before that day by mutual consent. They equally have such rights where both parties are, at the time of rescission, in breach; and where the contract is partly executed and obligations remain outstanding on both sides: for example, where a lease for seven years is rescinded by mutual consent after three years of the term have expired. In all such cases, the agreement generates its own consideration in the sense that each party provides consideration for the other's promise to release him by promising to give up his own rights under the contract. <sup>432</sup> It is, of course, essential that *each* party should make such a promise. If only one party does so, the other making no counter-promise, the former party's promise will be "entirely unilateral and unsupported by any consideration." <sup>433</sup>

#### Agreements to rescind where only one party has outstanding rights

#### 4-079

An agreement to rescind a contract may also be unsupported by consideration (and so lack contractual force) where only one party has outstanding rights under the contract. This will often be the position where the contract has been wholly executed by that party (A) alone and he then promises to release the other party (B) from his obligations. In such a case there is *prima facie* no consideration for A's promise since A gets no benefit and B suffers no detriment from the arrangement. The same is true where A is ready and willing to perform but B is not: B is then liable in damages and "rescission" of the contract at this stage would be gratuitous if it merely released B from liability. This is what is meant by the statement that rescission after breach requires separate consideration. <sup>434</sup> Whenever the rescinding agreement does not generate its own consideration, such separate consideration must be provided by B (usually in the form of some additional performance rendered, or promise made, by B) to make A's promise binding. There must, in the traditional terminology, be not merely accord but also satisfaction. The "accord" here refers to the agreement and the "satisfaction" to the consideration for it. <sup>435</sup>

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<sup>1.</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>432.</sup> *Foster v Dawber* (1851) 6 Ex.839, 850; cf. *Marseille Fret SA v D. Oltman Schiffahrts GmbH & Co (The Trado)* [1982] 1 Lloyd's Rep. 157; *Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600

(Comm), [2006] 1 All E.R. (Comm) at [51]; *affd. on other grounds* [2006] EWCA Civ 241, [2006] 2 All E.R. (Comm) 104.

[433.](#) *Collin v Duke of Westminster* [1985] Q.B. 581, 588.

[434.](#) *Atlantic Shipping & Trading Ltd v Louis Dreyfus & Co* [1922] 2 A.C. 250 at 262.

[435.](#) Below, para.4-117. For an exception to the requirement, see Bills of Exchange Act 1882, s.62, below, Vol.II, para.34-138. The release *prima facie* takes effect at the time of the accord: see *Jameson v CEBG* [2000] 1 A.C. 455 at 477 (where the original liability arose in tort).

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**Agreements to vary contracts**

**4-080**

Four situations call for discussion.

**(1) Rescission followed by new contract**

First, the parties may agree to rescind an existing contract and to enter into a new one, on different terms, in relation to the same subject-matter. The question whether there is consideration for the rescission then depends on the tests stated in paras 4-078 to 4-079 above. If these are satisfied, there will also generally be consideration for the promises of both parties made under the new contract. "The same consideration which existed for the old agreement is imported into the new agreement which is substituted for it." <sup>436</sup>

**(2) Variation which can prejudice or benefit either party**

Secondly, the parties may agree to vary the contract in a way that can prejudice or benefit either party. Here the *possible* detriment or benefit suffices to provide consideration for the promise of each party. This situation may be illustrated by an agreement to vary the currency in which a future payment under a contract of sale is to be made. <sup>437</sup> The seller's promise to accept payment in the new currency is supported by consideration since it *may* benefit him and prejudice the buyer as it is possible for the new currency to appreciate in relation to the old between the time of the variation and the time of payment. This possibility of benefit and detriment is sufficient. It is immaterial for the purpose of the requirement of consideration that the new currency in fact depreciates in relation to the old, or even that at the time of the variation it was highly probable that it would so depreciate. On the same principle, the requirement of consideration is satisfied where an agreement for the sale of goods is varied by mutual promises (made before the delivery date originally specified) on the part of the buyer to accept delivery and by the seller to perform his obligations with respect to delivery on a different (later) date. In one such case, it was said that such a variation amounted to "a new agreement supported by mutual promises" and that "sufficient consideration [for the buyer's promise] moved from the promisee." <sup>438</sup> (i.e., the seller). If a variation is, taken as a whole, capable of benefiting either party, the requirement of consideration will be satisfied even though a particular term of the variation is for the sole benefit of one. <sup>439</sup> However, it has been held that there is no consideration for a variation which, though capable of benefiting either party, is in fact made wholly for the benefit of one. For example, a variation as to the place at which a debt is to be paid is capable of benefiting either party; but where such a variation was introduced solely for the benefit of the debtor there was held to be no consideration for a promise by the creditor: e.g. for one to accept part payment in full settlement if the debtor made such payment at the different place. <sup>440</sup>



### (3) Variation which can benefit only one party

#### 4-081

Thirdly, the parties may agree to vary the contract in a way that is considered to be capable of conferring a legal benefit on one party only: e.g. where one party agrees to pay more for the performance of the other party's original obligation, or to accept less than the other party had originally undertaken without any corresponding variation (that could benefit him) of his own obligation. In some situations of this kind, it is settled that there is no consideration. Where, for example, after a debt has fallen due, the creditor promises to accept part payment of it in full settlement, the mere part payment does not constitute consideration for the variation,<sup>441</sup> though the creditor's promise may have a limited effect as a waiver, or in equity.<sup>442</sup> Consideration for the creditor's promise could be provided by some further variation which could benefit the creditor: e.g. by the debtor's promise to make the payment *before* the day when the debt becomes due. In other situations falling within the present group, it is arguable<sup>443</sup> that the variation may be supported by consideration if, though capable of conferring a legal benefit on only one party, it can also confer a factual benefit<sup>444</sup> on the other: e.g. where a buyer's promise to pay more than the originally agreed price secures eventual delivery of goods when strict insistence on the original contract would have led to nothing but litigation.

### (4) "Variation" before conclusion of contract

Fourthly, there is the apparently paradoxical possibility that the parties may agree to vary a contract even before that contract has been concluded. This may be the position where A and B negotiate on the basis of formal documents and A represents that the proposed contract will be on terms less favourable to himself than those set out in the documents. If the documents are nevertheless executed without alteration, the representation may then be enforceable as a collateral contract. The consideration for the promise contained in A's representation is provided by B when he executes the documents, and so enters into the principal contract, at the request of A and in reliance on the representation. This was the position in *Brikom Investments Ltd v Carr*,<sup>445</sup> where the landlords of blocks of flats negotiated with their tenants for the sale of long leases of the flats on terms requiring the tenants to contribute to the cost of (inter alia) roof maintenance. At the time of the negotiations, the roof was in need of repairs, and the landlords promised to execute these "at our own cost." It was held that one of the tenants had provided consideration for this promise by executing the agreement for the lease, and the lease itself; and that the promise was accordingly binding as a collateral contract.<sup>446</sup> It followed that the landlords could not enforce the term in the lease under which the tenant would (but for the collateral contract) have been liable to contribute to the cost of the roof repair.<sup>447</sup> Greater difficulty would have arisen if the tenant had already entered into the agreement to take the lease *before* the landlord's promise had been made,<sup>448</sup> for in that case the execution of the documents would have been past consideration.<sup>449</sup> The tenants could, however, have succeeded, even in such a case, on an alternative ground. The landlords had been guilty of unreasonable delay in executing the repairs, and the tenants would, by forbearing to take proceedings in respect of that breach,<sup>450</sup> have provided consideration for the landlords' promise to bear the cost of the repairs.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>436.</sup> *Stead v Dawber* (1839) 10 A. & E. 57, 66; *Compagnie Nogar D'Importation et D'Exportation SA v Abacha* [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915 per Tuckey L.J., with whose judgment on this point the other members of the court agreed.

<sup>437.</sup> *W. J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189; *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co* [1972] A.C. 741.

<sup>438.</sup> *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1

*Lloyd's Rep.* at [105]. The seller's "apparently insuperable" difficulties in meeting the originally agreed delivery dates appear not to have been treated by the buyer as breaches of the original contract.

- [439.](#) *Ficom SA v Sociedad Cadex Ltd* [1980] 2 *Lloyd's Rep.* 118, 132.
- [440.](#) *Vanbergen v St. Edmunds Properties Ltd* [1933] 2 *K.B.* 233; cf. *Continental Grain Export Corp. v S.T.M. Grain Ltd* [1979] 2 *Lloyd's Rep.* 460, 476.
- [441.](#) Below, para.4-117.
- [442.](#) Below, paras 4-130—4-138.
- [443.](#) On the analogy of the reasoning of *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 *Q.B.* 1, above, para.4-069.
- [444.](#) Above, para.4-006.
- [445.](#) [1979] *Q.B.* 467.
- [446.](#) Contrast, on the issue of the contractual intention necessary to establish such a contract, *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] *EWCA Civ* 622, [2007] *NLJ* 1263, above para.2-174.
- [447.](#) This was agreed by all members of the Court of Appeal. For other grounds for the decision, see below, paras 4-129, 4-135.
- [448.](#) From the grounds of appeal as stated on pp.472–473 of the report, it seems that reliance was placed on pre-contract promises or representations; cf. the statement at 490 that the landlord's promise was made "at the time when the leases were granted." According to Lord Denning, M.R. at 480 "some of the tenants" had *already* signed agreements for leases when the representations were made; but that does not seem to have been the position with regard to any of the cases before the court.
- [449.](#) Above, para.4-026.
- [450.](#) See [1979] *Q.B.* 467, 490; cf. above, para.4-058. Delay in *executing* the repairs was a breach irrespective of the question of who was to *pay* for them.

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#### (ii) - Common Law Mitigations

Waiver <sup>451</sup> or forbearance at common law

#### 4-082

A variation which is not contractually binding (e.g. for want of consideration) may nevertheless have certain limited legal effects. These are sometimes said to arise because the promise by a party to relinquish some or all of his rights under a contract amounts to a “waiver” of those rights. Unfortunately, however, “the word ‘waiver’ ... covers a variety of situations different in their legal nature ...” <sup>452</sup> It is, for example, sometimes used to refer to the variation of a contract which is supported by consideration and therefore binding as a contract. <sup>453</sup> To distinguish between such variations and those which are not supported by consideration, the latter will in the following discussion be referred to as “forbearances.” A forbearance in this sense may in certain circumstances limit the right of the party granting it to enforce his rights under the contract. <sup>454</sup> The exact effects of such a forbearance are discussed in Chapter 22; but something must be said here about the distinction between a forbearance and a variation.

**Forbearance generally revocable**

#### 4-083

The effect of a forbearance of the kind mentioned in the preceding paragraph differs from that of a contractually binding variation which is supported by consideration in that it does not *irrevocably* alter the rights of the parties under the original contract. The party granting the forbearance *can generally retract it*, provided that he gives reasonable notice of his intention to do so to the other party. <sup>455</sup> Thus in *Charles Rickards Ltd v Oppenheim* <sup>456</sup> a contract for the sale of a car provided for delivery on March 20. The car was not delivered on that day but the buyer continued to press for delivery and finally told the seller on June 29 that he must have the car by July 25 at the latest. It was held that the buyer could not have refused peremptorily to accept the car merely because the original delivery date had gone by, as he had continued to press for delivery; but that he could refuse on the seller’s failure to comply with a notice to deliver within a reasonable time. As the notice had given the seller a reasonable time to deliver, the buyer was justified in refusing to take the car after July 25. A fortiori, the buyer could have refused to take delivery if the original delivery date had been extended only for a fixed time and if delivery had not been made by the end of that time. <sup>457</sup>

**Forbearance may become irrevocable**

#### 4-084

A forbearance may, however, become irrevocable as a result of subsequent events: for example if a

buyer indicates that he is willing to accept goods of a different quality from those contracted for, and the seller, in reliance on that assurance, so conducts himself as to put it out of his power to supply goods of the contract quality within the contract period. <sup>458</sup>

### Basis of distinction between variation and forbearance

#### 4-085

The question whether a subsequent agreement amounted to a contractually binding variation or to a forbearance is sometimes said to depend on the intention of the parties. <sup>459</sup> It seems that a statement should be a forbearance if the party making it intended to reserve a power to retract, and a variation if he intended it permanently to affect his rights. In practice, however, neither this nor any other explanation of the distinction provides any very sound basis for distinguishing between the authorities on this subject. The explanation is also open to the objection that it leads to the paradoxical result that, the more a party tried to bind himself by a subsequent agreement, the less he was likely to be so bound. An attempt to abandon a right altogether would be classified as a variation, and so be invalid without consideration; while an attempt merely to suspend a right would have at least a limited effect as a waiver. The courts were, however, anxious to avoid the injustice which could result from holding that a variation was not binding for want of consideration. Accordingly, they were inclined to interpret the subsequent agreement as a forbearance, so as to give it at least some legal effects.

1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>451.</sup> Ewart, *Waiver Distributed*; Wilkins and Villiers, *Waiver, Variation and Estoppel*; Spence, *Protecting Reliance*; Cheshire and Fifoot (1947) 63 L.Q.R. 283; Stoljar (1958) 35 Can. Bar Rev. 485; Dugdale and Yates (1976) 39 M.L.R. 680.

<sup>452.</sup> *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp. of Liberia (The Laconia)* [1977] A.C. 850, 871; cf. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850, 882–883; *Telfair Shipping Corp. v Athos Shipping Corp. (The Athos)* [1981] 2 Lloyd's Rep. 74, 87 (a passage approved on appeal: [1983] 1 Lloyd's Rep. 127, 134); *Scandinavian Trading Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 430, affirmed [1983] 2 A.C. 694; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp. of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, 397; *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch. 12 at 28; *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2002] EWCA Civ 1068; [2002] 2 Lloyd's Rep. 487 at [64]; *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 28 at [89], [90]; *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [1], [36]–[37], distinguishing between “waiver by election” and “waiver by estoppel”; for this distinction, see also *Lexington Insurance Co v Multinacional de Seguros* [2008] EWHC 1170 (Comm), [2009] 1 All E.R. (Comm) 35 at [52]; *Argo Systems FZE v Liberty Insurance* [2011] EWCA Civ 1572, [2012] 1 Lloyd's Rep. 129 at [38], [39]. Waiver by (or in the sense of) election is relevant to loss of a party's right to rescind a contract on account of the other party's breach and does not call for further discussion in the present Chapter.

<sup>453.</sup> e.g. in *Hickman v Haynes* (1875) L.R. 10 C.P. 598, 604; and (semble) by Roskill and Cumming-Bruce L.JJ. in *Brikom Investments Ltd v Carr* [1979] Q.B. 467; cf. *Shamsher Jute Mills v Sethia (London) Ltd* [1987] 1 Lloyd's Rep. 388, 392. In *Royal Boskalis Westminster NV v Mountain* [1997] 2 All E.R. 929 “waiver” is similarly used to refer to a variation which would have been contractually binding if it had not been vitiated by duress and illegality. Only Phillips L.J. took the view that there was no “meaningful” consideration. “Meaningful” here seems to mean no more than “adequate,” for it appears from the facts stated at 934 and 958–959 that in the subsequent agreement each party gave up rights existing under the original contract.

<sup>454.</sup> Phipps, (2007) 123 L.Q.R. 286.

- [455.](#) *Banning v Wright* [1972] 1 W.L.R. 972, 981; *Ficom SA v Sociedad Cadex Ltda.* [1980] 2 Lloyd's Rep. 118, 131. Para.3-082 of the 31st edition of this book (para.4-083 in the present edition) is cited with apparent approval in *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204 at [122], recognising that "a representation [giving rise to 'waiver'] is generally revocable" (but may, as is stated in para.4-084 below, exceptionally be irrevocable). The case arose out of a distributorship agreement between A (the owner of intellectual property in a medical device) and B (the intended distributor) by which a payment of £25,000 was to be made by B to A on the provision by A to B of data necessary to secure the approval of a public authority (the FDA); failure to make the payment as agreed was to give A a right to terminate the contract. Later negotiations to the effect that the payment was not to be due until after FDA approval had been obtained were held to amount to a contractually binding variation of the agreement; and, if that was wrong, to amount to a representation giving rise to a promissory estoppel (below, para.4-086), which was revocable by reasonable notice (at [133], [152]; and see [134]–[135] for the length of that notice).
- [456.](#) [1950] 1 K.B. 616; cf. *State Trading Corp. of India v Cie Française d'Importation et de Distribution* [1983] 2 Lloyd's Rep. 679, 681.
- [457.](#) cf. *Nichimen Corp. v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 46, where similar fixed-term extensions were granted by a seller.
- [458.](#) *Toepfer v Warinco A.G.* [1978] 2 Lloyd's Rep. 569, 576; cf. *Leather Cloth Co v Hieronimus* (1875) L.R. 10 Q.B. 140 (goods lost while on altered route); *Bottiglieri di Navigazione SpA v Cosco Quindao Shipping Co (The Bunge Saga Lima)* [2005] EWHC 244 (Comm), [2005] 2 Lloyd's Rep. 1 at [31], below para.4-098.
- [459.](#) *Stead v Dawber* (1839) 10 A. & E. 57, 64.

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**Forbearance in equity**

**4-086**

Equity developed an approach more satisfactory than that taken by the common law to the problem discussed in para.4-085 above by concentrating, not on the intention of the party granting the forbearance, but on the conduct of that party and on its effect on the position of the other party. The leading case is *Hughes v Metropolitan Ry* <sup>460</sup> where a landlord had given his tenant notice requiring him to do repairs within six months. During the six months he began to negotiate with the tenant for the purchase of his lease. When the negotiations broke down, he immediately claimed to forfeit the lease on the ground that the tenant had not done the repairs. The claim was rejected, Lord Cairns saying that if one party leads the other “to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.” <sup>461</sup> The landlord had by his conduct during the negotiations led the tenant to suppose that he would not enforce his right to forfeit. Hence he could not forfeit immediately the negotiations broke down; he was bound to give the tenant a reasonable time from that date to do the repairs. This equitable doctrine can now be applied to arrangements which might formerly have been regarded as variations ineffective at common law for want of consideration. <sup>462</sup> For reasons to be discussed in para.4-104 below, the doctrine is often (if rather misleadingly) referred to as “promissory” or “equitable” estoppel.

**Requirements**

**4-087**

For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. <sup>463</sup> Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not “inequitable” for the first party to go back on his promise. The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships. The points here summarised will be discussed in paragraphs 4-088 to 4-096 below.

**Relationships within the doctrine**

**4-088**



The legal rights which the promisor or representor is prevented by the equitable doctrine from enforcing normally arise out of a contract between him and the other party. But the doctrine can also apply where the relationship giving rise to rights and correlative duties is non-contractual: e.g. to prevent the enforcement of a liability imposed by statute on a company director for signing a bill of exchange on which the company's name is not correctly given <sup>464</sup>; or to prevent a man from ejecting a woman, with whom he has been cohabiting, from the family home. <sup>465</sup> On the other hand, it has been said that the doctrine has "no application as between landlord and trespasser." <sup>466</sup> Hence the mere fact that a landowner has for some time failed or neglected to enforce his rights against a trespasser does not prevent him from subsequently doing so without notice. <sup>467</sup> The doctrine may also be excluded in some situations by statute. Thus it has been held <sup>468</sup> that estoppel or waiver could not preclude a man from withdrawing his consent to the use by a woman of his genetic material since the right to withdraw such consent was expressly given by statute <sup>469</sup> and since the application of waiver or estoppel to limit that right "would conflict with the Parliamentary scheme." <sup>470</sup>

### Requirement of pre-existing legal relationship

#### 4-089

⚠ It has, indeed, been suggested that the doctrine can apply where, before the making of the promise or representation, there is no legal relationship giving rise to rights and duties between the parties, <sup>471</sup> or where there is only a putative contract between them: e.g. where the promisee is induced to believe that a contract into which he had undoubtedly entered was between him and the promisor, when in fact it was between the promisee and another person. <sup>472</sup> ⚠ But it is submitted that these suggestions mistake the nature of the doctrine, which is to restrict the enforcement by the promisor of previously existing rights against the promisee. Such rights can arise only out of a legal relationship existing between these parties before the making of the promise or representation. To apply doctrine where there was no such relationship would contravene the rule (to be discussed in para.4-099 below) that the doctrine creates no new rights.

### A promise or representation

#### 4-090

There must, next, be a promise (or an assurance or representation in the nature of a promise <sup>473</sup>) which is intended to affect the legal relationship between the parties <sup>474</sup> and which indicates that the promisor will not insist on his strict legal rights, <sup>475</sup> arising out of that relationship, against the promisee. Here, as elsewhere, the law applies an objective test. It is enough if the promise induces the promisee reasonably to believe that the other party will not insist on his strict legal rights. <sup>476</sup> A mere threat to do something is not sufficient, nor, probably, is a representation or promise by a person that he will *enforce* a legal right: thus the doctrine does not apply where A tells B that he will exercise his right to cancel a contract between them unless by a specified date B has paid sums due under the contract to A. <sup>477</sup>

### The promise or representation must be "clear" or "unequivocal"

#### 4-091

⚠ The promise or representation must be "clear" or "unequivocal," or "precise and unambiguous." This requirement seems to have originated in the law relating to estoppel by representation <sup>478</sup> ⚠; and it is now frequently stated in relation to "waiver" <sup>479</sup> and "promissory estoppel." <sup>480</sup> ⚠ It does not mean that the promise or representation must be express <sup>481</sup>; it may equally well be implied. For example, in *Hughes v Metropolitan Ry.* <sup>482</sup> itself the landlord made no express promise that he would not enforce his right to forfeit the lease; but an implication of such a promise fairly arose from the course of the negotiations between the parties. There is some support for the view that the promise

must have the same degree of certainty as would be needed to give it contractual effect if it were supported by consideration. <sup>483</sup> Thus if the statement could not have had contractual force because it was too vague, <sup>484</sup> or if it was insufficiently precise to amount to an offer, <sup>485</sup> or if it did not amount to an unqualified acceptance, <sup>486</sup> it will not bring the equitable doctrine into operation. <sup>487</sup>

## 4-092

The purpose of the requirement that the promise or representation must be “clear” or “unequivocal” is to prevent a party from losing his legal rights under a contract merely because he has granted some indulgence by failing to insist throughout on strict performance of the contract <sup>488</sup>; or merely because he has offered some concession in the course of negotiations for the settlement of a dispute arising out of the contract <sup>489</sup> or merely because he has declared his willingness to continue such negotiations. <sup>490</sup> Thus the requirement was not satisfied where one of the parties to such a negotiation throughout insisted on strict compliance with the terms of the contract <sup>491</sup>; where he accepted less than that to which he was entitled but did so subject to an express reservation of his rights <sup>492</sup>; where an admission that he was liable for certain expenses was made by his solicitor, expressly “without prejudice” <sup>493</sup>; and where a charter’s notice that the ship would be redelivered on a specified date within the contractual “redelivery window” was made expressly “without guarantee” and subject to other qualifications. <sup>494</sup> Failure, in the course of negotiations of this kind, to object to a defect or deficiency in performance is likewise insufficient if the injured party did not know and could not reasonably have known of it <sup>495</sup> or if full performance remained possible and continued to be demanded by that party. <sup>496</sup> On the other hand, failure to object to a known defect or deficiency within a reasonable time of its discovery <sup>497</sup> may be regarded as an unequivocal indication of the injured party’s intention not to insist on his strict legal rights. <sup>498</sup> The position seems to be the same where the defect or deficiency, though not actually known to the injured party, was obvious or could have been discovered by him, if he had taken reasonable steps. <sup>499</sup> But where more than one matter is in dispute between the parties, “emphatic reliance upon some important disputed point does not by itself ... imply any unequivocal representation that compliance with other parts of the bargain is thereby waived.” <sup>500</sup>

### Conduct contrasted with inactivity

## 4-093

⚠ Although a promise or representation may be made by conduct, mere inactivity will not normally suffice for the present purpose since “it is difficult to imagine how silence and inaction can be anything but equivocal.” <sup>501</sup> Unless the law took this view, mere failure to assert a contractual right could lead to its loss; and the courts have on a number of occasions rejected this clearly undesirable conclusion. Thus it has been held that there is “no ground for saying that mere delay, however lengthy, destroys the contractual rights” <sup>502</sup>; that the mere failure to prosecute a claim regarded by both parties as hopeless did not amount to a promise to abandon it <sup>503</sup>; and that, because an insurer’s failure for seven years to raise the defence that the insured was guilty of a breach of warranty (discharging the insurer <sup>504</sup>) amounted to mere “silence and inaction”, it did not give rise to an estoppel, <sup>505</sup> and so did not prevent the insurer from relying on that defence. <sup>506</sup> The only circumstances in which mere “silence and inaction” can have this effect are the exceptional ones (discussed elsewhere in this book <sup>507</sup>) in which the law imposes a duty to disclose facts or to clarify a legal relationship and the party under the duty fails to perform it. <sup>508</sup> ⚠

### Reliance

## 4-094

The first requirement to be discussed under this heading is that the promise or representation must in some way have influenced the conduct of the party to whom it was made. Although the promise need not form the sole inducement, <sup>509</sup> it must (it is submitted) be *some* inducement. Hence the present requirement would not be satisfied if it could be shown that the other party’s conduct was not influenced by the promise <sup>510</sup> so that he was not in any way prejudiced by it. <sup>511</sup> But if this is a matter

of “mere speculation,” <sup>512</sup> or if the promise or representation “was one of the factors ... relied upon,” <sup>513</sup> it would form a sufficient inducement. Where the promisee has, after the promise, conducted himself in the way intended by the promisor, it will be up to the promisor to establish that this conduct was not induced by the promise. <sup>514</sup>

#### Whether “detriment” required

### 4-095

⚠ There is sometimes said to be a further requirement, namely that the promisee must have suffered “detriment” by acting in reliance on the promise. <sup>515</sup> This may mean that the promisee must have done something that he was not previously bound to do and as a result have suffered loss: for example, by incurring some expenditure in reliance on the promise. This alleged requirement of “detriment” is based on the analogy of the doctrine of estoppel by representation. <sup>516</sup> But that analogy is (as we shall see) <sup>517</sup> inexact, and the equitable doctrine may be applied even though there is no “detriment” in this

sense. <sup>518</sup> ⚠ It is enough if the promisee has altered his position in reliance on the promise so that it would be inequitable to allow the promisor to act inconsistently with it <sup>519</sup>: for example, if the promisee has forborne from taking steps that he would otherwise have taken to safeguard his legal position (as in *Hughes v Metropolitan Ry.* <sup>520</sup> itself); or if he has performed, or made efforts to perform the altered obligation (for example, where a seller after being promised extra time for delivery has continued his efforts to perform after the originally agreed delivery date had gone by). On the other hand, the fact that the promisee has not suffered any prejudice by acting in reliance on the promise may be relevant for the purpose of the requirement to be discussed in para.4-096 below; for in such circumstances it may not be “inequitable” for the promisor to go back on his promise. <sup>521</sup>

#### Inequitable

### 4-096

It must be “inequitable” for the promisor to go back on the promise. This requirement cannot be defined with anything approaching precision, but the underlying idea is that the promisee must have acted in reliance on the promise in one of the ways described in para.4-095 above, so that he can no longer be restored to the position in which he was before he took such action. <sup>522</sup> If the promisee can be <sup>523</sup> restored to that position, it will not be inequitable for the promisor to go back on the promise. In one case <sup>524</sup> the promisor reasserted his strict legal rights only two days after the promise had been made. It was held that this was not “inequitable” since the promisee had not, in this short period, suffered any prejudice by acting in reliance on the promise: he could be, and was, restored to exactly the position in which he had been before the promise was made. Sometimes, moreover, extraneous circumstances may justify the promisor in going back on the promise even without giving reasonable notice of his intention to do so. <sup>525</sup> In *Williams v Stern* <sup>526</sup> the plaintiff gave the defendant a bill of sale of furniture as security for a loan; the bill entitled the defendant to seize the furniture if the plaintiff defaulted in making payments under it. When the fourteenth instalment became due, the plaintiff asked for extra time, and the defendant said that he “would not look to a week.” Three days later he seized the furniture because he had heard that the plaintiff’s landlord intended to distrain it for arrears of rent. It was held that the defendant’s seizure was justified. The defendant’s promise to give time was not binding contractually as the plaintiff had given no consideration for it; nor did it, in the circumstances, bring the equitable doctrine into operation. Brett L.J. said: “Has there been any misconduct on the part of the defendant? I think not: it appears that a distress by the plaintiff’s landlord has been threatened; and under these circumstances I do not blame the defendant for changing his mind.” <sup>527</sup> The conduct of the promisee in obtaining the promise may also be relevant to the issue whether the promisor has acted “inequitably” in going back on it. <sup>528</sup>

#### Effect of the doctrine generally suspensive

### 4-097

⚠ The equitable doctrine, like the common law doctrine of waiver, generally does not extinguish, but only suspends rights. <sup>529</sup> The landlord in *Hughes v Metropolitan Ry* <sup>530</sup> was not permanently debarred from enforcing the covenant to repair. He could have enforced it by giving reasonable notice to the tenant requiring him to repair. <sup>531</sup> ⚠ The reason for the general rule is that, in equity, the effect of the representation is to give the court a discretion to give such relief as is just and equitable in all the circumstances <sup>532</sup>; and in cases such as *Hughes v Metropolitan Ry* it would be neither equitable nor in accordance with the intention of the parties to treat the promisor's rights as having been wholly extinguished. <sup>533</sup>

### Extinctive effect in exceptional cases

#### 4-098

Subsequent events may, however, give the doctrine an extinctive effect, by way of exception to the general rule stated in para.4-097 above. <sup>534</sup> They can most obviously lead to this result where they make it impossible for the promisee to perform his original obligation. For example, in *Birmingham & District Land Co v L. & N.W. Ry* <sup>535</sup> a building lease bound the tenant to build by 1885. The lessor agreed to suspend this obligation; but in 1886, while the suspension was still in force, the land was compulsorily acquired by a railway company, so that performance of the tenant's obligation became impossible. The tenant recovered statutory compensation from the railway company on the footing that the building lease was still binding; but clearly his obligation to build was utterly extinguished. Even where performance of the original obligation has not literally become impossible, the doctrine may sometimes have an extinctive effect. For example, where a vendor of land on August 15 indicated that he would not insist on the contractual completion date of August 30, it was held that no question of reinstating that date could arise "because the time was far too short." <sup>536</sup> And where a shipowner represented to a charterer that he would not rely, by way of defence to claims under the charterparty, on a one-year time bar (which had expired) it was held that he could not, after nearly another year had passed, go back on the representation, since it would by then have been too late to restore the charterer to his original position. <sup>537</sup> In all these cases the doctrine has an extinctive effect because subsequent events or the passage of time, though not making performance of the original obligation impossible, have made it highly inequitable to require such performance, even after reasonable notice. <sup>538</sup>

### Defensive nature of the doctrine

#### 4-099

⚠ The equitable doctrine prevents the enforcement of existing rights; but it does not "create new causes of action where none existed before." <sup>539</sup> The point was decided in *Combe v Combe* <sup>540</sup> where a husband, during divorce proceedings, promised to pay £100 per annum to his wife, who in reliance on the husband's promise, forbore from applying to the court for maintenance; and this forbearance did not constitute consideration for the husband's promise. <sup>541</sup> It was held that the equitable doctrine did not entitle the wife to recover the promised payments; nor is there any support in English cases for the view that it could create a cause of action in the narrower sense of creating a new right but "limiting recovery to reliance loss." <sup>542</sup> The view that the doctrine gave rise to no new rights came to be associated with its description as a kind of estoppel (known as "promissory estoppel" <sup>543</sup>) and hence with the rule, established in relation to another kind of estoppel (known as "estoppel by representation" <sup>544</sup>), that "you cannot found a cause of action on an estoppel." <sup>545</sup> It will be submitted below <sup>546</sup> that the analogy between the two kinds of estoppel is (to say the least) imperfect and that it does not satisfactorily account for the rule that the equitable doctrine (or "promissory estoppel") gives rise to no new rights. The more plausible explanation for this restriction on the scope of the equitable doctrine is that the restriction is needed to prevent that doctrine from coming into head-on collision with the rules which lay down the requirements for the creation of a binding contract. The significant point in the present context is that the restriction preserves consistency between the equitable doctrine and the rule that a promise is not binding as a contract unless it is supported by consideration or made in a deed. <sup>547</sup> *Combe v Combe* has likewise been relied on in support of the view that the equitable doctrine could not give rise to a cause of action on a promise which lacked

contractual force for want, not of consideration, but of certainty and contractual intention.<sup>548</sup> There seems, with respect, to be no reason in principle for distinguishing for the present purpose between promises which lack contractual effect for want of consideration and those which lack such effect for some other reason: the danger of collision between the equitable doctrine and the requirements for the creation of a contract exists, whatever the reason may be why a particular promise lacks contractual force.<sup>549</sup> The view that the equitable doctrine does not create new causes of action seems, indeed, to have been doubted<sup>550</sup> or ignored<sup>551</sup> by dicta in later cases; but the promises in these cases created new rights on the perfectly orthodox ground that they were, in fact, supported by consideration.<sup>552</sup> *Combe v Combe* therefore still stands as the leading English<sup>553</sup> authority for the proposition that the equitable doctrine creates no new rights<sup>554</sup>; and this proposition has been reaffirmed in a number of later cases.<sup>555</sup> !

### Modifications increasing a party's obligation

#### 4-100

It appears to follow from the proposition stated at the end of para.4-099 above that the equitable doctrine would not enable employees in a case like *Stilk v Myrick*<sup>556</sup> to recover the extra pay which they had been promised. It could, indeed, be argued<sup>557</sup> that in such a case the cause of action was the original contract of employment and that the subsequent agreement fell within the principle stated by Denning L.J. in *Combe v Combe* that consideration was not necessary for the "modification or discharge"<sup>558</sup> of a contract where the conditions required for the operation of the equitable doctrine were otherwise satisfied. This argument may derive some judicial support from a dictum that promissory estoppel "may enlarge the effect of an agreement"<sup>559</sup>; for this could mean that a promise of extra pay on facts such as those of *Stilk v Myrick* could create a cause of action even though it was not supported by consideration. This view is, however, hard to reconcile with the treatment of *Stilk v Myrick* in *Williams v Roffey Bros*<sup>560</sup> and with the fact that the decision in the latter case was based, not on estoppel,<sup>561</sup> but on the ground that the promise of extra pay there was supported by consideration. It is submitted that, when in *Combe v Combe* Denning L.J. used the phrase "modification or discharge", he had in mind a modification which *reduced* a party's obligations<sup>562</sup>; for to apply it to a case in which it had the effect of *increasing* them necessarily amounts to giving the other party new rights of action as a result of a promise for which he has not provided any consideration; and *Combe v Combe* decides that this is not the effect of the equitable doctrine here under discussion.<sup>563</sup> A cause of action on a promise unsupported by consideration may, however, arise under other equitable doctrines: e.g. under the doctrine of "proprietary estoppel," discussed later in this chapter.<sup>564</sup>

### "Shield and not a sword"

#### 4-101

The essentially defensive nature of the equitable doctrine here under discussion is sometimes expressed by saying that it operates as a shield and not as a sword.<sup>565</sup> This is true in most cases: usually the doctrine protects a promisee (wholly or in part) against enforcement of his original obligation. But the metaphor is apt to mislead<sup>566</sup>: the essential point is that the doctrine excuses (at least temporarily) the performance of the original obligation; and such an excuse may benefit a claimant no less than a defendant. For example, if the creditor's conduct in *Williams v Stern*<sup>567</sup> (discussed in para.4-096 above) had been "inequitable" the debtor could no doubt have obtained an injunction against a *threatened* seizure of his property. Similarly, a seller may tender delivery after the originally agreed date in reliance on the buyer's promise to accept such delivery. If the buyer then refuses to accept the delivery, the seller can claim damages.<sup>568</sup>

### Doctrine may deprive promisor of certain defences

#### 4-102

The equitable doctrine can also assist the promisee as claimant in that it may prevent the promisor



from relying on a defence that would, but for the promise, have been available to him: e.g. the defence that a claim which the promisee has made against him is time-barred, <sup>569</sup> or that the claim has been satisfied, <sup>570</sup> or that it has been lost by reason of the promisee's breach of the contract which would, but for the breach, have given rise to the claim, <sup>571</sup> or that the contractual document suffers from some minor formal defect, the effect of which on the validity of the contract is not specified by the statute imposing the formal requirement. <sup>572</sup> In such cases, the doctrine will, once again, enable the promisee to win an action which, but for the doctrine, he would have lost. <sup>573</sup> But it must be stressed that, in cases of this kind, the promisee's cause of action will have arisen independently of the promise which brought the equitable doctrine into operation: the effect of the doctrine is merely to prevent the promisor from relying on some circumstance which would, if the promise had not been made, *have destroyed the promisee's original cause of action*. This situation must be distinguished from that in which the promisor's "defence" is that (apart from the promise) the promisee's alleged *cause of action never existed at all*. It is submitted that the equitable doctrine should not prevent the promisor from relying on a "defence" of this kind. To allow the doctrine to operate in this way would amount to giving the promisee a new cause of action based on the promise though it was unsupported by consideration; and such a result would be inconsistent with the essentially defensive nature of the equitable doctrine. <sup>574</sup>

### Doctrine may deprive promisee of a defence

#### 4-103

The doctrine may also, some what paradoxically, deprive a *promisee* of a defence. This was the position in *Smith v Lawson* <sup>575</sup> where a lessor told the lessee that he would not trouble to collect the small rent which the lessee had previously paid. It was held that the lessee's rent-free occupation did not amount to adverse possession since the lessor was precluded by the doctrine of promissory estoppel from obtaining possession on the ground of non-payment of rent. It followed that the lessee could not rely on her occupation to defeat the lessor's claim for the declaration that he remained freehold owner of the land.

### Analogy with estoppel

#### 4-104

⚠ The equitable doctrine is sometimes compared with the doctrine of estoppel by representation and the two have, indeed, certain features in common. Each is based on a representation followed by reliance, and the nature of each is defensive in the sense that neither is capable of giving rise to new rights. On the other hand, there are many significant differences between the two, even though the word "estoppel" is now often used to refer to the equitable doctrine. <sup>576</sup> These differences are reflected in the statement of Millett L.J. that "the attempt ... to demonstrate that all estoppels ... are now subsumed in the single and all-embracing estoppel by representation and that they are all governed

by the same principle" <sup>577</sup> has "never won general acceptance." <sup>578</sup> ⚠ The various kinds of estoppel discussed in this book <sup>579</sup> are linked only by the broadest of general principles, that a person's taking of inconsistent positions is in some situations to be discouraged by law: in this sense it can be said that "unconscionability ... provides the link between them." <sup>580</sup> But they nevertheless have "separate requirements and different terrains of application" <sup>581</sup> and therefore "cannot be accommodated within a single principle." <sup>582</sup> An important difference between the two types of estoppel at this stage under discussion <sup>583</sup> relates to the types of representations required to bring them into operation. For the purpose of true estoppel by representation, the traditional view is that there must be a representation of existing fact. <sup>584</sup> Recent authority has modified this view to the extent that "it is now <sup>585</sup> possible for an estoppel by representation to be based on a representation of law" <sup>586</sup>, but the scope of this possibility is somewhat limited. <sup>587</sup> The important point to be made here is that this extension of the scope of estoppel by representation is that it does not affect the further rule that such an estoppel cannot arise where the representation is one of intention as to the promisor's future conduct (or a promise), while this is precisely the type of representation or promise which can bring the equitable doctrine into operation. For this reason, and because the doctrine was developed in equity, the doctrine is sometimes called "promissory" or "equitable" estoppel. <sup>588</sup> ⚠ The latter description is,



however, misleading as the requirement of a representation of existing fact for the purposes of estoppel by representation was recognised in equity <sup>589</sup> no less than at common law. <sup>590</sup> There are, moreover, other significant differences between the two doctrines. The first such difference relates to the requirements of the two doctrines; the equitable doctrine can operate even though there is no such “detriment” as is required to bring the doctrine of estoppel by representation into play. <sup>591</sup> A second relates to their effects: in general, the equitable doctrine only suspends rights, <sup>592</sup> while estoppel by representation, where it operates, has a permanent effect. And thirdly there is a difference in the legal nature of the two doctrines. Estoppel by representation prevents a party from establishing facts: i.e. from alleging that the facts represented by him are untrue, even where that is actually the case. <sup>593</sup> The equitable doctrine, by contrast, has nothing to do with proof of facts; it is concerned with the legal effects of a promise. There was, for example, no dispute about facts in *Hughes v Metropolitan Ry* <sup>594</sup>: the issue was not whether the repairs had been done or whether the landlord had promised or represented that he would not forfeit the lease; it was simply whether he was (to some extent, at least) bound by that undoubted promise.

### Analogy with waiver

#### 4-105

It is submitted that the characteristics of the equitable doctrine, described in para.4-104, above, indicate that the equitable doctrine is not truly analogous to estoppel by representation. As Denning J. (a leading proponent of the modern equitable doctrine) has pointed out, the authorities which support that doctrine, “although they are said to be cases of estoppel, are not really such”. <sup>595</sup> The doctrine has closer affinities with the common law rules of waiver, in the sense of forbearance <sup>596</sup>: both are based on promises, or representations of intention; both are suspensive (rather than extinctive) in nature and both are concerned with the legal effects of promises rather than with proof of disputed facts. The main difference between them is that the equitable doctrine avoids the difficulties encountered at common law in distinguishing between a variation and a forbearance. <sup>597</sup>

⚠ There is now much judicial support for these submissions. Thus Lord Pearson in *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* said that “promissory estoppel” was “far removed from the familiar estoppel by representation of fact and seems, at any rate in a case of this kind, to be more like a waiver of contractual rights.” <sup>598</sup> In a number of later cases, “waiver” and “promissory estoppel” (or the rule in *Hughes v Metropolitan Ry*) <sup>599</sup> are treated as substantially similar doctrines, <sup>600</sup> ⚠ the requirements and effects of the one being stated in terms equally applicable to the other. <sup>601</sup> Indeed, the expressions “waiver” and “promissory estoppel” have been judicially described as “two ways of saying exactly the same thing,” <sup>602</sup> and the courts often use them interchangeably when discussing situations in which it is alleged that one party to a legal relationship has indicated that he will not enforce his strict legal rights against the other. <sup>603</sup> This usage further supports the view that the equitable doctrine is more closely akin to waiver (in the sense of forbearance) than to true estoppel by representation of fact.

### Distinguished from promises supported by consideration

#### 4-106

Under the equitable doctrine, certain limited effects are given to a promise without consideration. But it is nevertheless in the interests of the promisee to show, if he can, that he did provide consideration so that the promise amounted to a contractually binding variation. Such proof will free him from the many rules that restrict the scope of the equitable doctrine: he need not then show that he has in any way “relied” on the promise, or that it would be “inequitable” for the other party to go back on it; the variation will permanently affect the rights of the promisor and not merely suspend them (unless it is expressed so as to have only a temporary effect); and a contractual variation can not only reduce or extinguish existing rights but also create new ones. Where parties agree to modify an existing contract, the equitable doctrine and its common law counterpart may have reduced, but they have by no means eliminated, the practical importance of the doctrine of consideration. <sup>604</sup>

## Other jurisdictions

### 4-107

The English view that the doctrine of promissory estoppel gives rise to no cause of action has not been followed in other common law jurisdictions. In the United States, a similar doctrine has long been regarded as being capable of creating new rights, though both the existence and the content of the resulting rights are matters for the discretion of the courts.<sup>605</sup> A line of Australian cases likewise supports the view that promises or representations which, for want of consideration or of contractual intention, lack contractual force may nevertheless (by virtue of an estoppel) be enforceable as if they were binding contracts. The leading Australian case is *Waltons Stores (Interstate) Ltd v Maher*,<sup>606</sup> where A, a prospective lessor of business premises, did demolition and building work on the premises while the agreement for the lease lacked contractual force because it was still subject to contract<sup>607</sup>; he had done so to meet the prospective lessee's (B's) requirements and on the assumption, of which B must have known, that a binding contract would be brought into existence. B withdrew from the agreement (relying on his solicitor's advice that he was not bound by it); and it was held that he was estopped from denying that a contract had come into existence and that the agreement for the lease was therefore specifically enforceable against him. The reasoning of the High Court is complex, but the basis of the decision appears to be that B had knowingly induced A to believe that a binding contract would be brought into existence by exchange of contracts<sup>608</sup> and to act in reasonable reliance on that belief. In English law, such reliance is, in appropriate circumstances, capable of giving rise to a variety of remedies, even where the promise or representation which induces it lacks contractual force. Sometimes the remedy may be the enforcement of the promise according to its terms, as in cases of proprietary estoppel (to be discussed later in this Chapter)<sup>609</sup>; sometimes it may be an award of the reasonable value of work done in the belief that a contract had, or would, come into existence.<sup>610</sup> Neither of these remedies would have been available in the *Waltons Stores* case since proprietary estoppel does not arise where work is done on the promisee's (rather than on the promisor's) land<sup>611</sup> and a claim for the reasonable value of the claimant's work is not available where the promisor is not unjustly enriched by the promisee's work<sup>612</sup> and the promisee is aware of the fact that no binding agreement has come into existence and so takes the risk that the negotiations may fail.<sup>613</sup> Even where the second of these objections can be overcome (e.g. on the ground that the work was done at the request of the promisor and as a result of his assurance that an exchange of contracts would take place) it does not follow that the appropriate remedy is enforcement of the supposed or anticipated contract in its terms<sup>614</sup>: if the basis of "Australian estoppel"<sup>615</sup> is reliance induced by the promisor, compensation for reliance loss would appear to be the more appropriate remedy. The Australian doctrine also gives rise to the difficulties that there appear to be no clear limits to its scope, and that this lack of clarity is a regrettable source of uncertainty. The doctrine is, moreover, hard to reconcile with a number of fundamental principles of English law, such as the non-enforceability of informal gratuitous promises (even if relied on)<sup>616</sup> and the rule that there is no right to damages for a wholly innocent non-contractual misrepresentation.<sup>617</sup> While on the facts of some of the cases in which the Australian doctrine has been applied the same conclusions would probably be reached in English law on other grounds,<sup>618</sup> the broad doctrine remains, in the present context, inconsistent with the view that the English doctrine of promissory estoppel (like that of estoppel by representation)<sup>619</sup> does not give rise to a cause of action in the sense of entitling the promisee to enforce a promise in its terms, even though it was unsupported by consideration.<sup>620</sup> It is true that other forms of estoppel, such as proprietary estoppel, may produce this result; but the scope and effects of that doctrine is limited in many important ways<sup>621</sup> and the law would present an incongruous appearance if those limits could be outflanked simply by invoking the broader doctrine of "Australian estoppel."

## Distinguished from estoppel by convention

### 4-108

⚠ Estoppel by convention may arise where both<sup>622</sup> parties to a transaction "act on assumed state of facts<sup>623</sup> or law,<sup>624</sup> the assumption being either shared by both or made by one and acquiesced in by the other."<sup>625</sup> ⚠ The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable<sup>626</sup> (typically because the party claiming the benefit has been "materially

influenced” by the common assumption<sup>627</sup> to allow them (or one of them) to go back on it.<sup>628</sup> **!** Such an estoppel differs from estoppel by representation and from promissory estoppel<sup>629</sup> in that it does not depend on any representation or promise.<sup>630</sup> **!** It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party.<sup>631</sup> **!** It seems, however, that the assumption resembles the representation required to give rise to other forms of estoppel to the extent that it must be “unambiguous and unequivocal”<sup>632</sup>; and this common feature can make it hard to distinguish between these two forms of estoppel.<sup>633</sup> Estoppel by convention has also been said to arise out of an express agreement by which the parties had compromised a disputed claim<sup>634</sup>; but where such a compromise is supported by consideration (in accordance with the principles discussed earlier in this Chapter<sup>635</sup>) it is binding as a contract,<sup>636</sup> so that there is, it is submitted, no need to rely on estoppel by convention.<sup>637</sup> **!**

#### Further requirements of estoppel by convention

#### 4-109

This kind of estoppel was discussed in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*.<sup>638</sup> In that case, A had negotiated with the X Bank for a loan to B (one of A’s subsidiaries) for the purpose of acquiring and developing a property in the Bahamas. It was agreed that the loan was to be secured by a mortgage on that property and also by a guarantee from A. In the guarantee, A promised the X Bank, in consideration of the Bank’s giving credit to B, to “pay you ... all moneys ... due to you” from B. This was an inappropriate form of words since the loan to B was not made directly by the X Bank but by one of its subsidiaries, the Y Bank, with money provided by the X Bank: hence, if the guarantee were read literally, it would not apply to the loan since no money was due from B to the X Bank. The Court of Appeal, however, took the view that this literal interpretation would defeat the intention of the parties, and held that, on its true construction, the guarantee applied to the loan made by the Y Bank.<sup>639</sup> But even if the guarantee did not, on its true construction, produce this result, A was estopped from denying that the guarantee covered the loan by the Y Bank, since, when negotiating the loan, both A and the X Bank had assumed that the guarantee did cover it; and since the X Bank continued subsequently to act on that assumption<sup>640</sup> in granting various indulgences to A in respect of the loan to B and of another loan made directly by the X Bank to A. It made no difference that the assumption was not induced by any representation<sup>641</sup> made by A but originated in the X Bank’s own mistake: the estoppel was not one by representation but by convention.<sup>642</sup> The same principle was applied in *The Vistafjord*<sup>643</sup> where an agreement for the charter of a cruise ship had been negotiated by agents on behalf of the owners. Both the agents and the owners believed throughout that commission on this transaction would be payable under an earlier agreement, but on its true construction this agreement gave no such rights to the agents. It was held that estoppel by convention precluded the owners from relying on the true construction of the earlier agreement, so that the agents were justified in retaining the amount of the commission out of sums received by them from the charterers. An estoppel by convention may, similarly, affect the amount payable under a contract. This was the position in *ING Bank NV v Ros Roca SA*,<sup>644</sup> where a dispute had arisen between the claimant bank and the defendant company as to the way in which an “additional fee” payable to the bank by the company was to be calculated. On the true construction of the contract, the amount of the fee was indeed that claimed by the bank; but it was held that the bank was estopped, by reason of its conduct and statements from relying on this construction, and that the bank was entitled only to a lower fee, based on the parties’ common assumption as to the way in which the fee was to be calculated.

#### “Communication” passing “across the line”

#### 4-110

To give rise to an estoppel by convention, the mistaken assumption of the party claiming the benefit of the estoppel must, however, have been shared or acquiesced in by the party alleged to be estopped; and both parties must have conducted themselves on the basis of such a shared assumption<sup>645</sup>: the estoppel “requires communications to pass across the line between the parties. It

is not enough that each of two parties acts on an assumption not communicated to the other.”<sup>646</sup> Such communication may be effected by the conduct of one party, known to the other.<sup>647</sup> But no estoppel by convention arose where each party spontaneously made a different mistake and there was no subsequent conduct by the party alleged to be estopped from which any acquiescence in the other party’s mistaken assumption could be inferred.<sup>648</sup> An estoppel by convention likewise cannot arise where neither party was aware of the facts on which the alleged common assumption is said to have been based<sup>649</sup>; or where the conduct alleged to have given rise to the estoppel can with equal or greater plausibility, be explained on grounds other than that the party alleged to be estopped shared an assumption made by the other party or as amounting to a communication by the former to the latter party.<sup>650</sup> Nor can a party (A) invoke such an estoppel to prevent the other (B) from denying facts alleged to have been agreed between A and B if A has later withdrawn from that agreement; for in the light of A’s withdrawal it is no longer unjust to allow B to rely on the true state of affairs.<sup>651</sup>

## Assumption of law

### 4-111

⚠ Many judicial statements support the view that the assumption giving rise to an estoppel by convention can be one of “fact or law.”<sup>652</sup> ⚠ The point of the reference to “law” in this formulation appears to be to include within the scope of the doctrine assumptions about the construction of a contract<sup>653</sup>; for, since the construction of a contract is often said to be a matter of “law,”<sup>654</sup> all such assumptions would be excluded from the scope of the doctrine (and its scope be unduly narrowed) if it did not include at least assumptions of this kind.<sup>655</sup> ⚠ The question whether estoppel by convention could be based on assumptions of “law” in a wider sense was the subject of conflicting views in *Johnson v Gore Wood & Co*<sup>656</sup>. In that case, a company had brought a claim for professional negligence against a firm of solicitors who were told that a further claim based on the same negligence would be made against them by the company’s managing director. The company’s claim was settled on terms which limited *some* of the director’s personal claims against the solicitors and when the director later brought *other* claims against the solicitors, it was held that this was not an abuse of process. Lord Bingham based this conclusion in part<sup>657</sup> on estoppel by convention: in his view, the terms of the settlement were based on the common assumption that it would not be an abuse of process for the director to pursue the claims which he had in fact brought; and it would be unfair to allow the solicitors to go back on this assumption. All members of the House of Lords agreed with Lord Bingham’s conclusion that there was no abuse of process; but Lord Goff was “reluctant to proceed on estoppel by convention”<sup>658</sup> as the common assumption was one of law, a type of assumption which in his view did not give rise to this form of estoppel; while Lord Millett was equally reluctant to “put it on the ground of estoppel by convention” as he had “some difficulty in discerning a common assumption.”<sup>659</sup> Lord Millett’s difficulty is an entirely factual one but Lord Goff’s raises a more difficult issue of principle. Support for the view that estoppel by convention can be based on a common assumption of law is admittedly based only on dicta<sup>660</sup>; but it is arguable that those dicta gain support from cases concerned with mistakes and misrepresentations of law. In these contexts, the distinction between matters of “law” and of “fact” has proved hard to draw and is now discredited.<sup>661</sup> On the other hand, the extension of estoppel by convention to *all* common assumptions of “law” could undermine the security of commercial transactions by allowing a party to resist enforcement merely on account of an assumption as to the *legal effect* of a contract, the terms or meaning of which were not in dispute; and this is a type of assumption which, on the authorities, does not give rise to such an estoppel.<sup>662</sup>

## Effect of estoppel by convention

### 4-112

The effect of this form of estoppel is to preclude a party from denying the agreed or common assumption of fact or, at least to the extent suggested in para.4-111, above, of law.<sup>663</sup> One such assumption may be that a particular promise has been made<sup>664</sup>; thus it is possible to describe the result in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*<sup>665</sup> by saying that A was estopped from denying that it had promised the X Bank to repay any sum left

unpaid by B to the Y Bank. But, although estoppel by convention may thus take effect in relation to a promise, it is quite different in its legal nature <sup>666</sup> from promissory estoppel. In cases of promissory estoppel, the promisor or representor is not estopped from denying that the promise or representation *has been made*: on the contrary, this must be proved to establish that kind of estoppel. The doctrine of promissory estoppel is concerned with the *legal effects* of a promise that has been shown to exist. Where, on the other hand, the requirements of estoppel by convention are satisfied, then this type of estoppel normally operates to prevent a party from denying a *fact*, <sup>667</sup> i.e. that the assumed promise *has been made*, or that a promise contains the assumed term: it does not specify the *legal effects* of the assumed promise or term. <sup>668</sup> In *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*, once A was estopped from denying the *existence* of the promise described above, no question arose as to its legal validity. There could be no doubt that that promise was supported by consideration <sup>669</sup>: this was provided by the X Bank in making funds available to the Y Bank to enable it to make a loan to B, and in inducing the Y Bank to make that loan. <sup>670</sup> Where the assumed promise is one that would, if actually made, have been unsupported by consideration, both types of estoppel can, however, operate in the same case: estoppel by convention to establish the existence of the promise, and promissory estoppel to determine its legal effect. <sup>671</sup>

### Estoppel by convention does not operate prospectively

#### 4-113











⚠ Estoppel for convention does not operate prospectively, so that “once the common assumption is revealed to be erroneous the estoppel will not apply to future dealings.” <sup>672</sup> ⚠ Discovery of the fact that the common assumption is false does not, however, “kill the estoppel stone dead there and then. The reliant party is commonly afforded a limited time within which to protect itself from the consequences of discovering the legal or factual position.” <sup>673</sup> In *Revenue and Customs Commissioners v Benchdollar Limited* that “limited” <sup>674</sup> or “reasonable” <sup>675</sup> time after discovery of the truth by the Revenue was held to be about one month. <sup>676</sup> It followed that the estoppel operated against the defendants (the taxpayers) so as to prevent them from relying on the Limitation Act 1980 in relation to tax claims which had become statute barred before, but not in relation to tax claims that had become barred after, the end of that time. <sup>677</sup> So far as the latter claims were concerned, “the prejudice occasioned to the Revenue by loss of the ability to pursue [them] was in no sense reliant on the convention” since “those claims could still be saved by taking prompt protective steps” <sup>678</sup> after the “limited time” had expired.

### Whether estoppel by convention creates new rights

#### 4-114

⚠ We have seen that promissory estoppel does not “create new causes of action where none existed before” <sup>679</sup>; and we shall see that the same principle applies to estoppel by representation. <sup>680</sup> Estoppel by convention resembles estoppel by representation in that it can prevent a party from denying *existing facts*, and one would therefore expect estoppel by convention further to resemble estoppel by representation in operating only where its effect was defensive in substance. The question whether estoppel by convention is so limited was discussed in the *Amalgamated Investment & Property* case <sup>681</sup> where, however, it was not necessary to decide the point. This action was brought because the X Bank had sought to apply money due from it to A under another transaction in discharge of A’s alleged liability under its guarantee of B’s debt. Hence the effect of the estoppel was to provide the X Bank with a defence to A’s claim for a declaration that the bank was not entitled to apply the money in that way. Eveleigh L.J. said: “I do not think that the bank could have succeeded in a claim on the guarantee itself.” <sup>682</sup> Brandon L.J. seems to have taken the view that the bank could have sued on the guarantee, but to have based that view on the ground that the loan agreement between A and the X Bank imposed an obligation on A to give the guarantee: hence it was that agreement, and not the estoppel, which would have given rise to the X Bank’s cause of action, if it had sued on the guarantee. <sup>683</sup> Lord Denning, M.R. seems to have expressed the principle of estoppel by convention in such a way as to enable it to give rise to a cause of action <sup>684</sup> ⚠ but he was alone in stating the principle so broadly. <sup>685</sup> In *The Vistafjord* <sup>686</sup> the estoppel similarly operated defensively.



This factor was not stressed in the judgments, but there is no suggestion in them that in this respect estoppel by convention differs from estoppel by representation, which does not, of itself, give rise to a cause of action. <sup>687</sup> It is indeed, possible for estoppel by convention (as it is for promissory estoppel <sup>688</sup> and estoppel by representation <sup>689</sup>) to deprive the defendant of a *defence*, and so to enable the claimant to win an action which otherwise he would have lost <sup>690</sup> ; but even in such cases the estoppel does not create the cause of action, for the *facts giving rise to the cause of action* exist independently of the estoppel. <sup>691</sup> In *Rivertrade Ltd v EMG Finance Ltd* <sup>692</sup>  Kitchin L.J., with whose judgment Moore-Bick and Ryder L.JJ. agreed, said that the case was not one “in which an estoppel [was] relied upon to create an enforceable right where none previously existed. It is instead one of those cases in which the estoppel is relied upon to bind the parties to an agreement to an interpretation which it would not otherwise bear” <sup>693</sup> ; and that, where this was the position, an estoppel by convention could “enlarge the effect of an agreement.” <sup>694</sup>  The view that estoppel by convention may have such an effect can, where the common assumption on which the estoppel is based *increases* the obligation of the party alleged to be estopped, give rise to the same difficulty as that discussed in the context of promissory estoppel in Vol.I, para.4-100: it could, for example, if applied in circumstances resembling those of *Stilk v Myrick* <sup>695</sup>  have the effect of allowing the claim that was there dismissed. It is respectfully submitted that the *Rivertrade* case <sup>696</sup>  should not be regarded as concluding the point. In that case, counsel for the defendant conceded the point; and although the Court approved of this concession, <sup>697</sup>  it also seemed to attach importance to the fact that the estoppel in that case did *not* “create an enforceable right where none previously existed.” <sup>698</sup>  The tension between these two positions should, it is respectfully submitted, not be regarded as having been finally resolved in the *Rivertrade* case; in particular the question whether there are limits to the extent to which estoppel by convention can “enlarge the effect of an agreement” remains an open one. The answer to this question requires fuller argument <sup>699</sup>  than it received in the *Rivertrade* case. No other authority squarely supports the view that estoppel by convention can, of itself, create a new cause of action; and the present position seems to be that it cannot, any more than promissory estoppel or estoppel by representation, produce this effect. <sup>700</sup> 



#### Invalidity of assumed term

### 4-115

A party is not liable on the basis of estoppel by convention where the alleged agreement would, if concluded, have been ineffective for want of contractual intention, <sup>701</sup> or on account of a formal defect <sup>702</sup> (other than a minor one) <sup>703</sup> or unenforceable for want of written evidence of it, <sup>704</sup> or where the term in respect of which such an estoppel is alleged to operate would, if actually incorporated in the contract, have been invalid (e.g. because it amounted to an attempt to deprive a tenant of statutory security of tenure which could not be excluded <sup>705</sup> by contract) <sup>706</sup>; nor does such an estoppel prevent a party from relying on the true legal effect (as opposed to the meaning <sup>707</sup>) of an admitted contract merely because the parties have entered into it under a mistaken view as to that effect. <sup>708</sup>

#### “Contractual estoppel”



### 4-116

 This form of “estoppel” is said to arise when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such “contractual estoppel” is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract. <sup>709</sup>  Three points must here be made about this concept. The first is that the answer to the question whether the contract term alleged to be of the kind described above in fact has this effect turns on the construction of the contract; and once the court has decided that, as a matter of



construction that term is held to preclude one of the parties from denying the existence of a specified state of facts, then nothing of substance is gained by classifying this conclusion under the rubric of “contractual estoppel.”<sup>710</sup> The second is that, even if that phrase is used, such an “estoppel” would differ from estoppels by convention in that “contractual estoppel” gives effect to a term of a contract which, on its true construction, prevents a party from denying facts specified in that term and in the circumstances (if any) specified in it<sup>711</sup>; while estoppels by convention invoke factors extrinsic to the contract as grounds for precluding the estopped party from denying facts such as the existence of a promise *not* included in the contract on its true construction<sup>712</sup> and of holding him bound by that promise (if the circumstances specified in para.4-108 above<sup>713</sup> are satisfied) to the extent specified in paras 4-112 to 4-115 above. The third is that “contractual estoppel” does not give rise to any of the problems of consideration which are our concern in this chapter: the term alleged to give rise to such an estoppel derives its binding force from the fact of being part of a legally binding contract, it being simply assumed that the requirement of consideration is satisfied in relation to the promises constituting that contract. For all these reasons, no further discussion of “contractual estoppel” is called for in this Chapter.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  460. (1877) 2 App. Cas. 439.
  461. *ibid.*, at 448; cf. *Smith v Lawson* (1998) 75 P. & C.R. 466: landlord who had told tenant that he would not ask her to continue to pay rent could not have recovered possession for failure to pay the rent when due. See further para.4-103, below.
  462. e.g. *Charles Rickards Ltd v Oppenheim* [1950] K.B. 616 (where both common law and equitable principles were applied). The principle in *Hughes v Metropolitan Ry* was said in *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 489 to be “an illustration of contractual variation of strict contractual rights” (*italics supplied*). This description was apt on the facts of that case, where the promise not to enforce such rights was supported by consideration: above, para.4-081. But the principle stated in *Hughes v Metropolitan Ry* applies even in the absence of such consideration: cf. below, para.4-134.
  463. *B.P. Exploration (Libya) v Hunt (No.2)* [1979] 1 W.L.R. 783, 812, affirmed (without reference to the point) [1983] 2 A.C. 352; *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd’s Rep. 245, 250.
  464. *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 Q.B. 839. A statement may also prevent the representor from denying the existence of a statutory liability, as in *Robertson v Minister of Pensions* [1949] 1 K.B. 227, as to which see also para.4-104, n.579 below.
  465. *Maharaj v Chand* [1986] A.C. 898.
  466. *Morris v Tarrant* [1971] 2 Q.B. 143, 160; cf. *Burrows v Brent LBC* [1996] 1 W.L.R. 1448, 1455, where no attempt was made to invoke the doctrine in favour of a “tolerated trespasser”; for discussion of this phrase, see *Knowsley Housing Trust v White* [2009] UKHL 70, [2009] 1 A.C. 636, above para.2-196; there is no reference in this case to the equitable doctrine discussed in the text above.
  467. *Lambeth LBC v O’Kane Holdings Ltd* [2005] EWCA Civ 1010; [2006] H.L.R. 2.
  468. *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2005] Fam. 1.
  469. Human Fertilisation and Embryology Act 1990, Sch.3 para.4(1).
  470. *Evans v Amicus Healthcare Ltd*, above n.463, at [37]; see also at [36] and [120].

- [471.](#) *Evenden v Guildford City F.C.* [1975] Q.B. 917, 924, 926 (actual decision overruled in *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] A.C. 506). The view stated in the text above was expressed at first instance in *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam), [2003] 4 All E.R. 903 at [304], [305], but the only authority there cited for this view was one of proprietary estoppel, to which the present requirement does not apply as this kind of estoppel can give rise to a cause of action: see below, para.4-183. The *Evans* case was affirmed on other grounds [2004] EWCA Civ 727, [2005] Fam. 1, above para.4-088. For the position in Australia, see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387; below, para.4-107.
- [472.](#)  *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd's Rep. 456, 466. Some doubt as to the correctness of this case is expressed by Webster J. (who decided it) in *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 596, 604 though the decision was approved on another point in *The Stolt Loyalty* [1993] 2 Lloyd's Rep. 281, 289–290, 291, affirmed without reference to this point [1995] 1 Lloyd's Rep. 599; *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd's Rep. 456 and *The Stolt Loyalty* [1993] 2 Lloyd's Rep. 281 were cited without adverse comment in *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC), [2017] 1 Lloyd's Rep. 331 at [103]–[104], but that discussion is concerned with the scope of the circumstances in which a person may be estopped (by representation or by convention) on the ground of having failed to perform a “duty to speak”: see below, para.4-092. There is no reference in the *Costain* case to the question discussed in Main Work, Vol.I, para.4-089, i.e. whether promissory estoppel can operate where there is no pre-existing legal relationship between the parties and so give rise to a cause of action, as opposed to a defence (on this point, see Main Work Vol.I, para.4-099); see also *Orion Finance Ltd v J. D. Williams & Co Ltd* [1997] C.L.Y. 986, where no estoppel arose in the absence of a previous legal relationship; *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737, at [89] apparently doubting some of the reasoning in *The Henrik Sif*, but not the outcome since there was undoubtedly “a legal relationship ... whoever were the parties thereto” (though the difficulty remains that the first defendants, against whom the doctrine was said to operate, were not parties to that relationship).
- [473.](#) *James v Heim Galleries* (1980) 256 E.G. 819, 821; *Collin v Duke of Westminster* [1985] Q.B. 581, 595. See also *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 where a letter to tenants of flats setting out the benefits to be obtained from a scheme for acquiring the interest of a superior leaseholder was held not to give rise to a promissory estoppel (at [34]) because, on its true construction, it “did not promise anything” (at [31]).
- [474.](#) *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 at 134; *Spence v Shell* (1980) 256 E.G. 55, 63; *Baird Textile* case, above n.467, at [92].
- [475.](#) Or that he will not rely on an available defence: below para.4-102.
- [476.](#) *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109, 126; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221 (both these cases concerned “waiver”); cf. below, n.474.
- [477.](#) *Drexel Burnham Lambert International NV v El Nasr* [1986] 1 Lloyd's Rep. 357.
- [478.](#)  *Low v Bouverie* [1891] 3 Ch. 82, 106; *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] A.C. 741; *The Shackelford* [1978] 2 Lloyd's Rep. 155, 159; *Channel Island Ferries Ltd v Sealink UK Ltd* [1987] 1 Lloyd's Rep. 559, 580, affirmed without reference to this point [1988] 1 Lloyd's Rep. 323; *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [23]–[26]; for the actual ground for this decision, see above, para.4-090 n.468. The requirement that, for the purpose of an estoppel by representation, the representation must be “clear or unequivocal” or “precise and unambiguous” is stated by Carr J. in *Spliethoff's Bevrachtungskantoor BV v Bank of China* [2015] EWHC 999 (Comm), [2015] 2 Lloyd's Rep. 123 at [156] citing, with apparent approval, para.3-090 of the 31st edition, replaced by para.4-091 of the 32nd (present) edition.
- [479.](#) *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 Lloyd's Rep. 508, 534; *Mardorf Peach & Co*

*Ltd v Attica Sea Carriers Corp. of Liberia (The Laconia)* [1977] A.C. 850, 871; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109, 126; *China National Foreign Trade Transportation Corp. v Evoglia Shipping Co of Panama SA (The Mihalios Xilas)* [1979] 1 W.L.R. 1018, 1024; *Avimex SA v Dewulf & Cie.* [1979] 2 Lloyd's Rep. 57, 67; *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 Lloyd's Rep. 207, 212; *Bremer Handelsgesellschaft mbH v Finagrain Cie. Commercial Agricole & Financière SA* [1981] 2 Lloyd's Rep. 259, 266; *Scandinavian Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 431; (affirmed [1983] 2 A.C. 694) *Italmare Shipping Co v Ocean Tanker Co Inc (The Rio Sun)* [1981] 2 Lloyd's Rep. 489 and [1982] 1 Lloyd's Rep. 404; *Telfair Shipping Corp. v Athos Shipping Corp. (The Athos)* [1983] 1 Lloyd's Rep. 127, 134-135; *Bremer Handelsgesellschaft mbH v Deutsche-Conti Handelsgesellschaft mbH* [1983] 1 Lloyd's Rep. 689; *Super Chem Products Ltd v American Life & General Insurance Co Ltd* [2004] UKPC 2, [2004] 2 All E.R. 358 at [23], where the present requirement was not satisfied; *Fortisbank SA v Trenwick International* [2005] EWHC 339, [2005] Lloyd's Rep. I.R. 464 at [32], [35]; *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [38], where the reference seems to be to "promissory estoppel": see below para.4-095 n.516). For the analogy between waiver and the equitable doctrine here under discussion, see above, para.4-086; below, para.4-104. For the further concept of "waiver by estoppel", see above, para.4-082 n.447.

480.

❗ *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 812 (affirmed without reference to this point [1983] 2 A.C. 352.); *Spence v Shell* (1980) 256 E.G. 55, 63; *James v Heim Galleries* (1980) 256 E.G. 819, 821; *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn. Bhd. (The Post Chaser)* [1981] 2 Lloyd's Rep. 695, 700; *Goldsworthy v Brickell* [1987] Ch. 378, 410; *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 523, 524, 535; *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants* [1999] 2 Lloyd's Rep. 443 at 448, *Thameside MBC v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1; [2001] B.L.R. 113 and *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam), [2003] 4 All E.R. 903 at [303]–[306] (where this requirement was not satisfied), affirmed on other grounds [2004] EWCA Civ 727; [2005] Fam. 1 (see above, para.4-089); for the requirement of an "unequivocal representation in a case of "waiver ... by estoppel", see *Warren v Burns* [2014] EWHC 3671 (QB) at [17] (where this requirement was not satisfied: at [20]); *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [51], [52] and passim; as the promise in this case was supported by consideration (see below, para.4-119A) it was not strictly necessary to decide the estoppel issue: see at [50].

481. *Spence v Shell* (1980) 256 E.G. 55, 63.

482. (1877) 2 App. Cas. 439; cf. *The Post Chaser*, above, n.475, at 700.

483. *China-Pacific SA v The Food Corp. of India (The Winson)* [1980] 2 Lloyd's Rep. 213, 222; reversed on other grounds [1982] A.C. 939; *Food Corp. of India v Antclizo Shipping Corp. (The Antclizo)* [1988] 2 Lloyd's Rep. 130, 142, affirmed [1988] 1 W.L.R. 603; *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2)* [1990] 2 Lloyd's Rep. 431, 452; *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) plc* [1992] 1 Lloyd's Rep. 513, 542.


484. Above, paras 2-147—2-152; cf. *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [38], [54], where one reason why the claim based on estoppel failed was that the implied agreement on which it was based was not sufficiently certain to have contractual force: see above, para.2-194 and below, para.4-099. The difficulty arising from lack of certainty was said, at [54], to "extend to the estoppel as well as the contractual issue." Cf., in cases of estoppel by convention, below, para.4-108 at n.625.


485. Above, para.2-003.

486. *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159, 173, a case of estoppel by representation, to which the requirement of a clear and unequivocal representation also applies: see *Low v Bouverie* [1891] 3 Ch. 82; *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co* [1972] A.C. 741. For the requirement of an "unqualified" acceptance, see above, para.2-031.

- [487.](#) *China-Pacific SA v The Food Corp. of India (The Winson)* [1980] 2 Lloyd's Rep. 213, 223; reversed on other grounds [1982] A.C. 939; *Drexel Burnham Lambert International NV v El Nasr* [1986] 1 Lloyd's Rep. 357. A promise which lacks contractual force can give rise to a proprietary estoppel even though by reason of its uncertainty or incompleteness it lacks contractual force (see below, para.4-145); but in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (below paras 4-161 to 4-162, 4-165 to 4-167) it was held that no such estoppel arose in favour of a party who knew that the promise was binding only in honour.
- [488.](#) *Scandinavian Trading Tanker Co A.B. v Flora Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 431, distinguishing *Tankexpress AS v Cie. Financière Belge des Petroles SA* [1949] A.C. 76 on the ground that there the creditor's conduct had resulted in a change in the "accepted method of payments"; *The Scaptrade*, above was affirmed without reference to the present point [1983] 2 A.C. 694; cf. *Cape Asbestos Ltd v Lloyd's Bank Ltd* [1921] W.N. 274, 276; *Bunge SA v Compagnie Européenne de Céréales* [1982] 1 Lloyd's Rep. 306; *Bremer Handelsgesellschaft mbH v Raiffeisen Hauptgenossenschaft E.G.* [1982] 2 Lloyd's Rep. 599; *Bremer Handelsgesellschaft mbH v Bunge Corp.* [1983] 1 Lloyd's Rep. 476.
- [489.](#) cf. *London & Clydebank Properties v H.M. Investment Co* [1993] E.G.C.S. 63.
- [490.](#) *Seechurn v Ace Insurance SA* [2002] EWCA Civ 67; [2002] 2 Lloyd's Rep. 390, esp. at [55].
- [491.](#) *V. Berg & Son Ltd v Vanden Avenne-Izegem P.V.B.A.* [1977] 1 Lloyd's Rep. 500; cf. *Edm. J. M. Mertens & Co P.V.B.A. v Veevoeder Import Export Vimex B.V.* [1979] 2 Lloyd's Rep. 372.
- [492.](#) *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 Lloyd's Rep. 508; cf. *Cook Industries Inc v Meunerie Liegeois SA* [1981] 1 Lloyd's Rep. 359, 368; *Peter Cremer v Granaria B.V.* [1981] 2 Lloyd's Rep. 583; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep. 476.
- [493.](#) *China-Pacific SA v The Food Corp. of India (The Winson)* [1980] 2 Lloyd's Rep. 213 (reversed on other grounds [1982] A.C. 399).
- [494.](#) *SMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The Zenovia)* [2009] EWHC 739 (Comm), [2009] 2 All E.R. (Comm) 177 at [34].
- [495.](#) *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57.
- [496.](#) *China National Foreign Trade Transportation Corp. v Evoglia Shipping Co SA of Panama (The Mihalios Xilas)* [1979] 1 W.L.R. 1018; *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 Lloyd's Rep. 207, 212–213; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1981] 1 Lloyd's Rep. 292, 299; *Peter Cremer v Granaria B.V.* [1981] 2 Lloyd's Rep. 583; *The Post Chaser*, above, para.4-091 n.475 at 700.
- [497.](#) See *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp. of Liberia (The Laconia)* [1977] A.C. 850 (where retention of an underpayment accepted without authority by the payee's bank was held not to amount to a waiver).
- [498.](#) e.g. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109; *Hazel v Akhtar* [2001] EWCA Civ 1883; [2002] 2 P. & C.R. 17 (landlord tolerating habitually late payment of rent).
- [499.](#) See *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221, where there was a division of opinion on the point in the Court of Appeal.
- [500.](#) *Telfair Shipping Corp. v Athos Shipping Corp. (The Athos)* [1983] 1 Lloyd's Rep. 127, 135.
- [501.](#) *Allied Marine Transport v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 W.L.R. 925, 937; cf. *Cook Industries v Tradax Export SA* [1983] 1 Lloyd's Rep. 327, 332 ([1985] 2 Lloyd's Rep. 454); *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August P.*



- Leonhardt) [1985] 2 Lloyd's Rep. 28, 33; *M.S.C. Mediterranean Shipping Co SA v B.R.E. Metro Ltd* [1985] 2 Lloyd's Rep. 239; *Cie Française d'Importation, etc., SA v Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592, 598; *Food Corp. of India v Antclizo Shipping Corp. (The Antclizo)* [1986] 1 Lloyd's Rep. 181, 187, affirmed 1 W.L.R. 603; *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2)* [1990] 2 Lloyd's Rep. 431, 452; *HH Casualty & General Insurance v Axa Corporate Solutions* [2002] EWCA Civ 1253; [2002] 2 All E.R. (Comm) 1053 at [26] (where there was no action in reliance); *Front Carriers Ltd v Atlantic Orient Shipping Corporation (The Archimidis)* [2007] EWHC 421 (Comm), [2007] 2 Lloyd's Rep. 131 at [45]–[46]; cf. *Tankerederei Ahrenkeil GmbH v Frahuil SA (The Multibank Holsatia)* [1988] 2 Lloyd's Rep. 486, 493 (no estoppel as no action in reliance).
502. *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305, 315; cf., in another context, *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova)* [1984] 1 Lloyd's Rep. 353, 365.
503. *Collin v Duke of Westminster* [1985] Q.B. 581.
504. Marine Insurance Act 1906, s.33(3), second sentence. This sentence will be omitted from the subsection on the coming into force of s.10(7) of the Insurance Act 2015. See also s.10(1) of that Act, which abolishes any rule of law by which a breach of warranty (express or implied) in an insurance contract by “results in discharge of the insurer's liability”.
505. *Argo Systems FZE v Liberty Insurance (Pte) (The Copa Casino)* [2011] EWCA Civ 1572, [2012] 1 Lloyd's Rep. 129 at [38] a case of “waiver by estoppel”: and see above, para.4-082.
506. *Argo Systems* case, above n.500 at [46].
507. Above, para.2-070; below, paras 7-155—7-180; see, e.g. *Tradax Export SA v Dorada Compania Naviera SA (The Lutetian)* [1982] 2 Lloyd's Rep. 140, 158; *The Stolt Loyalty* [1993] 2 Lloyd's Rep. 281, 289–291, affirmed (without reference to the point here under discussion) [1995] 1 Lloyd's Rep. 559; and see *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142, 151, where the statement that there may be a representation by “conduct (including silence)” seems to refer to the exceptional situations described in the text above.
508.  In *MIOM 1 Ltd v Sea Echo ENE (No.2)* [2011] EWHC 2715 (Admlty), [2012] 1 Lloyd's Rep. 142 it was held that a defendant's “silent conduct”, in failing to take the point that a claim against him was time-barred, estopped him from taking that point. The decision may be reconcilable with that in the *Argo Systems* case (above, n.500) on the ground that in the *MIOM* case the defendant had a “duty to take the point promptly” if it wished to rely on it (see the discussion in the latter case at [34] to [42]); and that this duty would make the case one of the exceptional ones referred to at n.502 above. Contrast *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC), [2017] 1 Lloyd's Rep. 331 where the defendant was under no “duty to speak out” (at [102]) as it had not been guilty of any “sharp practice” (at [113] and see at [112]) in failing to do so. In that case, the estoppels alleged to operate against the defendant were estoppel by representation and estoppel by convention and *both* these allegations were rejected by the court (see at [126]). In relation to estoppel by convention, which can arise without any representation (Main Work, Vol.I, para.4-108 and below, para.4-108), Coulson J. said in the *Costain* case (above) that the duty to speak “would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant ...” ([2017] EWHC 319 (TCC) at [124]). In such circumstances a “duty to speak” was held to have arisen in *Process Components Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch) at [129], [132].
509. cf. below, para.7-037.
510. See *Fontana N.V. v Mautner* [1979] 254 E.G. 199; *Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co* [1981] 1 Lloyd's Rep. 345, 352; *Cook Industries Ltd v Meunerie Liegeoise SA* [1981] 1 Lloyd's Rep. 359, 368; *Scandinavian Trading Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 1 All E.R. 301, affirmed without reference to this point [1983] 2 A.C. 694; *Bremer Handelsgesellschaft mbH v Bunge Corp.* [1983] 1 Lloyd's Rep. 476;


- Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 1 Lloyd's Rep. 689; *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 142; *The Nerano* [1996] 1 Lloyd's Rep. 1; *Rowan Companies Inc v Lambert Eggink Offshore Transport Ltd* [1999] 2 Lloyd's Rep. 443 at 449; *Kim v Chasewood Park Residents Ltd* [2013] EWCA 239, [2013] H.L.R. 24 at [40] ("no material reliance"; for the actual ground for the decision in this case, see above, para.4-090 n.468).
511. *Ets. Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd's Rep. 129; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multibank Holsatia)* [1988] 2 Lloyd's Rep. 486, 493.
512. *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 482.
513. *ibid.*, at 490 (per Cumming-Bruce L.J., whose decision was based on the different ground discussed in para.4-081, above).
514. *cf.* the similar rule in cases of "proprietary estoppel" stated in para.4-158, below.
515. *e.g.* in *Fontana N.V. v Mautner* [1979] 254 E.G. 199; *Meng Long Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] A.C. 511, 524; *cf.* *Wilson* (1951) 67 L.Q.R. 344.
516. For the requirement of detriment in cases of such estoppel, see *Carr v L. & N.W. Ry* (1875) L.R. 10 C.P. 310, 317. In *Aker Oil & Gas Technology UK plc v Sovereign Corporate Ltd* [2002] C.L.C. 557 benefit to the representor (as opposed to the more usually stated factor of detriment of the promisee) is said to suffice for the purpose of giving rise to this type of estoppel.
517. Below, para.4-104.
518.  *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189 at 213; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [54]; for this case (so far as it relates to estoppel) see also above, para.4-091 n.475.
519. *James v Heim Galleries* (1980) 256 E.G. 819, 825; *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn. Bhd. (The Post Chaser)* [1981] 2 Lloyd's Rep. 695, 701. *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2)* [1990] 2 Lloyd's Rep. 431, 454; *Fortisbank SA v Trenwick International Ltd* [2005] EWHC 339; [2005] 2 Lloyd's Rep. I.R. 464 at [13]; *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204 at [121], where the actual decision was that the contract had been varied by a contractually binding agreement (at [112]–[116]; above para.4-083 n.450) and "Waiver/Promissory estoppel" (before [117]) was discussed only on the assumption that there had been no such variation.
520. (1877) 2 App. Cas. 439, above, para.4-086; *cf.* *Bottiglieri di Navigazione SpA v Quindao Ocean Shipping Co (The Bunge Saga Lima)* [2005] EWHC 244, [2005] 2 Lloyd's Rep. 1 at [31] ("some conduct [including "a failure to act"] which differs from that which would have occurred in the absence of the representation").
521. *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn. Bhd. (The Post Chaser)* [1981] 2 Lloyd's Rep. 695. The point made in the text above may account for Rix L.J.'s statement in *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [38] that detriment is "probably" a requirement of the operation of this type of "estoppel". (For the use of "estoppel" to describe the equitable doctrine, see above, para.4-091 and below para.4-104.) The description in [2008] EWCA Civ 147 at [38] of the "estoppel" in question as "a promise supported not by consideration but by reliance" seems to indicate that the reference in this passage is to the type of "estoppel" here under discussion.
522. *Maharaj v Chand* [1986] A.C. 898; *The Bunge Saga Lima*, above n.515, at [31] (quoted in para.4-098 n.533 below).



- [523.](#) It may also not be inequitable for the promisor to go back on a promise where the detriment suffered by the promisee consists of a payment of money to the promisor and the latter has offered to refund that payment. For discussion of this possibility, see *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [43]–[45], where, however, this reasoning was not needed as the alleged promisees had “made it clear that they did not want their money back” (at [45]). The actual decision was that no promissory estoppel had arisen for the reason given in para.4-090 above, n.473.
- [524.](#) *Société Italo-Belge pour le Commerce et l'Industrie v Vegetable Oils (Malaysia) Sdn. Bhd. (The Post Chaser)* [1981] 2 Lloyd's Rep. 695; cf. *Bremer Handelsgesellschaft mbH v Bunge Corp.* [1983] 1 Lloyd's Rep. 476, 484; *Marseille Fret SA v D. Oltman Schiffahrts GmbH & Co K.G. (The Trado)* [1982] 1 Lloyd's Rep. 157, 160; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 1 Lloyd's Rep. 689; *Banner Industrial & Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 E.G.L.R. 139; *Transcatalana de Comercio SA v Incobrasa Industrial e Commercial Brasileira SA (The Vera)* [1995] 1 Lloyd's Rep. 215, 219.
- [525.](#) See below, para.4-097 and cf. above, para.4-083 for the requirement of such notice.
- [526.](#) (1879) 5 Q.B.D. 409.
- [527.](#) *ibid.*, at 413; cf. also *Southwark LBC v Logan* (1996) 8 Admin.L.R. 315; *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam), [2003] 4 All E.R. 903 at [309], affirmed [2004] EWCA Civ 727, [2005] Fam. 1 on the ground stated in para.4-089 above.
- [528.](#) See *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 167, below, paras 4-118, 4-138 and *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [112] (promise obtained by economic duress).
- [529.](#) Paras 3-095 to 3-097 of the 31st edition of this book (paras 4-096 to 4-098 in the present edition) are cited with apparent approval in *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366, [2015] 1 All E.R. (Comm) 204 at [122] introducing a discussion of when “the doctrine [of promissory estoppel] suspend[s] and when it ... extinguish[es] rights” (heading before [122]).
- [530.](#) (1877) 2 App. Cas. 439, above, para.4-086.
- [531.](#) **¶**cf. *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 W.L.R. 761; (below, para.4-133) *Banning v Wright* [1972] 1 W.L.R. 972, 981; *Brikom Investments Ltd v Seaford* [1981] 1 W.L.R. 863, 869; *Société Italo-Belge v Palm & Vegetable Oils (The Post Chaser)* [1981] 2 Lloyd's Rep. 695, 701; *Meng Long Development Pte Ltd v Jip Hong Trading Co Ltd* [1985] A.C. 511, 524; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp. of India (The Kanchenjunga)* [1987] 2 Lloyd's Rep. 509, 518 affirmed [1989] 1 Lloyd's Rep. 354; *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1391, *The Times*, June 26, 2003; *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [38] (“may be suspensory”; the reference appears to be to “promissory estoppel”: see above, para.4-095 n.516); see also *Hazel v Akhtar* [2001] EWCA Civ 1883; [2002] 2 P. & C.R. 17 at [43]; and *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [41] (“The general view is that promissory estoppel is usually only suspensory”; the actual decision in this case was that, for the reason given in para.4-090 n.473, no promissory estoppel had arisen; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [56] (“may only be suspensive”). No promissory estoppel would have arisen in this case as reasonable notice had been given to terminate the “variation agreement” (described below, see para.4-119A); for this point see at [63], [67] and [92]. No reference to the suspensive nature of the doctrine was made in *Smith v Lawson* (1998) 75 P. & C.R. 466 (below, para.4-103), probably because no attempt was made by the promisor to give reasonable notice of any intention to resume enforcement of his legal rights. Notice is not required to bring an end to the suspension where, on the true construction of the representation, the circumstances in which it was intended to apply had come to an end: see *Dunbar Assets plc v Butler* [2015] EWHC 2546 (Ch) at [50]; or where notice of termination was not necessary “to allow a reasonable period for the party to whom notice is given to make alternative arrangements” (*ibid.*, at [51]).

- [532.](#) *Roebuck v Mungovin* [1994] A.C. 224, 234.
- [533.](#) This is also true of cases such as *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 W.L.R. 761 and *Ajayi v R. T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1236, discussed in paras 4-132 and 4-133 below.
- [534.](#) cf. below, para.4-134.
- [535.](#) (1888) 40 Ch.D. 268; cf. *W. J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, where the actual decision was that there was a contractually binding variation: see above, para.4-080.
- [536.](#) *Ogilvie v Hope-Davies* [1976] 1 All E.R. 683, 696; cf. *Voest Alpine International GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep. 547, 560.
- [537.](#) *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd's Rep. 245.
- [538.](#) See *Maharaj v Chand* [1986] A.C. 898; cf. *W. J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189 (where the actual decision was that there was a variation supported by consideration); *Bottiglieri di Navigazione SpA v Cosco Quindao Ocean Shipping Co (The Bunge Saga Lima)* [2005] EWHC 244 (Comm), [2005] 2 Lloyd's Rep. 1 at [31]. The further statement in this passage that "no revocation can be retrospective" is, with respect, open to question; in a sense, any reassertion of the original obligation has "retrospective" effect. The crucial limitation on the effectiveness of a revocation lies in its inequitable, rather than in its merely retrospective, operation. This seems to be the test approved in *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204 at [122] ("the determinative consideration is whether it is inequitable in all the circumstances for the representor to enforce his rights inconsistently with his representation"). The judgment goes on to suggest that, for this purpose, "there may be a material difference between an open-ended forbearance [as in *Hughes v Metropolitan Ry* (1877) 2 App. Cas. 439, above para.4-086] and a promise not to enforce until a particular date is reached or a particular set of circumstances prevails."
- [539.](#) *Combe v Combe* [1951] 2 K.B. 215 at 219; the point had been foreshadowed in *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 at 134.
- [540.](#) [1951] 2 K.B. 215.
- [541.](#) Above, para.4-061.
- [542.](#) *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [91]; for the difficulty of distinguishing in that case between reliance and expectation loss, see *ibid.*, at [81], [82].
- [543.](#) Above, para.4-086, below, para.4-104.
- [544.](#) Below, para.4-104.
- [545.](#) *Low v Bouverie* [1891] 3 Ch. 82 at 101; cf. *ibid.* at 105.
- [546.](#) Below, para.4-104, especially n.588.
- [547.](#) This appears to be the point that Denning L.J. had in mind in *Combe v Combe* [1951] 2 K.B. 215 at 219 when he said that he did not want the equitable principle to be "stretched too far lest it be endangered." cf. *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 486; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 W.L.R. 761, 764; *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, 561; *Drexel Burnham Lambert International NV v El Nasr* [1986] 1 Lloyd's Rep. 357, 365. Contrast *Vaughan v Vaughan* [1953] 1 Q.B. 762, 768; Denning (1952) 15 M.L.R. 1.
- [548.](#) *Baird Textile Holdings Ltd v Marks & Spencer plc*, above, n.537, where *Combe v Combe* is

cited at [34], and [87] in support of the view stated in the text above; though an alternative explanation for the result in the *Baird* case may be that, in the absence of certainty or contractual intention, the *requirements for the operation* of the equitable doctrine are simply not satisfied (above, paras 2-150, 4-091), so that no question can arise as to its *effects*.


549. In *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159, 175 it is suggested that the rule that promissory estoppel gives rise to no cause of action "is limited to the protection of consideration" and has "no general application in the field of estoppel." The estoppel there under discussion was estoppel by representation, and the suggestion is, with respect, hard to reconcile with the statements in *Low v Bouverie* [1891] 3 Ch. 82 at 101, 105 cited at n.540 above. Similar difficulty arises from the more tentative suggestion in *Thornton Springer v NEM Insurance Ltd* [2000] 2 All E.R. 489 at 519 that estoppel could lead to the "enforcement of the promise" where no contract was concluded for want of acceptance of an offer, though not where there was no contract for want of consideration. The former situation is one of estoppel by convention (as to which see below, para.4-108); and it is also, with respect, hard to see why one answer should be given to the question whether rule in *Combe v Combe* applies where the promise lacks contractual force for want of consideration and a different one where it lacks such force for want of an effective acceptance. Such a distinction seems also to be inconsistent with the readiness of the Court of Appeal in the *Baird* case (above at n.537) to apply the rule in *Combe v Combe* to an alleged promise which lacked contractual force for some reason other than want of consideration. See also *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 1 where "waiver" was invoked (at [89]) in the context of failure to comply with one of the requirements of contract formation, in that case the execution of a formal document (above, para.2-123). The normal effect of such a waiver is that the party granting it is bound by the contract (e.g., above paras 2-046, 2-066); but in *The Botnica* it resulted in that party's entitlement to *enforce* a term of the contract. No reference was made to the equitable doctrine here under discussion or to the normally defensive nature of that doctrine or of waiver.
550. *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097, 1104-1105; Atiyah (1974) 38 M.L.R. 65; and see Allan (1963) 79 L.Q.R. 238; the point was left open in *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd's Rep. 456, 466-468 (as to which see above para.4-089, n.467).
551. *Evenden v Guildford City F.C.* [1975] Q.B. 917, 924, 926; Napier [1976] C.L.J. 38; and see next note.
552. See *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] A.C. 506, overruling *Evenden's* case, above. Lord Wilberforce remarked at 518 that "To convert this [contract] into an estoppel is to turn the doctrine of promissory estoppel ... upside down."
553. For the position in other common law jurisdictions, see para.4-107, below.
554. cf. the position in cases of estoppel by representation, below, para.4-104 n.588.
555.  *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 1 W.L.R. 444, 457; *Aquaflite Ltd v Jaymar International Freight Consultants Ltd* [1980] 1 Lloyd's Rep. 36; *Syros Shipping Co SA v Elaghill Trading Co (The Proodos C)* [1980] 2 Lloyd's Rep. 390, 391; *James v Heim Galleries* (1980) 256 E.G. 819, 821; *Brikom Investments Ltd v Seaford* [1981] 1 W.L.R. 863; cf. *Taylor's Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133, 152; *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737, above, n.537; *Newport City Council v Charles* [2008] EWCA Civ 1541 at [27] where this position was at [28] viewed with "unease" (for this case, see below, paras 4-102, 4-153); *Haden Young Ltd v Laing O'Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [167], [169], where the rule that estoppel could not be used to create a contract where none existed in fact was applied in relation to estoppel by representation and to estoppel by convention (as to the latter point, see below, para.4-114). The defensive nature of promissory estoppel is also by implication recognised in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [61], where promissory estoppel is in this respect contrasted with proprietary estoppel: see below, para.4-183. A dictum in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] 3 W.L.R. 166 at [73] (quoted in para.4-114 n.684 below) seems to suggest that promissory estoppel can "provide a

cause of action". But the point does not seem to have been argued in that case and no reference is made in the *Dixon* case to any of the authorities which are cited in Main Work, Vol.I, para.4-089 in support of the view that, in English law, promissory estoppel does *not* create a cause of action; and it is respectfully submitted that the above dictum in the *Dixon* case, so far as it departs from that view, should be treated as having been made per incuriam.

- 556. (1809) 2 Camp. 317; 6 Esp. 129; above, para.4-067.
- 557. See *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 524, 535.
- 558. [1951] 2 K.B. 215, 219.
- 559. *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737, at [88]; *Durham v BAI (Run Off) Ltd* [2008] EWHC 2692 (QB), [2009] 2 All E.R. 26 at [269] (discussing estoppel by convention, below paras 4-108 to 4-115) and [278] ("the *Baird Textile* exception"), reversed in part [2010] EWCA Civ 1096, [2011] 1 All E.R. 605, where "the issue of estoppel by convention has not been pursued" (at [24] and see at [187]). There was likewise "no suggestion of estoppel by convention on further appeal to the Supreme Court ([2012] UKSC 14 at [39]), where the decision, in part reversing that of the Court of Appeal, turned solely on the construction of the relevant insurance policies.
- 560. [1991] 1 Q.B. 1, above, para.4-069.
- 561. Though there are references to estoppel in that case at pp.13 ("not yet fully developed") and 17–18 (this reference seems to be estoppel by convention, the relevance of which to the case is doubted in para.4-112 n.660 below).
- 562. As in *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130, below para.4-130, this being the case under discussion in *Combe v Combe*, above n.553.
- 563. *Syros Shipping Co SA v Elaghill Trading Co (The Proodos C)* [1980] 2 Lloyd's Rep. 390.
- 564. Below, paras 4-139—4-185, especially para.4-170.
- 565. *Combe v Combe* [1951] 2 K.B. 215, 224; *The Proodos C*, above n.558 at 391 ("time honoured phrase"); *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 142; *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 524, 535.
- 566. *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159 at 175 ("largely inaccurate"); *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737, at [54] ("misleading aphorism").
- 567. (1879) 5 Q.B.D. 409.
- 568. cf. *Hartley v Hymans* [1920] 3 K.B. 475, applying the corresponding common law doctrine: above, para.4-082; *Johnson v Gore Wood* [2002] 2 A.C. 1 at [40]. And see Jackson (1965) 81 L.Q.R. 223.
- 569. See *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd's Rep. 245, above, para.4-098; the Australian case of *Commonwealth of Australia v Verwayen* (1990) 170 C.L.R. 394 (discussed by Spence (1991) 107 L.Q.R. 221) could, in England, be decided on the same ground (*Baird Textile Holdings Ltd v Marks & Spencers plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [98]) though it was actually based on the wider Australian principle referred to in para.4-107, below. No reference was made to *The Ion* (cited above in this note) in *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 W.L.R. 1884 where the rule that estoppel by representation is "a shield only and cannot found a cause of action" (at [27]) was held to prevent a local authority from relying on this form of estoppel to avoid a time bar imposed by statute on claims for the recovery of premises which it owned but had let to the representor on a secure tenancy. The two cases can perhaps be distinguished on the ground that, in the *Newport* case, the time bar had been imposed by the very statute which had given the claimant the right, within the specified time, to recover possession of the premises. But for



this point, there would have been considerable force in the argument that the claimant's cause of action was based, not on the representations giving rise to the estoppel, but on its title to the premises.

- [570.](#) cf. in cases of estoppel by representation, *Burrowes v Lock* (1805) Ves. 470, as explained in *Low v Bouverie* [1891] 3 Ch. 82.
- [571.](#) *Argo Systems FZE v Liberty Insurance (Pte) (The Copa Casino)* [2011] EWCA Civ 1572, [2012] 1 Lloyd's Rep 129 (where, for the reason given in para.4-093 above, the in some respects analogous doctrine of "waiver by estoppel" did not apply).
- [572.](#) *Shah v Shah* [2001] EWCA Civ 527; [2002] Q.B. 35 at [31] (a case of estoppel by representation).
- [573.](#) This may be the force of the statement in *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam); [2003] 4 All E.R. 903 at [303] that promissory estoppel "is not, of itself, the cause of action, although it may be an element in it"; affirmed, without reference to this point, [2004] EWCA Civ 727, [2005] Fam. 1 (above, para.4-089).
- [574.](#) cf. the criticism (above, para.4-089) of *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd's Rep. 456. For the position in relation to estoppel by convention see below, para.4-114.
- [575.](#) (1998) 75 P. & C.R. 466.
- [576.](#) See the cases cited in n.583 below.
- [577.](#) The reference seems to be to Lord Denning, M.R.'s statement in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 2 Q.B. 73 at 122 ("one general principle shorn of limitations"). The passage containing these words is cited with apparent approval by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 at 33 but it is not clear whether (a) this citation is part of Lord Bingham's *ratio* in that case; or (b) the apparent approval is shared by Lords Hutton and Cooke who agree generally with the part of Lord Bingham's speech in which it occurs. cf. also the reference, in another context, to a possible "move to a more uniform doctrine of estoppel" in *Scottish Equitable plc v Derby* [2001] EWCA Civ 369; [2001] 2 All E.R. 818 at [48]. Lord Denning's statement quoted above in this note is also cited in *Mears Limited v Shoreline Housing Partnership Limited* [2013] EWHC 27 (TCC), [2013] B.L.R. 181 at [30] where the statement is said to give rise to "some difficulties"; no discussion of these difficulties was called for in the *Mears* case. The decision in the *Mears* case was affirmed on appeal [2013] EWCA Civ 639, [2013] B.L.R. 639 without further reference to Lord Denning's statement quoted above. In further proceedings in this case ([2015] EWHC 1396 (TCC)) Akenhead J. treats estoppel by convention as distinct from estoppel by representation: see at [43].
- [578.](#)  *First National Bank plc v Thomson* [1996] Ch. 231, 236; cf. *Republic of India v India S.S. Co Ltd (The Indian Endurance)* (No.2) [1998] A.C. 878 at 913; *National Westminster Bank plc v Somer* [2001] EWCA Civ 970; [2002] 1 All E.R. 198 at [38], [39]; dicta in *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [38], [50], [83], [84] perhaps incline in the other direction but cannot be regarded as conclusive. Millett L.J.'s statement in *First National Bank plc v Thompson* [1996] Ch. 231, 236, to the effect that "the attempt to demonstrate that all estoppels ... are now governed by the same principle ... has never won general acceptance" (quoted in Main Work, Vol.I, para.4-104) is cited with apparent approval in *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2016] 2 Lloyd's Rep. 229 at [227], though it appears to be qualified by the point made in the latter judgment that "a representation followed by reliance" is "a fundamental requirement of estoppel by representation and promissory estoppel" ([ibid.]). This is, with respect, true, but the *kinds* of representation capable of giving rise to these two forms of estoppel are not the same, a representation as to the future (or a promise) being capable of giving rise to promissory estoppel but not to estoppel by representation (see Main Work, Vol.I, para.4-104). The judgment in the *Monde Petroleum* case also accepts that estoppel by convention (Main Work, Vol.I, paras 4-108—4-109) "does not depend on any representation or promise" ([2016] EWHC

1472 (*Comm*) at [227]), though it does depend on “communications to pass across the line between the parties”: *ibid.* and see Main Work, para.4-110. The latter requirement seems to be regarded as a sort of functional equivalent of the requirement of a representation in cases of estoppel by representation or promissory estoppel. It is, however, less exacting than those requirements, especially if the recent judicial suggestion that the existence of the “common assumption” on which estoppel by convention is based (Main Work, Vol.I, para.4-108) may be “inferred from conduct, or even silence”: *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] 3 W.L.R. 166 at [92]; and see below, para.4-108 n.630.

579. i.e. estoppel by representation (below, para.7-103) promissory estoppel (discussed here), estoppel by convention (below, paras 4-108 et seq.) and proprietary estoppel (below paras 4-139 et seq.).

580. *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 at 41; *Gillett v Holt* [2001] Ch. 210 at 225, per Walker L.J., cited with approval by Lord Neuberger in *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764 at [63]. In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [59] Lord Walker refers with apparent approval to a “broad or unified approach to equitable estoppel”. But in this speech he uses “equitable estoppel” to mean *proprietary* estoppel: see below, para.4-139 n.822; so that his approval is of a “unified approach” to the various situations within this kind of estoppel (below, para.4-140): not to such an approach to all of the *other* kinds of estoppel discussed in this chapter. In *Thorne v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776, Lord Walker (at [67]) while expressing no concluded view on the point seems to regard promissory estoppel as distinct from proprietary estoppel: see below, para.4-181 at nn.1150, 1151. Proprietary estoppel is likewise distinguished from estoppel by representation in *Newport City Council v Charles* [2006] EWCA Civ 1541 at [27], though neither of these forms of estoppel there applied: see paras 4-102 above and 4-154 below.

581. *Republic of India v India S.S. Co Ltd (The Indian Endurance)* (No.2) [1998] A.C. 878 at 913–914, where Lord Steyn distinguished between estoppels by convention and by acquiescence. This distinction was viewed with some scepticism in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [59] by Carnwath L.J., who added at [60] that there was a “degree of overlap” between these two kinds of estoppel. This view seems to be based on the passage from *The Indian Endurance* referred to earlier in this note. Lord Steyn had there said that an assumption either shared by the parties “or acquiesced in by the other” could give rise to an estoppel by convention and that this kind of estoppel was distinct from “estoppel by acquiescence” which can operate in favour of an “acquirer” of property against the “owner.” In this context, “estoppel by acquiescence” refers to one of the kinds of *proprietary* estoppel described in para.4-140 below; and it is the latter kind of estoppel that Lord Steyn distinguishes from estoppel by convention. Rix L.J. in the *ING* case, while accepting Carnwath L.J.’s “solution in terms of estoppel by convention”, also considered that the same solution could be based on promissory estoppel “supported by a duty to speak” (at [85]); and apparently regarded the failure to perform *that* duty as the necessary “acquiescence” (at [86]). Stanley Burnton L.J. inclined to the view that the case was “not one of promissory estoppel but of estoppel by convention” but thought it “unnecessary to decide this question, which is largely one of terminology” (at [76]). See also *Donegal International Ltd v Zambia* [2007] EWHC 197 (*Comm*), [2007] 1 Lloyd’s Rep. 397, distinguishing between estoppels by convention and by representation and referring with apparent approval to the text above in a previous edition of this book.

582. *Johnson v Gore Wood & Co* [2000] 2 A.C. 1 at 41. See also *Prime Sight Limited v Lavarello* [2013] UKPC 22, [2014] A.C. 436 at [30], referring to *Johnson v Gore Wood* [2002] 2 A.C. 1 at 39–40, where “Lord Goff expressed reservation about attempting to encapsulate the many circumstances capable of giving rise to an estoppel within a single formula, in part because consideration remains a fundamental principle of the law of contract and is not to be reduced out of existence by the law of estoppel” (at [30], per Lord Toulson).

583. i.e. estoppel by representation and promissory estoppel.

584. *Jordan v Money* (1854) 5 H.L.C. 195, criticised by Jackson (1965) 81 L.Q.R. 84; cf. Halliwell, 5 L.S. 15. Atiyah (op. cit., above, para.4-007, n.30, pp.53–57) suggests that the case does not support the proposition for which it is usually cited, but that there was a contract, which was



unenforceable for want of written evidence. But the claimant alleged no such contract: as Lord Cranworth said at p.215, “it is put entirely on the ground of misrepresentation.” The orthodox view is also supported by Lord Selborne (who was counsel in *Jordan v Money*) in his speech in *Maddison v Alderson* (1883) 8 App. Cas. 467, 473. For recent statements of the rule that estoppel can be based only on a representation of existing fact, see *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 1 Lloyd’s Rep. 67, 76; *China-Pacific SA v The Food Corp. of India (The Winson)* [1980] 2 Lloyd’s Rep. 213, 222 (reversed on other grounds [1982] A.C. 939); *Spence v Shell* (1980) 256 E.G. 55, 63; *T.C.B. Ltd v Gray* [1986] Ch. 621, 634 (affirmed [1987] Ch. 458); *Roebuck v Mungovin* [1994] 2 A.C. 224, 235; cf. *Janred Properties v Ente Nazionale per il Turismo* [1987] F.L.R. 179 (implied representation that approval *had* been given). So-called “estoppel by convention” is similarly based on a common assumption of *fact* or (at least to some extent) on one of “law”: see below, para.4-111. In *Robertson v Minister of Pensions* [1949] 1 K.B. 227, the equitable doctrine was mentioned though the representation was a statement of fact rather than a promise. In the present context, some difficulty arises from the statement in *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [23] that “in order to found a promissory estoppel (in the same way as any *other* estoppel based on a representation of fact) the representation or promise must be clear and unambiguous” (italics supplied). If the word “other” were read as meaning that promissory estoppel was “based on a representation of fact”, the statement here quoted would be hard to reconcile with the generally accepted view that promissory estoppel arises from a *promise*, as opposed to a statement of (present) *fact*, and would indeed contain an internal inconsistency by reason of the use of the words “or promise” where this phrase is italicised above. It would also be hard to reconcile the statement with the points made below at nn.587 and 589 and in para.4-105 at nn.594 to 595.

585. i.e. after the rejection of the distinction in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 between mistakes of fact and of law in the context of claims for the return of money paid under a mistake (below, paras 29-046, 29-047) and the recognition of the possibility that an assumption of law can give rise to an estoppel by convention (below, para.4-111).

586. *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All E.R. 553 at [35].


587. *ibid.*, stating that “it will very often be the case that a statement about law will not be capable of giving rise to a relevant estoppel” (giving examples). The actual decision in this case was that no such estoppel arose from an implied representation that deeds had been validly executed in accordance with s.1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 by which an instrument was “validly executed as a deed by an individual if it is signed (a)(i) by him in the presence of a witness who attests the signature.” Each of deeds in question was not witnessed and so “did not even appear to comply with the 1989 Act on its face” (at [42]).

588. ¶ e.g. *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] A.C. 741, 758; *Ogilvy v Hope-Davies* [1976] 1 All E.R. 683, 689; *B.P. Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 W.L.R. 783, 812 (affirmed [1983] 2 A.C. 352, without reference to this point); *China-Pacific SA v The Food Corp. Of India (The Winson)* [1980] 2 Lloyd’s Rep. 213, 222 (reversed on other grounds [1982] A.C. 939); *Ets. Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd’s Rep. 129, 133; *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 1 Lloyd’s Rep. 245, 259; *Peter Cremer v Granaria B.V.* [1981] 2 Lloyd’s Rep. 583, 587; *Société Italo-Belge pour le Commerce et l’Industrie v Palm & Vegetable Oils (Malaysia) Sdn. Bhd. (The Post Chaser)* [1981] 2 Lloyd’s Rep. 695, 700; *Roebuck v Mungovin* [1994] 2 A.C. 224, 235; in *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd’s Rep. 508, Andrew Smith J. rejected the submission that the facts of that case gave rise to an estoppel which “might be characterised as an estoppel by representation or an equitable estoppel” (at [33]); he did so on the ground that the claimant had made no relevant representation or so conducted itself as to give rise to the alleged estoppel (*ibid.*). It seems that “equitable estoppel” here refers to promissory estoppel; cf. *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 485, 489, where Roskill L.J. prefers to refer simply to the principle of *Hughes v Metropolitan Ry* (1877) 2 App. Cas. 439. *Amherst v James Walker Goldsmiths & Silversmiths Ltd* [1983] Ch. 305, 316 somewhat puzzlingly seems to distinguish between “promissory” and “equitable” estoppel. Terminological difficulty is compounded by occasional use of the phrase “equitable estoppel” to refer to true estoppel by representation: see below n.585.

- [589.](#) *Jordan v Money*, above, was itself an appeal from the Court of Appeal in Chancery. See also *Pigott v Stratton* (1859) 1 D.F. & J. 33, 51; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, 360; *Maddison v Alderson* (1883) 8 App. Cas. 467, 473; *Chadwick v Manning* [1896] A.C. 231, 238.
- [590.](#) Estoppel by representation of fact was recognised at common law at least as long ago as *Freeman v Cooke* (1848) 2 Ex. 654; but sometimes this form of estoppel is (confusingly) referred to as "equitable estoppel:" e.g. in *Lombard North Central plc v Stobart* [1990] Tr.L.R. 105, 107. In that case, an estoppel arose from a finance company's statement that no more than £1,003 was due under a conditional sale, when the actual sum due was nearly five times as much. This statement was clearly a representation of *fact* rather than a *promise*.
- [591.](#) Above, para.4-095.
- [592.](#) Above, para.4-097.
- [593.](#) This point accounts for the rule that estoppel by *representation* does not give rise to a cause of action: *Low v Bouverie* [1891] 3 Ch. 82 at 101, 105. If, for example, there are two warehousemen, A and B, and A represents to C that goods which have been bought by C are in B's warehouse when they are not, then the fact that A is estopped from denying the truth of the representation does not make A liable to C as a bailee of those goods. The rule that *promissory* estoppel does not give rise to a cause of action is based on different grounds explained in para.4-099 above.
- [594.](#) (1877) 2 App. Cas. 439, above, para.4-086. In *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 (below para.4-130) the fact that the promise had been made was likewise not in dispute.
- [595.](#) *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130, 134.
- [596.](#) Above, para.4-082.
- [597.](#) Above para.4-085.
- [598.](#) [1972] A.C. 741, 762.
- [599.](#) (1877) 2 App. Cas. 439; above, para.4-086.
- [600.](#) **¶** e.g. *Ogilvy v Hope-Davies* [1976] 1 All E.R. 683, 688–689; *Finagrain SA Geneva v P. Kruse Hamburg* [1976] 2 Lloyd's Rep. 508, 534; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221, 226; *Prosper Homes v Hambro's Bank Executor & Trustee Co* (1979) 39 R. & C.R. 395, 401; *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 488, 489, 490; *Scandinavian Trading Tanker Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 430 (affirmed without reference to this point [1983] 2 A.C. 694) *Procter & Gamble Philippine Manufacturing Corp. v Peter Cremer GmbH & Co (The Manila)* [1988] 3 All E.R. 843, 853; *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393, *The Times*, June 25, 2003; *Fortisbank SA v Trenwick International Ltd* [2005] EWHC 339; [2005] Lloyd's Rep. I.R. 464 at [29]; *Edo Corp v Ultra Electronics Ltd* [2009] EWHC 689 (Ch), [2009] 2 Lloyd's Rep. 349 at [28]; *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All E.R. (Comm) 204 at [117] (there are many other references in this case to "waiver or estoppel" and to "waiver and promissory estoppel"); *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [64], describing "waiver" in the context of para.4-015 of Vol.I, as "akin to promissory estoppel"; cf. *Bremer Handelsgesellschaft mbH v Finagrain Cie. Commercial Agricole & Financière* [1981] 2 Lloyd's Rep. 259, where Lord Denning, M.R. refers at 263 to "the principle ... in *Hughes v Metropolitan Railway*" while Fox L.J. refers at 266 to "waiver"; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr.* [1981] 1 Lloyd's Rep. 292, 298; *Bremer Handelsgesellschaft mbH v Bunge Corp.* [1983] 1 Lloyd's Rep. 476, 484; *BICC Ltd v Burndy Corp.* [1985] Ch. 232, 253; *Pearl Carriers Inc v Japan Lines Ltd (The Chemical Venture)* [1993] 1 Lloyd's Rep. 509, 521; and see *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch. 12 at 27, 28, where the issue was whether there had been a

“waiver” in the sense of election between remedies, rather than in the sense (here under discussion) of giving up rights. In *W. J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, 212 waiver is described as an instance of the principle of *Hughes v Metropolitan Ry* (above), which, however, is said to be of “wider” scope; cf. *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd’s Rep. 245 where an agreement not to plead a contractual time bar was held not to take effect as a “waiver” (at 249) but to give rise to an “equitable or promissory estoppel” (at 250). In *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 485, 489 the principle of *Hughes v Metropolitan Ry* (above) is, unusually, regarded as distinct from “promissory estoppel” but rather as an illustration of “waiver,” thus suggesting a difference between these two concepts—perhaps because in the *Brikom* case the waiver amounted to a contractual variation supported by consideration: cf. below, para.4-135. In *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No.2)* [1990] 2 Lloyd’s Rep. 431, 449 “waiver” is distinguished from “equitable estoppel” on the ground that the former doctrine requires the party who is alleged to have lost his rights to know the material facts, while the latter is not subject to any such requirements. But when “waiver” is said to be subject to this requirement, the reference is to “waiver” in the sense of election between remedies (below, para.24-007) and not to the “waiver” in the sense of relinquishing rights; and it is this latter type of waiver which is here under discussion. The reference in *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514, 518 to “waiver or estoppel” is likewise to election between remedies rather than to the relinquishing of rights which is under discussion in the present chapter. This was also the type of waiver under discussion in the *Oliver Ashworth* case, above, and in *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2002] EWCA Civ 1068; [2002] 2 Lloyd’s Rep. 487 at [64].

- [601.](#) e.g. *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 Lloyd’s Rep. 207, 212–213.
- [602.](#) *Prosper Homes v Hambro’s Bank Executor Trustee Co* (1979) P. & C.R. 395, 401; cf. *The Nerano* [1996] 1 Lloyd’s Rep. 1, 6 (“really one and the same thing”).
- [603.](#) See the authorities cited in nn.595 and 596, above.
- [604.](#) cf. para.4-104 above at n.577.
- [605.](#) Restatement, Contracts §90 and Restatement 2d, Contracts §90. In English law, the need to use the doctrine to give rise to a cause of action is less acute than in the United States, where the courts are less ready than the English courts to “invent” consideration (above para.4-010).
- [606.](#) (1988) 164 C.L.R. 387; Duthie 104 L.Q.R. 362; Sutton 1 J.C.L. 205.
- [607.](#) Above, para.2-125.
- [608.](#) For this requirement, see above, para.2-126.
- [609.](#) e.g. in *Dillwyn v Llewelyn* (1862) 4 D.F. & G. 517 below, paras 4-141, 4-170.
- [610.](#) e.g. in *William Lacey (Hounslow) Ltd v Davis* [1954] 1 Q.B. 428; *Countrywide Communications Ltd v ICL Pathways Ltd* [2002] C.L.C. 325; *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752, as to which see n.607 below.
- [611.](#) Below, para.4-154; proprietary estoppel would also probably have been excluded on the ground that A had no belief that a right had been or would be created in his favour while the agreement remained “subject to contract”: see *Att.-Gen. of Hong Kong v Humphreys Estates (Queens Gardens)* [1987] 1 A.C. 114; this obstacle can be overcome if one party induces the other to believe that he will not withdraw: see *ibid.*, at 124; but this qualification can scarcely enable the party by whom the interest in property is to be created to rely on proprietary estoppel.
- [612.](#) Such enrichment was the crucial factor leading to the award of a quantum meruit in *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (below, para.4-167) even though the claimant knew that the anticipated contract was binding in honour only and so took the risk of its never becoming legally binding.

- [613.](#) *Regalian Properties plc v London Dockland Development Corp.* [1995] 1 W.L.R. 212.
- [614.](#) There was no such enforcement in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752, as to which see above, n.607.
- [615.](#) A phrase borrowed from the title of a thesis for the degree of D.Phil. at Oxford University by M. J. Spence, in which the Australian cases are fully discussed and compared with English and other common law authorities.
- [616.](#) Above, para.4-002.
- [617.](#) e.g. *Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370.
- [618.](#) See, e.g., *Commonwealth of Australia v Verwayen* (1990) 179 C.L.R. 394, which could be explained in English law on the ground stated in para.4-102 at n.564.
- [619.](#) *Low v Bouverie* [1891] 3 Ch. 82; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep. 547, 557.
- [620.](#) Above, para.4-090.
- [621.](#) e.g. by the requirements that the promisee must believe that legal rights have been, or will be, created in his favour, and that these are rights in or over the promisor's property: see below, para.4-154; and by the further requirements derived from *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 and *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 and discussed in paras 4-149 to 4-152 and 4-161 to 4-164 below.
- [622.](#) There can be no such estoppel where one party is not yet in existence: see *Rover International Ltd v Cannon Film Sales Ltd* (1987) 3 B.C.C. 369, reversed in part on other grounds [1989] 1 W.L.R. 912 (company not yet formed).
- [623.](#) In *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 it was argued at [63] that "fact" here referred to "present fact", but Carnwath L.J. said that the "understanding" giving rise to the estoppel could "relate to the factual or legal basis on which a current transaction is proceeding, even if that understanding includes reference to events in the future" (at [64(i)]). This view is indirectly supported by Rix L.J. who adopted Carnwath L.J.'s "solution in terms of estoppel by convention" even though his preference was for the view that the estoppel arose from a "promissory representation" so that it could give rise to a promissory estoppel (at [85]–[86]).
- [624.](#) See below, para.4-111.
- [625.](#)  *Republic of India v India Steamship Co (The Indian Endurance)* (No.2) [1998] A.C. 878, 913; and see *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep. 343, 351; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 596; see also *Blindley Heath Investments v Bass* [2014] EWHC 1366 (Ch) at [127] to [134], where the requirements of estoppel by convention were satisfied, and para.3-107 of the 31st edition of this book (para.4-108 of this edition) was cited with apparent approval; *Phillip Collins Ltd v Davis* [2000] 3 All E.R. 808 at 823 (where there was no common assumption or acquiescence); *Thor Navigation Inc v Ingosstrakh Insurance* [2005] EWHC 19 (Comm), [2005] 1 Lloyd's Rep. 547 at [66], [70]; *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd's Rep. 588 at [2]; *Canmer International Insurance v UK Mutual Assurance* [2005] EWHC 1694, [2005] 2 Lloyd's Rep. 479 at [41], where there was no common assumption and hence no estoppel by convention; *Tamil Nadu Electricity Board v ST-CMS Electricity Company Private Ltd* [2007] EWHC 1713 (Comm), [2007] 2 All E.R. (Comm) 701 at [104], where again there was no evidence of the alleged shared assumption (at [115]); *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2007] EWHC 458 (Comm), [2007] 2 All E.R. (Comm) 215 at [53], where reliance on estoppel by convention failed on the same ground. On appeal this aspect of the decision at first instance in the *Kosmar* case was affirmed ([2008] EWCA Civ 147, [2008] 2 All E.R. (Comm) 14 at [85]) even though the actual decision was reversed on the ground that the



principle of “estoppel by election” (cf. below para.24-003) did not there apply; or, if it did apply, the requirement of an “unequivocal communication” (at [71]) needed to give rise to such an estoppel had not been satisfied (at [79]). For other cases in which the requirements of estoppel by convention were discussed but not satisfied (usually for want of the requisite common assumption) see *Haden Young Ltd v Laing O’Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [187]–[192]; *The W D Fairway (No.3)* [2009] EWHC 1782 (Admlty), [2009] 2 Lloyd’s Rep. 420 at [22]; *Republic of Serbia v ImageSut International NV* [2009] EWHC 2853 (Comm), [2010] 1 Lloyd’s Rep. 325 at [68], [69]; *Pindell v Airasia Berhad* [2010] EWHC 2516 (Comm), [2011] 1 All E.R. (Comm) 396 at [55]; *Khan v Tyne and Wear Passenger Transport Executive* [2015] UKUT 43 at [41], where the requirement stated in para.4-110 below was also said not to have been satisfied and *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWHC 803, where paras 3-107 to 3-114 of the 30th edition of this book (paras 4-108 to 4-115 in this edition) are referred to with apparent approval; *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC), where the requirements and effects of estoppel by convention are fully discussed at [43]–[50] and summarised at [57]. The decision in the *Crossco* case (above) was affirmed on appeal ([2011] EWCA Civ 1619, [2012] 2 All E.R. 754) without further discussion of the requirements of estoppel by convention. So far as the claim was based on this kind of estoppel, it failed on the findings of fact in the court below: see [2011] EWCA Civ 1619 at [115]; see also *F G Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2012] EWHC 2477 (Comm), [2012] 2 Lloyd’s Rep. 479, where the argument that there was an estoppel by convention was rejected on the facts as there “was no relevant communicated assumption which was shared by [the parties] ... or in which [the party alleged to be estopped] ... acquiesced” (at [73]); reversed, sub nom. *Caterpillar (NJ) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 All E.R. 785, without further reference to estoppel. *F G Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365 is doubted in *PST Energy 7 Shipping LLC v O W Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23, [2016] 2 W.L.R. 1193, but not on the estoppel point for which it is cited in this footnote. And see Spencer Bower and Turner, *Estoppel by Representation*, (4th edn) VIII.2.1; Dawson (1989) L.S. 16. The requirements of estoppel by convention are summarised in *Spliethoff’s Bevrachtungskantoor BV v Bank of China* [2015] EWHC 999 (Comm), [2015] 2 Lloyd’s Rep. 123 at [159], citing “paras. 3-107 [of the 31st edition] and following” with apparent approval; the corresponding paragraphs in the present, 32nd edition are paras 4-108 et seq. Carr J. would have held those requirements to have been satisfied but it was “strictly unnecessary” (at [154]) to decide the point since his “primary conclusion” (at [170]) was that the facts which the claimant sought to estop the defendant from denying had been established by the evidence (see at [147]–[154]). This was also the position in *Crabbe v Townsend* [2016] EWHC 2450 (Ch), [2017] W.T.L.R. 13 where an agreement between the Claimant and the Defendant (her brother) was held to have contractual force (see above, para.2-123) and the defendant further argued that the claimant was estopped by convention from enforcing that agreement. The requirements of this form of estoppel were stated at [2016] EWHC 2450 (Ch) at [7] but were held not to have been satisfied on the ground that the parties had not made any “common assumption” (at [18]) and on the further grounds that there had been no reliance on any such assumption (at [19]), nor would it have been “unjust or unconscionable” (at [20]) for the Claimant to enforce the agreement, so that the requirement stated in Main Work, Vol.I, para.4-108 at n.621 would also not have been satisfied, since no detriment had been suffered by the defendant nor any benefit obtained by the claimant (ibid.).

626. *Crédit Suisse v Borough Council of Allerdale* [1995] 2 Lloyd’s Rep. 315, 367–370 (where this requirement was not satisfied); affirmed on other grounds [1997] Q.B. 362; *Gloyne v Richardson* [2001] EWCA Civ 716, [2001] 2 B.C.L.C. 669 at [41] (below, para.4-110 at n.644); *Thor Navigation* case, above n.620 at [66] and *Ease Faith Ltd v Leonis Marine Management* [2006] EWHC 232 (Comm), [2006] 1 Lloyd’s Rep. 673 at [171] and *Durham v BAI (Run Off) Ltd* [2008] EWHC 2692 (QB), [2009] 4 All E.R. 26, at [277], [278], where the requirements of estoppel by convention were not satisfied; for the appeals in the *Durham* case, see above, para.4-100 n.554. Cf. *Townsend v Persistence Holdings* [2013] UKPC 12, where vendors of a property terminated the contract under a term entitling them to do so if a licence requisite for its lawful performance were not granted within 12 months. It was held that acts done by the purchaser in relation to the property did not estop the vendor from terminating, apparently because “what happened was precisely what the contract envisaged would, or at least could, happen” (at [38]).

[627.](#) *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC) at [51], relying on Robert Goff J. in *Amalgamated Investment and Property Co Ltd v Texas Commerce Bank International Ltd* [1982] Q.B. 84 at 104 F–G (the reference to p.“34” in para.[44] of the Official Transcript of the *Mears* case appears to be a misprint).

[628.](#) **!** *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd’s Rep. 343, 352; *Hiscox v Outhwaite (No.1)* [1992] 1 A.C. 562, affirmed on other grounds at 585; *The Indian Endurance (No.2)*, above, n.620 at 913. For the difficulties of applying estoppel by convention so as to bind members of a company pension scheme, see *Trustee Solutions v Dubery* [2006] EWHC 1426 (Ch), [2007] I.C.R. 412. They arise mainly from the need to show that “the general body of members” (at [50]) had all put the same interpretation on the scheme and had acted on the assumption. Here “the evidence was simply too exiguous” to support such a conclusion. The decision was reversed on other grounds: [2007] EWCA Civ 771, [2008] I.C.R. 101; there was no appeal on the estoppel point: see [2007] EWCA Civ 771 at [12]. For the requirements of estoppel by convention “arising out of non-contractual dealings, see *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [52], cited in *Grieverson v Grieverson* [2011] EWHC 1367 (Ch) at [27]. For discussions of estoppel by convention, see also *Mitchell v Watkinson* [2014] EWCA Civ 1472, [2015] L. & T.R. 22 at [51], where para.3-107 of the 31st edition (para.4-108 of the present, 32nd, edition) is cited with apparent approval; in that case the defence of estoppel by convention failed for want of a common assumption (at [60])—but the appeal was dismissed on other grounds: at [95]; *Edray Ltd v Canning* [2015] EWHC 2744 (Ch), where the two requirements of estoppel by convention stated at notes 620 and 621 (that there must be a common assumption and that it must be unjust to allow the party alleged to be estopped to resile from that assumption (at [38]) were held to have been satisfied (at [48]); and *Roundlistic Ltd v Jones* [2016] UKUT 325 where the requirements of estoppel are stated at [47] and [48] and no such estoppel was held to have arisen as the parties had not made any “common assumption” (at [50] and [56]). See also *Preedy v Dunne* [2016] EWCA Civ 805, [2016] C.P. Rep. 44, where, after the claim based on proprietary estoppel had been rejected at first instance, an alternative claim was made on appeal that the facts had given rise to an estoppel by convention. This claim, too, was rejected on the grounds that the parties had not made any “common assumption” ([2016] EWCA Civ 805 at [64]) and that, even if there had been such an assumption, there had been no reliance on it by the party claiming the benefit of the estoppel (ibid.).

[629.](#) cf. the discussion of the distinction between various kinds of estoppel in para.4-104, above;

[630.](#) **!** *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84, 131–132 below, para.4-109; *Republic of Serbia v ImageSat International NV* [2008] EWHC 2853 (Comm), [2010] 1 Lloyd’s Rep. 235 at [71]: “no requirement of an unequivocal representation” (italics supplied), as opposed to an “unambiguous and unequivocal” assumption (below at n.625); *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] 3 W.L.R. 166 at [73] (“not founded on a unilateral representation”); *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2016] 2 Lloyd’s Rep. 229 at [227] (“does not depend on any representation or promise”); *Process Components Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch) at [116], [117], distinguishing between estoppel by convention and estoppel by representation (in this case the requirements of both these forms of estoppel were satisfied: see at [135]). See also *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC), [2017] 1 Lloyd’s Rep. 331 at [101], where the statement that “Estoppel by convention depends on a shared assumption, not a representation ...” forms part of Coulson J.’s discussion of the “ingredients of estoppel by convention”. In that case the attempt to invoke estoppel by convention failed on the ground that there was no “common understanding” (at [111]), no “sharp practice” (at [113]) by the party alleged to be estopped, nor any detriment suffered by the other party (at [118]) so that it would not be unconscionable for the former party to act inconsistently with any assumption, had it been made (see Main Work, Vol.I, para.4-108 at n.421).

[631.](#) **!** The passage running from Main Work, Vol.I, para.4-108 after n.619 to n.624a is quoted with apparent approval by the Court of Appeal in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] 3 W.L.R. 166 at [74] quoting from the judgment of the Court below



[2014] EWHC 1366 (Ch), where the quotation was taken from para.3-107 of the 31st edition of the Main Work. In the *Dixon* case, it was further held that such an estoppel was not “confined to cases of mistake” but could extend to cases in which the common assumption of the parties had arisen simply because they had forgotten the true facts” since “a mistaken recollection [was] not ... legally different from a state of forgetfulness” (at [79]). In this case the erroneous common assumption of parties to a share transfer arose because they had forgotten that valid rights of pre-emption existed in relation to the shares.


632. *Smithkline Beecham plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch. 71 at [102], where this point was “not disputed” and the concession was evidently approved by the Court; cf. *Commercial Union Assurance plc v Sun Alliance Group plc* [1992] 1 Lloyd’s Rep. 474, 481 where the argument based on estoppel by convention failed as the evidence did not “clearly and unequivocally establish the agreement of the parties ... on the conventional interpretation.” A passage from *Troop v Gibson* [1986] 1 E.G.L.R. 1 cited in *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA 274, [2002] 1 All E.R. (Comm) 734 at [84] must be read as denying the requirement of a representation rather than the quality of clarity of the common assumption: see the reference there to “sufficient clarity and certainty of the common assumption”; cf. *ibid.*, at [38]; cf. the *Republic of Serbia* case, above n.624, at [71] (“clarity and certainty necessary for a conventional agreement”) and [81] (“with clarity”). The present requirement was doubted in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472 at [64(iii)] but, as only one of the authorities cited in this note (*viz. Troop v Gibson*) was, in this context, drawn to the attention of the Court of Appeal in the *ING* case, the doubt there expressed may call for further consideration.

633. See *Menolly Investments 3 SARL v Cemp SARL* [2009] EWHC 516 (Ch), 125 Con. L.R. 75 where the estoppel was said to have been based on the fact that the party allegedly estopped had “represented ... that practical completion [of building works] had been achieved” (at [153(g)]) or on both parties having “conducted themselves on a common understanding or convention” to that effect (at [153h]); see also [184], where “[154]” seems to be a misprint for “[153]”. The further reference to “promissory” estoppel at [154] is puzzling since, insofar as the estoppel was based on a representation, that representation (as quoted above) was one of existing fact rather than one amounting to a promise (see above, para.4-104). The further point that the estoppel was said to arise from failure to perform “a duty to speak out” (at [184]) can be explained that the case fell within one of the “exceptional circumstances” in which estoppel by representation can arise from non-disclosure, as opposed to a positive representation (below, para.7-103).

634. *Colchester BC v Smith* [1992] Ch. 421, 434.



635. Above, paras 4-048 et seq.

636. *Colchester BC v Smith*, above, at 435.


637.  *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All E.R. 553 at [179]. Cf. *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd’s Rep. 388 where, as a “contract by conduct” had come into existence (see above, para.2-029) it was “not necessary to determine” an issue relating to estoppel by convention: see at [21], [37]. In *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] 3 W.L.R. 166 the Court of Appeal did “not think that there must be expression of accord” and that the common assumption could be “inferred from conduct, or even silence ... ” (at [92]), though this view did not dispense with the requirement, discussed in Main Work, Vol.I, para.4-110, that “something must be shown to have ‘crossed the line’ to manifest an assent to the assumption” (at [92]). “Silence”, could it seems, only satisfy this requirement in cases where the party alleged to be estopped was under a “duty to speak”, as, for example in *Process Components Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch) : see at [129]-[132].

638. [1982] Q.B. 84. See also *Astilleros Canarios SA v Cape Hatteras Shipping Co SA* [1982] 1 Lloyd’s Rep. 518, 527; *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC) at [51].

639. cf. on the issue of construction, *TCB Ltd v Gray* [1987] Ch. 458; *Bank of Scotland v Wright* [1990] B.C.C. 663.
640. Contrast *Crédit Suisse v Allerdale BC* [1996] 2 Lloyd's Rep. 315, 367, where this requirement was not satisfied as the conduct of the party alleged to be estopped had not "influenced the mind" of the other party; the decision was affirmed on other grounds [1997] Q.B. 362.
641. A dictum in the *Crédit Suisse* case, above n.633 at 367 which appears to treat representation as a requirement of estoppel by convention is, with respect, inconsistent with the treatment of that doctrine in the *Amalgamated Investment* case.
642. cf. *Government of Swaziland Central Transport Administration v Leila Maritime Co Ltd (The Leila)* [1985] 2 Lloyd's Rep. 172; as to which see below, n.641; *Thornton Springer v NEM Insurance Co Ltd* [2000] 2 All E.R. 489 at 516–518.
643. *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep. 343. cf. also *Kenneth Allison Ltd v A. E. Limehouse & Co* [1992] 2 A.C. 105, 127 per Lord Goff. The other members of the House of Lords took the view that there was an actual agreement (to accept service of a writ) which was legally effective even though the requirements of the Rules of the Supreme Court (with regard to personal service) had not been complied with.
644. [2011] EWCA Civ 353, [2012] 1 W.L.R. 472.
645. *Empresa Lineas Maritimas Argentinas v The Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 2 Lloyd's Rep. 517 (where neither of these requirements was satisfied); *Astilleros Canarios SA v Cape Hatteras Shipping Co SA* [1982] 1 Lloyd's Rep. 518, 527; *Heinrich Hanno & Co B.V. v Fairlight Shipping Co (The Kostas K.)* [1985] 1 Lloyd's Rep. 231, 237; *The Vistafjord*, above para.4-109 n.636; *Thor Navigation Inc v Ingosstrakh Insurance* [2005] EWHC 19 (Comm), [2005] 1 Lloyd's Rep. 547 at [66]; *Fortisbank SA v Trenwick International* [2005] EWHC 339, [2005] Lloyd's Rep. I.R. 464 at [43], where the present requirement was not satisfied; *Tamil Nadu Electricity Board v ST-CMS Electricity Company Private Ltd* [2007] EWHC 1713 (Comm), [2007] 2 All E.R. (Comm) 701 at [125], where again this requirement was not satisfied; *Bear Stearns plc v Forum Global Equities Ltd* [2007] EWHC 1576 at [192], where again the present requirement was not satisfied but the actual decision was that the communications between the parties had given rise to a contract: see above, para.2-121; *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All E.R. 533 at [209], where this requirement was not satisfied: see at [185].
646. *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No.2)* [1990] 2 Lloyd's Rep. 395, 405, following *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pty Ltd (The August P. Leonhardt)* [1985] 2 Lloyd's Rep. 28, 35; *Hiscox v Outhwaite (No.3)* [1991] 2 Lloyd's Rep. 524, 533; *The Indian Endurance*, above para.4-108 n.620, at 913; *Republic of Serbia v ImageSat International NV* [2009] EWHC 2853, [2010] 1 Lloyd's Rep. 325 at [69].
647. As in *The Vistafjord* [1988] 2 Lloyd's Rep. 343, 351 ("very clear conduct crossing the line ... of which the other party was fully cognisant"). An even stricter requirement was stated in *Bank Leumi (UK) plc v Phillip Robert Akrill* [2014] EWCA Civ 909, where it was said that there was no estoppel by convention because the assumption in question had not been "expressly communicated" (at [55], italics supplied) between the parties.
648. *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pty Ltd (The August P. Leonhardt)* [1985] 2 Lloyd's Rep. 28, reversing [1984] 1 Lloyd's Rep. 332, which had been followed in *The Leila*, above n.635. The present status of *The Leila* therefore remains in some doubt but the two cases can be reconciled on the ground that in *The Leila* there was, while in *The August P. Leonhardt* there was not, conduct by the party alleged to be estopped from which acquiescence in the other party's mistaken belief could be inferred.
649. *HIH Casualty & General Insurance v Axa Corporate Solutions* [2002] EWCA Civ 1253; [2002] 2 All E.R. (Comm) 1053 at [32].

- [650.](#) *Blankley v Central Manchester etc. NHS Trust* [2014] EWHC 168 (QB), [2014] 2 All E.R. 1104 where the actual decision was that the state of facts which the defendant was alleged to be estopped from denying actually existed (at [59]). But it was also said (at [60]) that, if that had not been the case, the alleged estoppel would not have arisen since no inference of any shared assumption by, or communication from, the defendant could be drawn from the latter's conduct as this conduct was more readily explicable on other grounds.
- [651.](#) *Gloyne v Richardson* [2001] EWCA Civ 716; [2001] 2 B.C.L.C. 669 at [41].
- [652.](#)  *Amalgamated Investment case* [1982] 2 Q.B. 84 at 122, 126; *The Vistafjord* [1988] 2 Lloyd's Rep. 343 at 351; *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570 at 596; *Republic of India v India Steamship Co. (The Indian Endurance)* (No.2) [1998] A.C. 878 at 913; *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC) at [51]. Cf. *NRAM v McAdam* [2014] EWHC 4174 (Comm), [2015] 1 All E.R. (Comm) 1239 at [29] and [2015] EWCA Civ 751, [2016] 2 All E.R. (Comm) 333 at [43] and [2015] EWCA Civ 751, [2016] 2 All E.R. (Comm) 333 at [43]; *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] 3 W.L.R. 166 at [73].
- [653.](#) See *Charterbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [47] ("some common assumption, which may include an assumption that words will bear a certain meaning"). Such an assumption could also be called one of "private rights" and hence of fact: below, para.7-016.
- [654.](#) e.g. *Carmichael v National Power plc* [1992] 1 W.L.R. 2042 at 2049; *Hay v Gilgrove* [2013] EWCA Civ 412, [2013] I.C.R. 1139 at [24], [29].
- [655.](#)  For a recent case in which estoppel by convention arose from a shared mistaken assumption as to the true construction of a contract, see *Zvi Construction Co LLC v Notre Dame University (USA) in England* [2016] EWHC 1924 (TCC), [2016] B.L.R. 604 at [64]. For earlier cases in which a shared assumption as to the construction of the contract gave rise to an estoppel by convention, see Main Work, Vol.I, para.4-109.
- [656.](#) [2002] 2 A.C. 1.
- [657.](#) See *ibid.*, at p.34 for an alternative ground for Lord Bingham's decision. Lords Cooke and Hutton agreed with Lord Bingham on the "abuse of process" point but without referring to estoppel by convention.
- [658.](#) *ibid.*, at p.40.
- [659.](#) *ibid.*, at p.61.
- [660.](#) Above, nn.645, 646.
- [661.](#) Below, para.6-042, 29-046.
- [662.](#) Below para.4-115. For other limits to the principle that an assumption of law may give rise to estoppel by convention, see *Durham v BAI (Run Off) Ltd* [2008] EWHC 2692 (QB), [2009] 2 All E.R. 26 at [268]; for the appeals in this case, see above, para.4-100 n.554.
- [663.](#) *Amalgamated Investment & Property case* [1982] Q.B. 84, 126, 130.
- [664.](#) Such an assumption is one of fact (and not as to the future): below, para.7-015.
- [665.](#) [1982] Q.B. 84; above, para.4-109.
- [666.](#) Above, para.4-104.
- [667.](#) In this respect its legal nature resembles that of estoppel by representation: see above,

para.4-104.

668. *The Vistafjord* [1988] 2 Lloyd's Rep. 343, 351 ("not dependent on contract but on common assumption"). For this reason the citation in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 17–18 of the *Amalgamated Investment & Property* case (above, para.4-109) seems, with respect, to be of doubtful relevance. In the *Williams* case there was no doubt that the promise had been made; and the actual decision was that it was supported by consideration and thus binding contractually: above, para.4-069.
669. This was also true in *The Vistafjord*, above, n.660 and para.4-109.
670. It is enough for consideration to move from the promisee (the X bank); it need not move to the hypothetical promisor (A): above paras 4-037 et seq.
671. e.g. (apparently) *Troop v Gibson* [1986] 1 E.G.L.R. 1.
672.  *Hiscox v Outhwaite* [1992] A.C. 562 at 575, per Lord Donaldson, M.R. (affirmed *ibid.* p.585 on other grounds); *Phillip Collins Ltd v Davis* [2000] 3 All E.R. 808 at 823. *Tamil Nadu Electricity Board v ST-CMS Electricity Company Private Ltd* [2007] EWHC 1713 (Comm), [2007] 2 All E.R. (Comm) 701 at [105], [128]; *Zvi Construction Co LLC v Notre Dame University (USA) in England* [2016] EWHC 1924, [2016] B.L.R. 604 where it was said (at [64]) that the estoppel which operated in relation to the dispute before the Court did not apply to any future disputes, presumably because by the time they arose the truth would have been revealed in the instant proceedings. But where the common assumption was that intellectual property was vested in one of the parties sharing that assumption it was held that the other party was "permanently (like a tenant or bailee) estopped from denying" that the property was so vested and that a licence agreement relating to it had been terminated: *Process Components Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch) at [136], apparently cross referring to *ibid.* at [128].
673. *Revenue and Customs Commissioners v Benchdollar Limited* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174 at [60], per Briggs J. For the nature of the falsity of the common assumption, see, paras 2-170 and 4-036 above.
674. [2009] EWHC 1310 (Ch) at [60].
675. At [61].
676. At [61].
677. At [85].
678. At [65].
679. *Combe v Combe* [1951] 2 K.B. 215, 219; above, para.4-099.
680. Below, para.7-103.
681. [1982] Q.B. 84; above, para.4-109.
682. [1982] Q.B. 84, 126.
683. *ibid.* at 132; cf. *Dumford Trading A-G v OAO Atlantrybflot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289 at [39], where Rix L.J. referred to Brandon L.J.'s view in the *Amalgamated Investment case* [1982] Q.B. 84, 131–132 as the likely answer to the argument that the estoppel was being used "as a sword rather than a shield." In *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWHC 274, [2002] 1 All E.R. (Comm) 737 at [88] Mance L.J. said that he "would prefer" the view of Brandon L.J. to that of Lord Denning M.R. The alleged estoppel in the *Baird* case was regarded at first instance as one "by convention" (at [20]) but it is far from clear whether the Court of Appeal so regarded it. In *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC) at [88] Akenhead J. said that he "would prefer" Brandon L.J.'s view



in the *Amalgamated Investment* case to that there expressed by Lord Denning M.R.

684.

❗ [1982] Q.B. 84 at 122. A similar view may be hinted at in *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1999] Q.B. 1 at 17–18; but as to this see above, para.4-112 n.660. In *NRAM v McAdam* [2014] EWHC 4174 (Comm), [2015] 1 All E.R. (Comm) 1239 the point is left open, there being no need to decide it since the shared assumption was held, as a matter of the true construction of the contract, to have contractual force: see at [25]–[28]. In this case the Court of Appeal allowed the appeal: see [2015] EWCA Civ 751, [2016] 2 All E.R. (Comm) 333 at [59]. The Court held that the judge below had been wrong to conclude that the contract contained the term giving effect to the allegedly shared assumption (at [50]); and that he had also been wrong in holding that, if there was no “relevant contractual term,” then the lender in that case was “estopped on the basis of some sort of contractual estoppel, estoppel by convention or estoppel by representation” from denying that the borrower was protected as if there had been some such term (at [56]); but the Court further held that the lender’s representations gave rise to liability (1) under the Misrepresentation Act 1967 and (2) as “contractual warranties” (at [57]), presumably collateral to the main contract.

685.

*Keen v Holland* [1984] 1 W.L.R. 251, 261–262; and see n.675 above. In *Wilson Bowden Properties Ltd v Milner and Bardon* [1996] C.L.Y. 1229 the cause of action arose out of the undisputed contract and not out of the estoppel.

686.

[1988] 2 Lloyd’s Rep. 343; above, para.4-109. In *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd’s Rep. 570, the estoppel would likewise (if supported on the facts) have operated defensively; cf. also *Mitsui Babcock Energy Ltd v John Brown Energy Ltd* (1996) 51 Const. L.R. 129, 185–186 where the effect of the estoppel would (if the contract in question had not existed) again have been to restrict the plaintiff’s rights by reference to the terms of the (in that event non-existent) contract.

687.

Below, para.7-103.

688.

Above, para.4-102.

689.

*Burrowes v Lock* (1805) 10 Ves. 470, as explained in *Low v Bouverie* [1891] 3 Ch. 82.

690.

❗ This was the effect of the estoppel in *Furness Withy (Australia) Ltd v Metal Distributors (UK) Ltd, (The Amazonia)* [1990] 1 Lloyd’s Rep. 238, where it operated to prevent a party from relying on facts giving rise to a mistake of both parties alleged to make the contract void (see above, para.3-022 at n.86) and where the effect of allowing him to rely on those facts would have been to bar the other party’s claim by lapse of time. For the possibility that estoppel by convention may deprive a party of a defence, see also *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd’s Rep. 159 at 175–176; semble this is subject to the limitation discussed with regard to promissory estoppel at para.4-102 above. See also *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch) (above, paras 2-170, 4-113), where estoppel by convention operated so as to deprive taxpayers in part of the defence that the Revenue’s claims against them were barred by lapse of time. See also *Mears Limited v Shoreline Housing Partnership Limited* [2013] EWCA Civ 639, [2013] B.L.R. 393, where the Court of Appeal recognised that estoppel by convention could not be “used to set up a contract where there was no contract at all” (at [24]), but held that such an estoppel could deprive the defendant of a defence (at [20]). In that case the defence was that the defendants were entitled to deduct from the amount claimed under a maintenance contract amounts alleged to have been overpaid by them to the claimants for earlier work done by the claimants under that contract; and the estoppel was alleged to have arisen on the ground that both parties had conducted themselves on the common assumption that payment to the claimants would be made at a rate other than that actually specified in the contract: see the statement of facts and the pleadings at first instance [2013] EWHC 27 (TCC), [2013] B.L.R. 181 at [6(c)], [9(e)], [17]. These allegations required an investigation of the facts, so that it would be inappropriate to accede to the defendants’ application that the claim should be struck out (as opposed to proceeding to trial: [2013] EWCA Civ 639 at [21]). In further proceedings in this case ([2015] EWHC 1396 (TCC)) Akenhead J. held that the requirements of estoppel by convention had been satisfied (at [64]–[69]), so that the defendants were deprived by that estoppel from

asserting that they were entitled to make the deduction described above and that they were accordingly liable for the amount of that deduction (at [84]). The statement (at [69]) that “the amount deducted should be repaid” (italics supplied) gives rise to some difficulty as the overpayment had been made *by* (not *to*) the defendants; but the sense is clear, i.e. that the estoppel prevented the defendants from relying on the fact of overpayment as a ground for in part resisting the claimants’ claim under the present contract. The significant point here is that the claimants’ cause of action in respect of that deduction was the latter contract and not the estoppel. The case thus provides a further illustration of the point made in the text above (as well as in para.[51] of the judgment). See also *Rivertrade Ltd v EMG Finance Ltd* [2015] EWCA Civ 1295, where estoppel by convention did not “create an enforceable right” but was relied upon “to bind the parties to [the] agreement to an interpretation that would not otherwise be correct” (at [50]).

691. cf. *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 (above, para.4-111) where the estoppel likewise did not create the cause of action, which was based on the alleged negligence of the defendant solicitors; it merely helped to dispose of the defendants’ objection that the action to enforce that claim was an abuse of process.

692. ! [2015] EWCA Civ 1295.

693. ! At [50].

694. ! At [48].

695. ! (1809) 2 Camp. 317, 6 Esp. 129, Vol.I, para.4-067.

696. ! Above, at note 683a.

697. ! [2016] EWCA Civ 1295 at [48].

698. ! At [50], quoted above at note 683b.

699. ! The concession referred to at note 683f had the effect that the point was not fully argued.

700. ! cf. *Russell Brothers (Paddington) Ltd v John Elliott Management Ltd* (1995) 1 Const. L.J. 377, denying that estoppel by convention can be used as a sword. Contrast dicta in *Thornton Springer v NEM Insurance Co Ltd* [2000] 2 All E.R. 489 at 516–518, which seem to assume that estoppel by convention can give rise to new rights. This aspect of the case gives rise to the same difficulty as that discussed in relation to promissory estoppel at para.4-099 n.544, above. The actual decision in the *Thornton Springer* case was that there was a contract supported by consideration in the form of “an implied promise not to take proceedings” (at p.516): see above, para.4-048. The view that estoppel by convention cannot create new rights is also supported by *Smithkline Beecham plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch. 71 at [103], [107] and [110], where the claim was based on estoppel by representation and by convention (at [102]). This was also the position in *Haden Young Ltd v Laing O’Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) (above, para.4-099) where the statement, at [169], that estoppel by convention could not create a contract where none existed in fact seems to mean that such an estoppel cannot create a cause of action. See also the *Mears case* [2013] EWCA Civ 639 at [24], quoted in n.682 above, and *Transgrain Shipping BV v Deulemar Shipping Ltd* [2014] EWHC 4202 (Comm), [2015] 1 Lloyd’s Rep. 461, where para.3-113 of the 31st edition of this book (para.4-114 in the present edition) was cited at [39] with apparent approval and it was said (ibid.) that an estoppel “could not create an agreement”. See also *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] 3 W.L.R. 166 at [73], where it is said that the effect of estoppel by convention “is to bind the parties to their shared, even though mistaken understanding or assumption of law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case




of promissory estoppel and proprietary estoppel)". Insofar as this passage supports the view that the effect of promissory estoppel gives rise to a cause of action, it is, with respect, inconsistent with the authorities discussed in para.4-099 of the Main Work which on balance support the view that promissory estoppel does *not* of itself give rise to a cause of action; though (as is pointed out in n.550 to that paragraph) this position has given rise to some judicial "unease": *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 W.L.R. 1884 at [28].

701. *Orion Insurance plc v Sphere Drake Insurance* [1922] 1 Lloyd's Rep. 239. But an estoppel by convention may be based on an arrangement which, for want of contractual intention, lacks contractual force where the liability in respect of which it is invoked arises otherwise than under a contract: *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [51] (estoppel by convention "arising out of non-contractual dealings").
702. *Yaxley v Gotts* [2000] Ch. 162 at 182. A party may, however, be liable on an agreement which does not comply with the formal requirements of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 on the basis of a *proprietary* estoppel amounting, or giving rise also, to a constructive trust: see *Kinane v Mackie Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345, below paras 4-141, 5-040. Such liability arises by virtue of s.2(5) of the 1989 Act. On the question whether a defendant would be so liable, if his conduct gave rise to a proprietary estoppel but *not* to a constructive trust, there may be a difference of judicial opinion in the *Kinane* case when Arden L.J. at [28] can be read as taking the view that the s.2(5) exception to s.2(1) would apply in such a case, while Neuberger L.J. at [46] takes the opposite view. In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (below, paras 4-161 to 4-167), the latter view is also supported by Lord Scott at [29] (with whose speech Lords Hoffmann, Brown and Mance agreed) who added that it was not necessary to resolve the question since in that case the agreement was not specifically enforceable (quite apart from s.2) as it "remained incomplete" (above, para.2-119). Probably for this reason, Lord Walker in the *Cobbe* case [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [93] said that it was "not necessary to consider the issue on section 2". See also *Thorne v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 (below, para.4-149) where Lord Neuberger said at [99] that "as at present advised" he did "not consider that section 2 [of the 1989 Act] ... ha[d] any impact on ... a straightforward estoppel claim without any contractual connection"; in this respect the claim in this case differed from that in the *Cobbe* case (cited above in this note). Where s.2 thus had "no impact", there would be no need to rely on the s.2(5) exception to s.2(1). For the relationship between proprietary estoppel and constructive trusts, see below, para.4-142. The requirements of proprietary estoppel (below, paras 4-147 to 4-164) differ widely from those of estoppel by convention (above, paras 4-108 to 4-111).
703. cf. *Shah v Shah* [2001] EWCA Civ 527; [2001] 4 All E.R. 138 at [31] (deed signed and witnessed but not signed in presence of attesting witness); contrast *ibid.*, at [28] (deed not signed at all); *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All E.R. 553 at [43] (deed signed but not witnessed and therefore "did not even appear to comply with" s.1(3) of the Law of Property (Miscellaneous Provisions) Act 1989). In both these cases, the estoppels unsuccessfully invoked.
704. *Actionstrength Ltd v International Glass Engineering SpA* [2003] UKHL 17; [2003] 2 A.C. 541.
705. The principle stated in the text above does not apply where the statutory right or defence *can* be excluded by contract (e.g. to the defence that the claim in question is statute-barred by lapse of time): *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174.
706. See *Keen v Holland* [1984] 1 W.L.R. 251; cf. *Wilson v Truelove* [2003] EWHC 750, [2003] W.T.L.R. 609; *Laroche v Spirit of Adventure (UK) Ltd* [2008] EWHC 788 (QB), [2008] 2 Lloyd's Rep. 34 at [73], affirmed [2009] EWCA Civ 12, [2009] 2 All E.R. 175 without reference to the present point; contrast *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1989] 1 Lloyd's Rep. 403 (illegality under foreign statute); *Godden v Merthyr Tydfil Housing Association* (1997) 74 P. & C.R. D1. For discussion of a similar point in relation to estoppel by representation, see *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] H.L.R. 18 (above, para.4-102), where the outcome was said at [18]–[21] to depend on whether this type of estoppel would "frustrate" the purpose of the statute; this reasoning could also apply

in relation to estoppel by convention.

[707.](#) Above, para.4-111.

[708.](#) *Keen v Holland*, above, n.690; *Hamed El Chiaty & Co (T/A Travco Nile Cruise Lines) v Thomas Cook Group (The Nile Rhapsody)* [1992] 2 Lloyd's Rep. 399, 408, where, however, the court treated the contract as rectified so as to correct the mistake; affirmed [1994] 1 Lloyd's Rep. 382, without reference to estoppel by convention.

[709.](#)  *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [57]; *Springwell Navigation Corp. v J P Morgan Chase Bank* [2010] EWCA Civ 1221 at [157]–[170]; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [230]; *Cassa Di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [466]; *Shaker v VistaJet Group Holding SA* [2012] EWHC 1329 (Comm), heading before [18] where “contractual estoppel” is mentioned but is not the ground of decision. See also the reference in *NRAM v McAdam* [2014] EWHC 4174 (Comm), [2015] 1 All E.R. (Comm) 1239 at [14] and [29] to “estoppel by convention and/or contractual estoppel”. The phrase (at [14(iii)(a)]) “if *either* can be established” (italics supplied) appears to treat these two concepts as distinct, but it is less clear whether they are likewise treated as distinct at [29]. If the nature of “contractual estoppel” is correctly stated in the text above after the present note, then there seems in principle to be no reason why such an “estoppel” should not be used as a sword even if estoppel by convention cannot be so used (see above, para.4-114); and a hint to the contrary at [14(iii)(a)] in the *NRAM* case above is, with respect, open to question. It has been said that a statement need not be one “as to a *past* state of affairs” in order to give rise to a “contractual estoppel”: *Crédit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) at [307]–[309]. The Court of Appeal allowed the appeal in the *NRAM* case: see [2015] EWCA Civ 751, [2016] 2 All E.R. (Comm) 333 at [59]. The judgment of the Court of Appeal contains two references to “estoppel by convention and/or contractual estoppel” (at [52] and [56]). Neither of these passages refers to any requirement that the statement or common assumption must relate to a “past” state of affairs to be capable of giving rise (in cases of alleged “contractual estoppel”) to a cause of action.

[710.](#) See *Olympic Airlines SA v ACG Acquisition xx LLC* [2013] EWCA Civ 369, [2013] 1 Lloyd's Rep 658, where the phrase “contractual estoppel” occurs in a statement of the grounds of appeal (at [16]) and in a quotation from the judgment at first instance (at [46]). But the concept forms no part of the reasoning which led Tomlinson L.J. (with whose judgment Kitchin and Toulson L.JJ. agreed) to conclude that the lessee of an aircraft was, in the circumstances which had occurred, precluded by a term of the contract from denying that the aircraft was, at the time of delivery, in an airworthy condition: that conclusion was based simply on the construction of that term. In *Prime Sight Limited v Lavarello* [2013] UKPC 22, [2014] A.C. 436 a deed of assignment of an underlease expressed to have been made in consideration of a sum of money “now paid by the Assignee” was held to have “estopped” the assignor's trustee in bankruptcy from asserting that the payment had not been made; but no reference was made to the concept of “contractual estoppel”, the ground of decision being simply that the assignee was “on ordinary contractual principles to rely on the terms of the deed ...”, i.e. (apparently) on its true construction. There is, with respect, force in the statement in the *Crédit Suisse* case (above, n.693) at [309] that “contractual estoppel” is no more than a “convenient label” for describing a situation which lacks a “defining characteristic of estoppels”, viz., “a detriment in some form or other”.

[711.](#) e.g. the *Olympic Airlines* case, above n.694.

[712.](#) See the cases discussed in para.4-109 above, distinguishing between issue of construction and issues of estoppels by convention.

[713.](#) See, in particular, para.4-108 above at nn.621 and 631.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 10. - Part Payment of a Debt

### (a) - General Rule

#### General common law rule

#### 4-117

At common law, the general rule is that a creditor is not bound by a promise to accept part payment in full settlement of a debt. An accrued debt can be discharged by the creditor's promise only if the promise amounts, or gives rise, to an effective accord and satisfaction. <sup>714</sup> A counter-promise by the debtor to pay only part of the debt provides no consideration for the accord, as it is merely a promise to perform part of an existing duty owed to the creditor. And the actual payment is no satisfaction under the rule in *Pinnel's Case* that "Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole." <sup>715</sup> This rule was approved by the House of Lords in *Foakes v Beer*. <sup>716</sup> Mrs Beer had obtained a judgment against Dr Foakes for £2,090 19s. Sixteen months later, Dr Foakes asked for time to pay. A written agreement <sup>717</sup> was made under which Mrs Beer undertook not to take "any proceedings whatsoever" on the judgment, in consideration of an immediate payment by Dr Foakes of £500 and on condition <sup>718</sup> of his paying specified instalments "until the whole of the said sum of £2,090 19s. shall have been paid and satisfied." Some five years later, when Dr Foakes had paid £2,090 19s., Mrs Beer claimed £360 <sup>719</sup> for interest on the judgment debt. The House of Lords upheld her claim and the actual result does not appear to be unjust; for it seems that in making the agreement Mrs Beer intended only to give Dr Foakes time to pay and not to forgive interest. <sup>720</sup>

#### Effects of the rule

#### 4-118

The rule established in *Foakes v Beer* may sometimes have performed the useful function of protecting a creditor against a debtor who too ruthlessly exploited the tactical advantage of being a potential defendant in litigation. This point is well illustrated by *D. & C. Builders Ltd v Rees*. <sup>721</sup> The defendant owed £482 to a firm of builders. Six months after payment had first been demanded, the defendant's wife (acting on his behalf) offered the builders £300 in full settlement. The builders accepted this offer as they were in desperate straits financially and there was some evidence that the defendant's wife knew this. <sup>722</sup> It was held that they were nevertheless entitled to the balance; and the majority <sup>723</sup> of the Court of Appeal based their decision to this effect on the rule in *Foakes v Beer*.

#### 4-119

On the other hand, it is arguable that the function of protecting the creditor in such a situation is now more satisfactorily performed by the expanding concept of economic duress <sup>724</sup> than by the rule in *Pinnel's Case*; and that the rule therefore no longer serves any useful purpose. In some circumstances, an agreement to accept part payment of a debt in full settlement may be a perfectly fair and reasonable transaction. <sup>725</sup> Moreover, in *Foakes v Beer* the rule was criticised <sup>726</sup> on the ground that part payment was often in fact more beneficial to the creditor than strict insistence on his

legal rights. A factual benefit <sup>727</sup> of a similar kind has been accepted as sufficient consideration for a promise to make an extra payment for the performance of an existing contractual duty owed by the promisee to the promisor <sup>728</sup>; and the law would be more consistent, as well as more satisfactory in its practical operation, if it adopted the same approach to cases of part payment of a debt. Agreements of the kind here under discussion would then be binding unless they had been made under duress. But it has been held that this departure from the rule in *Foakes v Beer* could be made only by the House of Lords <sup>729</sup> (or now by the Supreme Court). In the meantime, its operation is mitigated by limitations on its scope at common law <sup>730</sup> and in equity. These are discussed in the following paragraphs.

#### 4-119A

! The discussion in para.4-119 of the Main Work of the likely relationship between, on the one hand, the general rule stated in *Pinnel's* <sup>731</sup> ! case and in *Foakes v Beer*, <sup>732</sup> ! and, on the other, the more recently developed view stated in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd* <sup>733</sup> ! now calls for further discussion in the light of the decision of the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* <sup>734</sup> ! ("the *MWB* case"). In that case, office premises managed by the claimants were occupied by the defendants under a licence agreement between themselves and the claimants. The defendants having fallen into arrears with payments due from them to the claimants, the parties agreed on February 27, 2012 to vary their original licence agreement by "re-scheduling" the payments due from the defendants to the claimants (so as in effect to give the defendants extra time to pay). One of the re-scheduled payments (of £3,500) was made on that day, but on March 30, 2012 the claimants exercised their right under the original contract to lock the defendants out of the premises. <sup>735</sup> ! On March 30, 2012 the claimants gave notice terminating the (original) agreement <sup>736</sup> !; they then sued for arrears of licence fees and damages. The defendants relied on the variation agreement (re-scheduling their payments); and one of the issues before the Court of Appeal was whether the claimants' promise to (in effect) give the defendants extra time to pay was supported by consideration. In answering this question in the affirmative, <sup>737</sup> ! the Court applied the reasoning of the *Williams* case <sup>738</sup> !: that is, it held that the requirement of consideration was satisfied because the variation agreement had conferred "practical

benefits" <sup>739</sup> ! on the claimants. *Foakes v Beer* <sup>740</sup> ! and *Re Selectmove* <sup>741</sup> ! were distinguished on the ground that they applied only where the sole benefit accruing to the creditor from the performance of the variation agreement took the form of receiving part payment of a debt already legally due to him, instead of insisting on payment of the whole. <sup>742</sup> ! Indeed, this view is supported, as Arden L.J. points out in the *MWB* case, by the well known statement in *Pinnel's* case that the rule there laid down, and approved in *Foakes v Beer*, is subject to the "rider" that "the gift of a horse, hawk or robe etc. shall be good satisfaction ...". <sup>743</sup> ! It is sometimes assumed that the provision of such benefits satisfies the requirement of consideration because the debtor was not bound by the original contract to provide them <sup>744</sup> !; but the ensuing discussion will show that the requirement of consideration may (though it will not necessarily) be satisfied where the debtor's performance which confers the "practical benefit" on the creditor was already due from the debtor to the creditor under the original contract between these parties before that contract was varied by agreement between them; indeed that was the position in the *Williams* case <sup>745</sup> ! itself. It is convenient here to begin the discussion of the consideration issue in the *MWB* case by reference to the way in which Arden L.J. there discusses this question. Her starting point is to refer to the way in which the judge in the Court below had dealt with the point: he had found that the "variation agreement conferred on [the claimant] the practical benefit of continuing occupation by" the defendant and thus (in Arden L.J.'s own words) that "of avoiding a void", the noun "void" being here used "in the sense in which it is used in property management to refer to unoccupied and therefore unproductive property, which may cause loss in the form of loss of rent and in other ways." <sup>746</sup> ! Substantially the same point is made by Kitchin L.J., <sup>747</sup>

! who in addition agreed with Arden L.J. on this issue <sup>748</sup> !; while McCombe L.J. agreed with both

of the other judgments.<sup>749</sup> ! Both these judgments also identify a second “practical benefit” obtained by the claimants. This was the benefit which they obtained by reason of the facts that, in performance of the variation agreement they had received a payment of £3,500 and that they would, under that agreement, be “likely to recover more than [they] would by enforcing the terms of the original agreement.”<sup>750</sup> ! This second “practical benefit” seems closely to resemble the benefit described by Lord Blackburn in *Foakes v Beer*,<sup>751</sup> ! but reluctantly there regarded by him as not amounting to consideration, a point on which that case was followed in *Re Selectmove*.<sup>752</sup> ! It is therefore hard to accept that the second “practical benefit” identified in the *MWB* case would, on its own, have satisfied the requirement of consideration. That benefit differs, or may differ, from the benefit that a debtor may provide by way of a horse, a hawk or a robe<sup>753</sup> ! in that those benefits are assumed to be of a kind that the debtor is *not* obliged under the original contract to provide<sup>754</sup> !; and it is not clear from the report of the Court of Appeal's decision in the *MWB* case whether the original contract in that case imposed any obligation on the defendants to continue to occupy the premises for the term of the licence.<sup>755</sup> ! The *Anangel Atlas* case<sup>756</sup> ! supports the view that a benefit may satisfy the requirement of consideration even though it takes the form of an act which the debtor was bound under the contract to do, in that case taking delivery of the contractual subject-matter. This benefited the creditor in that the debtor's refusal to take delivery might have prejudiced the creditor's relations with other actual or potential customers; and from a commercial point of view this resembled the benefit that the claimants in the *MWB* case obtained from “avoiding a void.”<sup>757</sup> ! The only situation in which a “practical benefit” conferred by the debtor on the creditor will *not* satisfy the requirement of consideration because the debtor was already bound by the contract to confer that benefit on the creditor is that in which the benefit consists of part payment (or the promise of part payment) of a debt already due. In the *MWB* case, this was said to be the only situation squarely covered by *Foakes v Beer* and *Re Select-move*.<sup>758</sup> ! Where the benefit is of a different kind, the *MWB* case recognises that it can constitute consideration for the creditor's promise and it can do so whether or not the debtor was already bound by the original contract to confer that benefit on the creditor. The remaining puzzle arising from this part of the reasoning of the *MWB* case is that the defendants' continuing in occupation was regarded as a benefit to the claimants in spite of the fact that, by locking the defendants out of the premises, the claimants had shown that they did not themselves so regard it.<sup>759</sup> !

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>714</sup>. *Commissioners of Stamp Duties v Bone* [1977] A.C. 511, 519 (“A debt can only be truly released by agreement for valuable consideration or under seal.”) This principle appears to have been overlooked in a dictum in *Brikom Investments Ltd v Carr* [1979] Q.B. 467, 488, according to which a “waiver” of instalments of rent would bind the landlord. The actual promise of the landlord in that case was supported by consideration: above, para.4-081; below, para.4-135.






<sup>715</sup>. (1602) 5 Co.Rep. 117a; *Cumber v Wane* (1721) 1 Stra. 426; *McManus v Bark* (1870) L.R. 5 Ex. 65; *Underwood v Underwood* [1894] P. 204; *Re Broderick* [1986] N.I.J.B. 36, 49–55; *Tilney Engineering v Admods Knitting Machinery* [1987] C.L.Y. 412; cf. *Bagge v Slade* (1616) 3 Bulst. 162.

<sup>716</sup>. (1884) 9 App. Cas. 605.























<sup>717</sup>. Drawn up by Dr Foakes' solicitor: (1884) 9 App. Cas. at 625.

<sup>718</sup>. Dr Foakes made no *promise* to pay the instalments.



- [719.](#) *Beer v Foakes* (1883) 11 Q.B.D. 221, 222.
- [720.](#) Lords Fitzgerald and Watson thought that the agreement did not, on its true construction, cover interest. Lords Selborne and Blackburn sympathised with this view but felt unable to adopt it as the operative part of the document was too “clear” to be controlled by the recital: see (1884) 9 App. Cas. at 610, 614, 615.
- [721.](#) [1966] 2 Q.B. 617; *Chorley* (1966) 29 M.L.R. 165; *Cornish* (1966) 29 M.L.R. 428; and see below, para.4-138.
- [722.](#) [1966] 2 Q.B. at 625.
- [723.](#) Lord Denning, M.R. based his decision on a different ground: below, para.4-138.
- [724.](#) cf. above, para.4-068.
- [725.](#) e.g. on the facts of *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130; below, para.4-130.
- [726.](#) Especially by Lord Blackburn: (1884) 9 App. Cas. at 617–622; see also Lord Selborne at 613 and *Couldery v Bartrum* (1881) 19 Ch.D. 394, 399, where Jessel, M.R. called the rule “a most extraordinary peculiarity of English law.”
- [727.](#) Above, para.4-004.
- [728.](#) *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, above para.4-069.
- [729.](#) *Re Selectmove* [1995] 1 W.L.R. 474, where the Court of Appeal refused to apply the principle of the *Williams* case, above n.712, in the present context; Peel, (1994) 110 L.Q.R. 353; *Collier v P & M.J. Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643 at [27(i)], [44] (as to which see also below, n.714); *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732 at [89].
- [730.](#) In *Collier v P & M.J. Wright (Holdings) Ltd* above, n.713 Arden L.J. said at [3] that “the rule does not apply where the debt arises from the provision of services: *Williams v Roffey* [1991] 1 Q.B. 1”; but that *Re Selectmove* [1995] 1 W.L.R. 474 had “confirmed that a promise to pay part of the money to which the creditor is already entitled is not good consideration.” The reference to “the rule” in the first part of this statement appears to be to “the rule in *Pinnel’s case*” (at [3]) (1603) 5 Co.Rep. 117a, (above, para.4-117) but it is respectfully submitted that this rule was not under consideration in the *Williams* case. The issue in that case was not whether payment of less than the amount due could be good consideration for the creditor’s promise to forgo the balance. It was whether performance (in full) of the agreed services could be consideration for a promise by the recipient of the services (the debtor) to pay more than the originally agreed sum: see above, para.4-069. In the *Collier* case, the actual decision was that the debtor had an arguable case based on the doctrine of promissory estoppel: see below, para.4-134.
- [731.](#)  (1602) 5 Co. Rep. 117a; Vol.I, para.4-117.
- [732.](#)  (1884) 9 App. Cas. 605; Vol.I, para.4-117.
- [733.](#)  [1991] 1 Q.B. 1; Vol.I, paras 4-069, 4-070.
- [734.](#)  [2016] EWCA Civ 553; [2017] Q.B. 604. Leave to appeal to the Supreme Court was granted on January 31, 2017.
- [735.](#)  At [4].



- [736.](#)  *ibid.*
- [737.](#)  *[2016] EWCA Civ 553* at [49], [66], [67], [87].
- [738.](#)  Above, at note 714c.
- [739.](#)  *[2016] EWCA Civ 553* at [42].
- [740.](#)  (1884) 9 App. Cas. 605; para.4-117.
- [741.](#)  *[1995] 1 W.L.R. 474*; para.4-119 n.713.
- [742.](#)  See *[2016] EWCA Civ 553* at [39], [85]–[87].
- [743.](#)  At [85].
- [744.](#)  e.g. at [41] (“some other act that he was not bound by the contract to perform”); cf. at [84], explaining *Re Selectmove* (above, n.714k) on the ground that there was no “extra” benefit to the promisor.
- [745.](#)  *[1991] 1 Q.B. 1*, paras 4-069, 4-070.
- [746.](#)  *[2016] EWCA Civ 553* at [72], italics supplied; e.g., perhaps by reducing the rental value of other units in the same building.
- [747.](#)  At [48] (“would retain [the defendant] as licensee”).
- [748.](#)  At [49].
- [749.](#)  At [67].
- [750.](#)  At [48].
- [751.](#)  (1884) 9 App. Cas. 605 at 622, quoted in the *MWB* case *[2016] EWCA Civ 553* at [39].
- [752.](#)  *[1995] 1 W.L.R. 474*, para.4-119 n.713.
- [753.](#)  See above, at note 714m.
- [754.](#)  See above at note 714n.
- [755.](#)  Cf., for example, *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, Vol.I, para.27-031, for a clause of this kind. No issue of consideration arose in this case.
- [756.](#)  *[1990] 2 Lloyd’s Rep. 526, 544*, discussed in the Vol.I, para.4-125.
- [757.](#)  *[2016] EWCA Civ 553* at [72].

[758.](#)

! See [2016] EWCA Civ 553 at [48], [49], [67] and [82]–[87].

[759.](#)

! Perhaps the resolution of the above reasoning may be sought by reasoning similar to that of para.4-024.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 10. - Part Payment of a Debt

### (b) - Limitations at Common Law

#### Disputed claims

#### 4-120

The rule stated in para.4-117 above does not apply where the creditor's claim (or its amount) is disputed in good faith. <sup>760</sup> In such a case, the value of the creditor's claim is doubtful and the debtor therefore provides consideration by paying something, even though it is less than the amount claimed. The requirement of consideration is satisfied even though the amount paid is small in relation to the amount claimed, and even though the creditor has a good chance of succeeding on the claim; for the law will not generally investigate the adequacy of consideration. <sup>761</sup> The agreement to accept a reduced amount may also amount to a compromise of the disputed claim <sup>762</sup>; if so, the requirement of consideration can be satisfied under the rules, discussed earlier in this Chapter, <sup>763</sup> relating to compromises of, and forbearances to enforce, invalid or doubtful claims. However, where the defendant admits liability for a sum less than that claimed, payment of that smaller sum is no consideration for the claimant's promise to accept payment of that sum in full settlement of the larger claim. The rule in *Foakes v Beer* applies since, once a binding admission has been made to pay the smaller sum, the payment of it amounts to no more than the performance of what, at that stage, is legally due from the defendant. <sup>764</sup>

#### Unliquidated claims

#### 4-121

For reasons similar to those given in para.4-120 above, the general rule applies only if the original claim is a "liquidated" one, i.e. a claim for a fixed sum of money, such as one for money lent or for the agreed price of goods <sup>765</sup> or services. It does not apply where the creditor's claim is an unliquidated one, <sup>766</sup> such as a claim for damages or for a reasonable remuneration (where none is fixed by the contract). The value of such a claim is again uncertain; and even if the overwhelming probability is that it is worth more than the sum paid, the possibility that it may be worth less suffices to satisfy the requirement of consideration.

#### Unliquidated claims becoming liquidated

#### 4-122

An originally unliquidated claim may subsequently become liquidated by act of the parties. This appears to have happened in *D. & C. Builders v Rees*, <sup>767</sup> where it does not seem that the contract specified the amount to be paid to the builders. When they presented their account they had only an unliquidated claim; and if they had at this stage accepted the £300 in full settlement they would not have been protected by the rule in *Foakes v Beer*. <sup>768</sup> That rule became applicable only because the defendant had, by retaining the account without objection, impliedly agreed that it correctly stated the

sum due, and so turned the builders' claim into a liquidated one. <sup>769</sup>

#### **Claim partly liquidated and partly unliquidated**

### **4-123**

A creditor may have two claims against the same debtor, one of them liquidated and the other unliquidated; or a single claim which is partly liquidated and partly unliquidated. If the debtor pays no more than the liquidated amount, and if his liability to pay this amount was undisputed, the payment of it will not constitute consideration for a promise by the creditor to accept that payment in full settlement of the *whole* of the claim or claims in question. In *Arrale v Costain Civil Engineering Ltd* <sup>770</sup> an employee was injured at work. Legislation in force at the place of work gave him a right against the employers to a fixed lump sum of £490, for which the employers did not dispute liability; and it was assumed that he also had a common law right to sue the employers in tort for unliquidated damages. It was held that any promise which he might have made not to pursue the common law claim was not made binding by the employers' payment of the £490. The employers had provided no consideration for such a promise since in making the payment, they merely did what they were already bound to do. <sup>771</sup>

#### **Variation in the debtor's performance**

### **4-124**

Consideration for a creditor's promise to accept part payment of a debt in full settlement can be provided by the debtor's doing some act that he was not previously bound by the contract to do. <sup>772</sup> For example, payment of a smaller sum at the creditor's request before the due day is good consideration for a promise to forgo the balance, since it is a benefit to the creditor to be paid before he was entitled to payment, and a corresponding detriment to the debtor to pay early. <sup>773</sup> The same rule applies, *mutatis mutandis*, where payment of a smaller sum is made at the creditor's request at a place different from that originally fixed for payment, <sup>774</sup> or in a different currency. <sup>775</sup> Again, payment of a smaller sum accompanied at the creditor's request by the delivery of a chattel is good consideration for a promise to forgo the balance: "The gift of a horse, hawk or robe, etc. in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc., might be more beneficial than the money. ..." <sup>776</sup>

#### **Other benefit to creditor**

### **4-125**

We have seen that a promise to pay a supplier of services more than the agreed sum for performing his part of the contract can be supported by consideration in the form of a benefit in fact obtained by the other party as a result of that party's obtaining the promised performance. <sup>777</sup> Conversely, a promise by the supplier to accept less than the agreed sum may be supported by a similar consideration. The mere receipt of the smaller sum cannot, indeed, constitute the consideration: that possibility is precluded by *Foakes v Beer*. <sup>778</sup> But the performance by the debtor of *other* obligations under the contract may confer such a benefit on the creditor and so satisfy the requirement of consideration. This possibility is illustrated by the *Anangel Atlas* <sup>779</sup> case, where a shipbuilder's promise to reduce the price which the buyers had agreed to pay was held to have been supported by consideration, and one way in which the buyers to whom the reduction was promised had provided consideration was by accepting delivery on the day fixed for such acceptance. Even if the buyers were already bound to take delivery on that day, they had conferred a benefit on the shipbuilder by so doing since they were "core customers" <sup>780</sup> and their refusal to take delivery might have led other actual or potential customers to cancel (or not to place) orders.

#### **Forbearance to enforce cross-claims**

## 4-126

A debtor may provide consideration for the creditor's promise not only by doing an *act* that he was not previously bound to do, but also by a *forbearance*. Thus, where the debtor has a claim against the creditor, the debtor's forbearance to enforce that claim can constitute consideration for the creditor's promise not to claim part of the debt. For example, where a landlord promises to accept part payment of rent in full settlement, the tenant may provide consideration for this promise by forbearing to sue the landlord for breach of the latter's obligation to keep the premises in repair. <sup>781</sup>

### Composition with creditors

## 4-127

The doctrine of consideration gives rise to some difficulty in relation to composition agreements by which a debtor who cannot pay all his creditors in full induces them to agree with himself and with each other to accept part payment in full settlement of their claims. <sup>782</sup> The binding force of such agreements is well established, <sup>783</sup> in spite of the rule in *Foakes v Beer*. <sup>784</sup> One possible reason for the validity of such agreements is that it would be a fraud on the other parties for a creditor who had accepted a composition to claim the balance of his original debt. <sup>785</sup> An alternative view is that the consideration for the creditor's promise is to be found in the promise of every other creditor to forgo part of his own debt <sup>786</sup>; but this consideration does not move from the promisee (i.e. the debtor) unless he also joins in the agreement. <sup>787</sup> In that event there may be consideration in the shape of a benefit to each creditor <sup>788</sup>: he is certain of some payment, while in the scramble for priorities which might take place if there were no composition agreement he might get nothing at all.

### Part payment of debt by a third party

## 4-128

Part payment by a third party, if accepted by the creditor in full settlement of the debtor's liability, is a good defence to a later claim by the creditor for the balance. <sup>789</sup> This rule seems not to depend on any contract between debtor and creditor, so that it can apply even though no promise has been made to the debtor and even though no consideration has moved from him. <sup>790</sup> The rule has therefore been explained on other grounds. One such ground is that it would be a fraud <sup>791</sup> on the third party to allow the creditor, in disregard of his promise to the third party, to sue the debtor for the balance of the debt. The difficulty with this reasoning is that the mere breach of a promise does not amount to fraud at common law: it has this effect only if the promisor had no intention of performing his promise when he made it. <sup>792</sup> A second reason for the rule is that the court will not help the creditor to break his contract with the third party by allowing him to obtain a judgment against the debtor. On the contrary, it has been held that where A (the creditor) expressly contracts with B (the third party) not to sue C (the debtor) and A nevertheless does sue C, then B can intervene so as to obtain a stay of the action. <sup>793</sup> This possibility would extend to the case where the consideration provided by B was a *promise* by B to pay A: it thus goes beyond the cases in which B had *actually paid* A. A third explanation is suggested by *Hirachand Punamchand v Temple* <sup>794</sup> where the defendant was indebted on a promissory note to the claimant, who accepted a smaller sum from the defendant's father in full settlement. It was held that the claimant could not later recover the balance of the debt from the defendant because the promissory note was extinct: the position was the same as if the note had been cancelled. <sup>795</sup> This reasoning again does not depend on any contract between the claimant and the defendant, for the cancellation of a promissory note can release a party liable on it irrespective of contract and without consideration. <sup>796</sup> The debtor may also, if the requirements of the Contracts (Rights of Third Parties) Act 1999 are satisfied, <sup>797</sup> be able to take the benefit of any term in the contract between the creditor and the person making the payment, which may exclude the debtor's liability for the balance; and he will be able to do so without having to show that he provided any consideration for the creditor's promise to accept the part payment in full settlement. <sup>798</sup>

### Collateral contract

## 4-129

An agreement to accept part payment of a debt may take effect as a collateral contract if the requirements of contractual intention and consideration are satisfied. This was the position in *Brikom Investments Ltd v Carr*<sup>799</sup> where a tenant's liability to contribute to the maintenance costs of a block of flats was held to have been reduced by a collateral contract under which the landlord undertook to execute certain roof repairs at his own expense.<sup>800</sup> The landlord's claim for contribution in this case was probably unliquidated; but the principle seems to be equally applicable where a creditor enters into a collateral contract to accept part payment in full settlement of a liquidated claim.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.
  - <sup>760.</sup> *Cooper v Parker* (1855) 15 C.B. 822; *Re Warren* (1884) 53 L.J.Ch. 1016; *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No.2)* [1990] 2 Lloyd's Rep. 526, 544; for other consideration in this case, see *ibid.* at 545 and below, para.4-125; *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep. 620 at 629.
  - <sup>761.</sup> Above, para.4-014. But the fact that the sum received is much smaller than that claimed may be evidence that the recipient has not accepted it in full settlement: *Rustenburg Platinum Mines Ltd v Pan Am* [1979] 1 Lloyd's Rep. 19.
  - <sup>762.</sup> *North Sea Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230, [2011] 2 All E.R. (Comm) 1024 at [42], [58].
  - <sup>763.</sup> Above, paras 4-052 to 4-055.
  - <sup>764.</sup> *Ferguson v Davies* [1997] 1 All E.R. 315 per Henry L.J.; Evans L.J.'s judgment is based on the ground that, as a matter of construction, the claimant had not accepted the smaller sum in full settlement. Aldous L.J. agreed with both the other judgments.
  - <sup>765.</sup> A claim may be "liquidated" even though it is disputed and even though the dispute relates to its amount: e.g. where it is for the price of goods and the buyer alleges short delivery: *Aectra Refining and Manufacturing Inc v Exmar N.V. (The New Vanguard)* [1994] 1 W.L.R. 1634.
  - <sup>766.</sup> *Wilkinson v Byers* (1834) 1 A. & E. 106; *Ibberson v Neck* (1886) 2 T.L.R. 427.
  - <sup>767.</sup> [1966] 2 Q.B. 617; above, para.4-118.
  - <sup>768.</sup> (1884) 9 App. Cas. 605; above, para.4-117.
  - <sup>769.</sup> cf. *Amantilla v Telefusion* (1987) 9 Con.L.R. 139, where a builder's quantum meruit claim, which had not been disputed, was treated as "liquidated" for the purpose of Limitation Act 1980, s.29(5)(a).
  - <sup>770.</sup> [1976] 1 Lloyd's Rep. 98; cf. *Rustenburg Platinum Mines Ltd v Pan Am* [1979] 1 Lloyd's Rep. 19, 24.
  - <sup>771.</sup> Per Stephenson and Geoffrey Lane L.J.J.; Lord Denning, M.R. based his decision on a different ground: below, para.4-138, after n.817.
  - <sup>772.</sup> e.g. *Re William Porter & Co* [1937] 2 All E.R. 261; *Ledingham v Bermejo Estancia Co Ltd* [1947] 2 All E.R. 748.
  - <sup>773.</sup> *Pinnel's Case*, above, para.4-117.
  - <sup>774.</sup> *ibid.*



- [775.](#) cf. above, para.4-080.
- [776.](#) *Pinnel's Case* (1602) 5 Co. Rep. 117a, above, para.4-117. Cases which formerly supported the view that part payment by a negotiable instrument, made at the request of the creditor and accepted by him in full settlement, discharged the debt were overruled in *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617.
- [777.](#) *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, above, para.4-069.
- [778.](#) (1884) 9 App. Cas. 605, above, para.4-122.
- [779.](#) *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No.2)* [1990] 2 Lloyd's Rep. 526. For other consideration in that case, in the form of reducing "a previously ill-defined understanding to 'precise terms,' and so settling a potential dispute", see *ibid.* 544.
- [780.](#) *ibid.*, at 544.
- [781.](#) *Brikom Investments Ltd v Carr* [1979] Q.B. 467, as explained in para.4-081, above.
- [782.](#) Provision for publicity and substantial agreement among creditors is made by Deeds of Arrangement Act 1914 (repealed in part by Insolvency Act 1985, s.235 and Sch.10, Pt III, and amended by Insolvency Act 1986, s.439(2)). Oral agreements are not caught by the 1914 Act: *Hughes & Falconer v Newton* [1939] 3 All E.R. 869. "Voluntary arrangements" under Insolvency Act 1986, Pts. I and VIII can, by virtue of ss.5(2) and 260(2), bind even a creditor who did not attend the meeting, or dissented from the proposal, "as if he were a party to the arrangement:" see *Johnson v Davies* [1999] Ch. 117 at 138; cf. *Re Cancel Ltd* [1996] 1 All E.R. 37. *Re a Debtor* (No.259 of 1990) [1992] 1 W.L.R. 226.
- [783.](#) *Good v Cheesman* (1831) 2 B. & Ad. 328; *Boyd v Hind* (1857) 1 H. & N. 938; an agreement to pay a dividend may, if the parties so intend, operate as satisfaction: *Bradley v Gregory* (1810) 2 Camp. 383.
- [784.](#) (1894) 9 App. Cas. 605; above, para.4-117.
- [785.](#) *Wood v Roberts* (1818) 2 Stark. 417; *Cook v Lister* (1863) 13 C.B.(N.S.) 543, 595.
- [786.](#) *Boothbey v Snowden* (1812) 3 Camp. 175.
- [787.](#) As in *Good v Cheesman* (1831) 2 B. & Ad. 328 where the debtor also made an assignment for the benefit of his creditors.
- [788.](#) In *West Yorkshire Darracq Agency Ltd v Coleridge* [1911] 2 K.B. 326, the same principle was applied although the creditors got nothing; but it is hard to see how this application of the rule can be justified: above, para.4-038, n.236. Even in such a case, the debtor may get the benefit of the agreement if, when he is sued by one creditor, the other (or others) can intervene to stay the action: see *Snelling v John G. Snelling* [1973] 1 Q.B. 87, below, para.18-073. The debtor will not, however, be able to avoid the requirement of consideration by relying on the Contracts (Rights of Third Parties) Act 1999 since this applies only in favour of "a person who is *not* a party" to the contract (s.1(1)); and in the case of a composition agreement the debtor typically *will* be a party.
- [789.](#) *Welby v Drake* (1825) 1 C.&P. 557; *Cook v Lister* (1863) 13 C.B.N.S. 543 at 595; *Bracken v Billingshurst* [2003] EWHC 1333 (TCC); [2003] All E.R. (D) 488 (Jul).
- [790.](#) As in *Hirachand Punamchand v Temple* [1911] 2 K.B. 339, below at n.749.
- [791.](#) See the first two cases cited in n.744, above.
- [792.](#) Below, para.7-008.

- [793.](#) See *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87 (below, para.18-072), distinguishing *Gore v Van der Lann* [1967] 2 Q.B. 31 where no promise was made not to sue C.
- [794.](#) [1911] 2 K.B. 330.
- [795.](#) *ibid.* at 336; cf., in the case of joint debts, *Johnson v Davies* [1999] Ch. 117, 130. In *Chelsea Building Society v Nash* [2010] EWCA Civ 1247 B and C were jointly and severally indebted to A who agreed with B to accept part payment “in full and final settlement.” It was held that this agreement prevented A from suing C for the share of the debt attributed by A to C as the agreement between A and B was not shown by A to have either expressly or impliedly to have reserved A’s rights against C. In the Court of Appeal A also relied for the first time on the rule in *Pinnel’s case* (1602) Co.Rep. 117a (above, para.4-117) but it was held that this point could not be taken at this late stage as the opportunity to find relevant facts (presumably relating to the limitations on the scope of that rule discussed in paras 4-120 above et seq.) had been irretrievably lost (at [40]).
- [796.](#) Bills of Exchange Act 1882, s.62; below, paras 22-020 and Vol.II, 34-138.
- [797.](#) Below, para.18-090 et seq.
- [798.](#) Above, para.4-046, below para.18-102. For the purposes of the Act it is the debtor who, in the example given above, is the “third party”.
- [799.](#) [1979] Q.B. 467. Contrast, on the issue of contractual intention necessary to establish a collateral contract, *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, [2007] L. & T.R. 26, above para.2-174.
- [800.](#) For the consideration supporting this promise, see above, para.4-081; for other grounds for the decision, see below, para.4-135.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

#### Part 2 - Formation of Contract

#### Chapter 4 - Consideration <sup>1</sup>

#### Section 10. - Part Payment of a Debt

#### (c) - Limitations in Equity

#### Equitable forbearance


#### 4-130

⚠ Under the equitable doctrine of *Hughes v Metropolitan Ry* <sup>801</sup> a promise by a contracting party not to enforce his strict legal rights has (even where it is not supported by consideration) at least a limited effect in equity. Before 1947, this doctrine had not been applied where a creditor's promise to accept part payment of a debt in full settlement was not supported by any consideration moving from the debtor. <sup>802</sup> Such an extension of the rule seemed to be barred by *Foakes v Beer*. <sup>803</sup> The possibility of making the extension was, however, suggested in 1947 in *Central London Property Trust Ltd v High Trees House Ltd*. <sup>804</sup> In that case a block of flats had been let for 99 years to the defendants in 1937 at a rent of £2,500 a year. In January 1940 the landlords agreed to reduce this rent to £1,250 a year because of wartime conditions as a result of which only a few of the flats were let. After the end of the war, when the flats were fully let, the landlords claimed the full rent, and tested their claim by suing for rent at the original rate for the last two quarters of 1945. Denning J. upheld the claim on the ground that, as a matter of construction, the agreement of 1940 was intended to apply only while the war-time difficulties of sub-letting lasted, and that it had therefore ceased to operate in the early part of 1945, when these difficulties had come to an end. <sup>805</sup> ⚠ But he also said that the landlords would have been precluded by the equitable doctrine of *Hughes v Metropolitan Ry* <sup>806</sup> from recovering the full rent for a period which was covered by the agreement of 1940. He added: "The logical consequence no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration." <sup>807</sup> The requirements of the equitable doctrine have already been discussed. <sup>808</sup> A number of further points give rise to difficulty in its application to promises to accept part payment in full settlement of a debt; these points are considered in paras 4-131 to 4-138 below.

#### Suspensive nature of the doctrine

#### 4-131

⚠ The first difficulty is to reconcile Denning J.'s statement in the *High Trees* case, quoted in para.4-130 above, <sup>809</sup> with the actual decision in *Foakes v Beer*. <sup>810</sup> If Mrs Beer could go back on her promise not to claim interest, why could not the landlords in the *High Trees* case go back on their promise not to ask for the full rent in (say) 1941, when the war-time difficulties of subletting still prevailed? One possibility is to say that "That aspect was not considered in *Foakes v Beer*" <sup>811</sup> which was decided on purely common law principles, without reference to equity, <sup>812</sup> and is therefore "no longer valid" <sup>813</sup>; but this reasoning is open to the objection that the rule in *Pinnel's Case* <sup>814</sup> (on which *Foakes v Beer* was based) was recognised in equity no less than at common law. <sup>815</sup> Another possibility, and the one which does least violence to the authorities, is to say that the creditor's right to the balance of his debt is (save in exceptional cases <sup>816</sup>) not extinguished but only suspended. <sup>817</sup> This is generally the sole effect of the rule in *Hughes v Metropolitan Ry*. <sup>818</sup> and in the present context it

would give effect to the intention of the parties where the purpose of the arrangement was merely to give the debtor extra time to pay, <sup>819</sup> rather than to extinguish the debt. Of course where the intention is to extinguish, and not merely to suspend, the creditor's right to the balance, the suggestion that he is permanently bound by his promise to accept part payment in full settlement <sup>820</sup> may seem to be an attractive one. <sup>821</sup>  But such an extension of the principle of *Hughes v Metropolitan Ry* would require the overruling of *Foakes v Beer*. It is, no doubt, with such difficulties in mind that Lord Hailsham L.C. has said that the *High Trees* principle "may need to be reviewed and reduced to a coherent body of doctrine by the courts." <sup>822</sup>

## Continuing obligations

### 4-132

For the present, the better view is that the principle only suspends rights; but the meaning of this statement is not entirely clear where the promisee is under a continuing obligation to make a series of payments, e.g. of rent under a lease, <sup>823</sup> of royalties under a licence to use a patent, <sup>824</sup> or of instalments under a hire-purchase agreement. <sup>825</sup> In such cases the statement may mean one of two things: first, that the creditor is entitled to payment in full only of amounts which fall due after the expiry of a reasonable notice of the retraction of the promise, <sup>826</sup> or, secondly, that he is then entitled, not only to future payments in full, but also to the balance of past ones. Of course the latter interpretation of the rule might sometimes be at variance with the intention of the parties at the time of the promise. <sup>827</sup> On the other hand it is hard to see why a debtor whose liability accrues from time to time should, for the purpose of the present rule, be in a more favourable position than one whose liability is to pay a single lump sum; nor is it clear which of the two possible rules should apply where a debtor who owed a lump sum promised to pay it off in instalments and the creditor first made, and then gave reasonable notice revoking, a promise to accept reduced instalments. In such a case, it is at least arguable that the intention of the creditor is only to give extra time for payment. Hence the total debt remains due, and the only effect of the promise is to extend the period over which it is to be repaid. <sup>828</sup>

### 4-133

In *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* <sup>829</sup> a licence for the use of a patent provided that the licensees should pay "compensation" if they manufactured more than a stated number of articles incorporating the patent. The owners of the patent agreed in 1942 to suspend the obligation to pay compensation until a new agreement was made. No such agreement had been made by 1944, when disputes arose between the parties. In 1945 the owners claimed to have revoked their suspension and to be entitled to the "compensation" as from June 1, 1945. This claim failed, the Court of Appeal holding that the arrangement to suspend claims for compensation was binding until proper notice of its termination had been given; and that no such notice had been given. The owners then brought the present action claiming compensation as from January 1, 1947. The House of Lords upheld the claim on the ground that, by then, sufficient notice had been given of the ending of the suspension period. It seems to have been assumed that the defendants were no longer liable to pay the sums which would, under the original contract, have fallen due during the suspension period. But this point was not directly considered by the House of Lords; so that the case does not conclusively determine the precise results that flow, in cases of continuing obligations, from the suspensive nature of the doctrine.

## Extinctive effects in exceptional cases

### 4-134

There may, moreover, be exceptional situations in which the creditor's promise can wholly extinguish his rights. We have seen that, under the rule in *Hughes v Metropolitan Ry*, <sup>830</sup> a promise cannot be retracted where subsequent events make it impossible to perform the original obligation. <sup>831</sup> That principle cannot, as such, be applied to cases of part payment of a debt, since performance of the original obligation, being one to pay money, can never become literally impossible. But there is also support for the view that a forbearance cannot be retracted where it would, even after reasonable

notice, be highly inequitable to require performance of the original obligation<sup>832</sup>; and this aspect of the principle could be applied to cases of the present kind, with the result that the promise becomes “final and irrevocable if the promisee cannot resume his position.”<sup>833</sup> Thus the creditor’s right to the balance of a debt might be extinguished if in reliance on his promise the debtor had undertaken new commitments in relation to the subject-matter: if, for example, the tenant in the *High Trees* case had used the rebate to modernise the flats.<sup>834</sup> There is some support in the authorities for the view that the creditor’s right may be extinguished (as opposed to being suspended) even where the debtor’s reliance on the creditor’s promise goes no further than merely paying the part of the debt which the creditor had agreed to accept in full settlement. This had been the view of Lord Denning MR in *D & C Builders Ltd v Rees*.<sup>835</sup> His actual decision there was that it was not “inequitable” for the creditor to go back on his promise to accept part payment of the debt in full settlement as there had been no “true accord” to this effect.<sup>836</sup> But he went on to say that “where there has been a *true accord*” and “the debtor *acts upon* that accord by paying the lesser sum, then it is inequitable for the creditor afterwards to insist on the balance.”<sup>837</sup> In *Collier v P & M.J. Wright (Holdings) Ltd*<sup>838</sup> Arden LJ relied on this dictum in support of the view that, if a creditor promised to accept part payment in full settlement of a debt, and the debtor relied on that promise by making the stipulated payment, then the debtor’s defence on the ground of promissory estoppel was one which had a real prospect of success.<sup>839</sup> She accepted that “the effect of promissory estoppel is usually suspensory only” but added that “if the effect of resiling is sufficiently inequitable, a debtor may be able to show that the right to recover the debt is not merely postponed but extinguished.”<sup>840</sup> There may, indeed, as is pointed out in para.4-138 below, be special circumstances in which promissory estoppel may, exceptionally, have such an extinctive effect; but the difficulty to which the *Collier* case gives rise is that the judgments do not identify any such circumstances beyond (a) the creditor’s promise to accept part payment in full settlement and (b) the debtor’s making the stipulated part payment. If these circumstances were sufficient for the application of promissory estoppel with extinctive effect, the difficulty mentioned in the discussion of the *High Trees* case<sup>841</sup> in para.4-131 above would again arise: that is, there would be a direct conflict between such an application and the outcome in *Foakes v Beer*.<sup>842</sup> No doubt, the law as laid down in that case may, for reasons given in para.4-119, be defective, at least in its operation in some situations. But any such defect would be more satisfactorily dealt with by a reconsideration by the Supreme Court of *Foakes v Beer* than by continuing to regard that case as good law while seeking to bypass its consequences by invoking the doctrine of promissory estoppel. The latter course would provide no clear guidance as to which of the two conflicting principles would apply in any particular situation and so be a source of undesirable uncertainty. The point is well illustrated by the *D & C Builders* case itself where the judgment of Lord Denning was based on the doctrine of promissory estoppel,<sup>843</sup> while those of Danckwerts and Winn L.JJ. were based on the rule in *Foakes v Beer*<sup>844</sup> and conflict between these two approaches was avoided in the *D & C Builders* case only by Lord Denning’s conclusion that promissory estoppel was of no avail by reason of the debtor’s conduct in securing the creditor’s promise.<sup>845</sup> In the *Collier* case, it was assumed that there was no such objectionable conduct on the debtor’s part. The conflict between the two approaches was thus a real one and the judgments do not provide any principled basis for its resolution.

## 4-135

In *Brikom Investments Ltd v Carr*<sup>846</sup> long leases of flats obliged the tenants to pay, not only rent and a maintenance charge, but also contributions in respect of certain “excess expenses” incurred by the landlords in keeping the structure in repair. In the course of the negotiations leading to the execution of the leases, the landlords had promised to put the roof into repair “at our own cost.” This was held to amount to a collateral contract<sup>847</sup> with one of the original tenants, precluding the landlords from enforcing against her the provision in the lease requiring her to contribute to the cost of the roof repairs. It was further held that claims for contributions to the cost of those repairs could not be made against assignees and sub-assignees of original tenants, even though there was no collateral contract with these persons. Lord Denning, M.R. based this conclusion on the *High Trees* principle which, in his view, was available not only between the original parties, but also in favour of and against their assigns.<sup>848</sup> The extinctive effect of the principle in these circumstances can perhaps be supported on the ground that the original tenants, the assignees and the sub-assignees had all, in reliance on the landlords’ promise, undertaken fresh commitments by entering into long leases of the flats. Roskill and Cumming-Bruce L.JJ., on the other hand, treated the case, not as one of “promissory estoppel,”<sup>849</sup> but as one of “waiver.”<sup>850</sup> It seems that the latter expression here refers to a variation supported by consideration,<sup>851</sup> for the consideration provided by the tenants<sup>852</sup> could equally support the landlords’ promise whether that promise was regarded as a collateral contract or as a variation. On this

interpretation of the case, there is no difficulty in accounting for the extinctive effect of the landlords' promise. It amounted to a variation supported by consideration, so that the liability of the original tenants to contribute to the cost of the repairs in question was extinguished; and once it had been so extinguished it was not revived on assignment of the leases.

## Requirements

### 4-136

Granted that the equitable principle can apply to cases of part payment of a debt, it is in this context subject to the usual requirements on which its operation depends. These have already been considered <sup>853</sup> but two of them call for further discussion at this point.

## Whether detriment necessary

### 4-137

The equitable principle is sometimes said to be analogous to the doctrine of estoppel by representation. <sup>854</sup> According to this analogy, the principle would operate only in favour of a person who had suffered some "detriment" in the sense in which that word is used in that branch of the law. <sup>855</sup> Where, as in the *High Trees* case, a tenant pays only half the agreed rent he suffers no such "detriment"; and although ingenious attempts have been made to find some other "detriment" in the *High Trees* case, <sup>856</sup> the better view is that "detriment" of the kind required for the purpose of estoppel by representation is not an essential requirement of the operation of the equitable principle. <sup>857</sup> This is the position under the rule in *Hughes v Metropolitan Ry* <sup>858</sup> on which the *High Trees* case is based; and no such requirement of "detriment" is mentioned by Denning J. in the *High Trees* case itself or in his later statements of the principle. <sup>859</sup> All that is necessary is that the promisee should have acted in reliance on the promise in such a way as to make it inequitable to allow the promisor to act inconsistently with it. <sup>860</sup> This requirement was satisfied on the facts of the *High Trees* case, no less than on those of *Hughes v Metropolitan Ry*.

## Inequitable

### 4-138

By making the part payment, the debtor acts in reliance on the creditor's promise, and so makes it prima facie "inequitable" for the creditor peremptorily to go back on his promise. But other circumstances may lead to the conclusion that it would not be "inequitable" for the creditor to reassert his claim for the full amount <sup>861</sup>: this would, for example, be the position where the debtor had failed to perform his promise to pay the smaller amount. <sup>862</sup> Another such circumstance may be the conduct of the debtor in obtaining the creditor's promise. This possibility may be illustrated by further reference to *D. & C. Builders Ltd v Rees*. <sup>863</sup> Lord Denning, M.R. there stressed the fact that the builders' promise to accept £300 in full settlement of their claim for £482 had been obtained by taking undue advantage of their desperate financial position. In these circumstances it was not "inequitable" for the builders to go back on their promise, so that the *High Trees* principle did not apply. The difficulty with this reasoning is that most debtors who offer part payment in full settlement try to exert some kind of "pressure" against their creditors. The law now recognises that it is possible for such "pressure" to amount to duress, <sup>864</sup> and where it has this effect, a promise obtained as a result of it should clearly not bring the *High Trees* principle into operation. <sup>865</sup> Where, on the other hand, there is no duress, the *High Trees* principle should not be excluded merely because it could be said that the promise has been "improperly obtained." Such an intermediate category between promises obtained by duress and those not so obtained should here, as elsewhere, <sup>866</sup> be rejected as "unhelpful because it would render the law uncertain." <sup>867</sup>

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts*




(2014); Shatwell (1955) 1 Sydney Law Review 289.

[801.](#) (1877) 2 App. Cas. 439; above, para.4-086.

[802.](#) The doctrine had been applied in *Buttery v Pickard* (1946) 62 T.L.R. 241 to a landlord's promise to accept payment of part of the rent in full settlement, but in that case consideration did move from the tenant in the shape of her forbearance to exercise her contractual right to terminate the lease (though this was not the ratio decidendi to the case).

[803.](#) (1884) 9 App. Cas. 605, above, para.4-117.

[804.](#) [1947] K.B. 130; Denning (1952) 15 M.L.R. 1; Wilson (1951) 67 L.Q.R. 330; Sheridan (1952) 15 M.L.R. 325; Bennion (1953) 16 M.L.R. 441; Guest (1955) 30 A.L.J. 187; Turner (1964) 1 N.Z.U.L.Rev. 185; Campbell, *ibid.* 232.

[805.](#)  For similar reasoning, see *Dunbar Assets plc v Butler* [2015] EWHC 2546 (Ch) where the issue was not one of part payment of a debt, but was one of the postponement of a liability. In that case A had lent money to two companies, in the management of which a "prominent part" (at [2]) was played by B for whom and whose family most of the shares in the companies were held in trust and who, without charging any fees, managed development properties owned by the companies (at [11]). B had guaranteed debts of the companies, and in an action to enforce these guarantees, B relied on the defence of promissory estoppel; such an estoppel was alleged to have arisen from a representation or promise by A that any such enforcement would be "postponed indefinitely" for so long as B continued with his (unpaid) work for the companies (at [18]). B's defence of promissory estoppel was rejected on the ground that A's statement was intended to affect the rights of the parties "only for the intended duration of the arrangement" (at [49]), i.e. for so long as B continued to provide the (unpaid) management work "with the concurrence of" A (*ibid.*). It no longer applied after A had made it clear that B's work was no longer required; and, once B had ceased to do the work, his reliance on A's representation, and hence the suspension of B's liability, had come to an end (at [50]).

[806.](#) (1877) 2 App. Cas. 439; above, para.4-086.

[807.](#) [1947] K.B. 130, 134; cf. *Combe v Combe* [1951] 2 K.B. 215, 220.

[808.](#) Above, paras 4-086 et seq.

[809.](#) At n.761.

[810.](#) (1884) 9 App. Cas. 605; above para.4-117.

[811.](#) *High Trees case* [1947] K.B. 130 at p.135; this sentence does not occur in any of the other reports of the case ([1947] L.J.R. 77, (1946) 175 L.T. 333, (1946) 62 T.L.R. 557, [1956] 1 All E.R. 256n.); see also *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98, 102. The argument, with respect, lacks plausibility since *Hughes v Metropolitan Ry*, above, n.760 had been decided only seven years before *Foakes v Beer* and Lords Selborne and Blackburn heard the appeals in both cases.

[812.](#) *High Trees case*, above n.765, at p.133.

[813.](#) *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98 at 102.

[814.](#) (1602) Co.Rep. 117a; above, para.4-117.

[815.](#) *Re Warren* (1884) 53 L.J.Ch. 1016; *Bidder v Bridges* (1887) 37 Ch.D. 406.

[816.](#) Below, para.4-134.


[817.](#) *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326, 1330; Unger (1965) 28 M.L.R. 231; cf. *Re Venning* [1947] W.N. 196. Gordon [1963] C.L.J. 222 objects to giving the creditors' promise

even this limited effect, arguing that the equitable principle is limited to relief against forfeiture. But though *Hughes v Metropolitan Ry* was a case of this kind, the equitable principle had developed since 1877 and is no longer restricted to such cases: see Wilson [1965] C.L.J. 93.

818. Above, para.4-097.

819. e.g. in *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326: see below, para.4-132, n.781. This seems also to have been the position in *Foakes v Beer*: see above, para.4-117, esp. at n.704.

820. Originally made by Lord Denning in the *High Trees* case at 134 and repeated by him in *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617, 624; cf. *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, 213; and *ibid.*, at 218, 220; but in that case there was consideration: above, para.4-080.

821.  Provided, at any rate, that there was no duress: cf. above, para.4-118. In *Stevensdrake Ltd v Hunt* [2016] EWHC 1111 (Ch), at [65], it was held that, where the creditor's "agreement permanently to forego rights" was "clear and unequivocal", and the other requirements of promissory estoppel were satisfied it would be wrong to treat the agreement as "merely suspensory", with the result that "the doctrine of promissory estoppel [was] engaged" and made it "inequitable" for the creditor to pursue its claim against the debtor. In treating the issue of the extinctive (as opposed to the "suspensory") effect of the doctrine as a matter of construction, this conclusion, though it may in the circumstance have been desirable as a matter of policy, is not easy to reconcile with earlier authorities (for example *Foakes v Beer* (1884) 9 App. Cas. 605, Vol.I, para.4-117) cited in the *Stevensdrake* case (above) at [42].

822. *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co* [1972] A.C. 741, 758; cf. *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737 at [49] ("not yet ... fully developed").

823. As in the *High Trees* case, above, para.4-130.

824. As in the *Tool Metal* case [1955] 1 W.L.R. 761, discussed in para.4-133, below.

825. As in *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326.

826. *Banning v Wright* [1972] 1 W.L.R. 972, 981; cf. *W.J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, 213; in *Bottiglieri di Navigazione v Cosco Quindao Ocean Shipping Co (The Bunge Saga Lima)* [2005] EWHC 244 (Comm), [2005] 1 Lloyd's Rep. 1 it was said at [31] that "no revocation can be retrospective"; but this statement is, with respect, open to question for the reason given in para.4-098 n.533.

827. This would be so in cases like the *High Trees* case and the *Tool Metal* case (below, para.4-133) but probably not in a case like *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326, as the promise there "was not intended to be irrevocable:" *Meng Long Development Pte Ltd v Jip Hong Trading Pte Ltd* [1985] A.C. 511, 524. *J.T. Sydenham & Co Ltd v Enichem Elastometers Ltd* [1989] E.G.L.R. 257, 260 (discussed by Cartwright [1990] C.L.J. 13) purports to give the "estoppel" an extinctive effect; but the amount of rent due in that case was in dispute, so that the actual decision is explicable on the ground stated in para.4-120, above.

828. *Hardwick v Johnson* [1978] 1 W.L.R. 683 (where the creditor was said at 691 to have agreed to "postpone" the debtor's obligation to pay instalments).

829. [1955] 1 W.L.R. 761; Smith (1955) 18 M.L.R. 609.

830. (1877) 2 App. Cas. 439; above para.4-098.

831. Above para.4-098.

832. *ibid.*

- [833.](#) *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326, 1330; in *The Bunge Saga Lima*, above para.4-132 n.780: it was said at [31] that it would there have been “inequitable to permit retraction.” The case was not concerned with “waiver” of an obligation to pay money.
- [834.](#) cf. Mitchell (1951) Univ. of W. Australia Law Rev. 245, 251. The principle is somewhat similar to that which underlies the defence of “change of position” in an action for the recovery of money paid; for recognition of this defence, see *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548; below paras 29-186, Vol.II, 41-047.
- [835.](#) [1967] 2 Q.B. 617; above, para.4-118.
- [836.](#) At 625.
- [837.](#) At 625; and see below, para.4-138.
- [838.](#) [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643; Trukhtanov, (2008) 124 L.Q.R. 364.
- [839.](#) [2007] EWCA Civ 1329 at [21], [37]–[40], [50]; Longmore L.J. was more sceptical: see [2007] EWCA Civ 1329 at [45]–[49].
- [840.](#) [2007] EWCA Civ 1329 at [37].
- [841.](#) [1947] K.B. 130, stated above in para.4-130.
- [842.](#) The citation of the *High Trees* case in the *Collier* case [2007] EWCA 1329 at [37] does not help to resolve the difficulty discussed in the text below, i.e. that of reconciling what is described in the latter case (at [42]) as “the brilliant obiter dictum of Denning J, as he then was, in the *High Trees* case” with the outcome in *Foakes v Beer* (above, para.4-117): see above, para.4-131. Nor does the citation in the *Collier* case at [37] of “the *Tool Metal* case” [1955] 1 W.L.R. 761 help to resolve this difficulty: see the discussion of that case in para.4-133 above.
- [843.](#) See para.4-138 below.
- [844.](#) See para.4-118 above. Danckwerts L.J. did indeed begin his judgment by saying ([1962] 2 Q.B. 617 at 625–626): “I agree with the judgment of the Master of the Rolls.” But his own reasoning is entirely concerned with the rule in *Foakes v Beer* and his conclusion (at 627) is that “the county court judge was right in applying the rule in *Foakes v Beer*.”
- [845.](#) Above at n.790; below, para.4-138.
- [846.](#) [1979] Q.B. 467.
- [847.](#) Above, para.4-081; contrast *ibid.*, n.441.
- [848.](#) [1979] Q.B. 467, 484–485.
- [849.](#) *ibid.*, at 485, 490.
- [850.](#) *ibid.*, at 488, 490.
- [851.](#) cf. above, para.4-082.
- [852.](#) Above, para.4-081. Roskill L.J. at 489 refers to *Hughes v Metropolitan Ry* (1877) 2 App. Cas. 439 (above, para.4-086) as stating a principle of “contractual variation of strict contractual rights.” It is respectfully submitted that this phrase should be interpreted to refer simply to *variations of contracts*, rather than to *contractually binding variations*; for the principle clearly applies to variations which are not contractually binding (but revocable on reasonable notice) because they are not supported by consideration.
- [853.](#) Above, paras 4-087 et seq.

- [854.](#) Above, para.4-104.
- [855.](#) cf. above, para.4-095.
- [856.](#) Wilson (1951) 67 L.Q.R. 330, 344.
- [857.](#) cf. Denning (1952) 15 M.L.R. 1, 6–8.
- [858.](#) (1877) 2 App. Cas. 439.
- [859.](#) e.g. in *Combe v Combe* [1951] 2 K.B. 215 at 220.
- [860.](#) Above, para.4-096; *Tool Metal case* [1955] 1 W.L.R. 761, 764; *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 548, 560; affirmed [1961] Ch. 105, as to which see below, para.4-193 n.1234; *Ajayi v R.T. Briscoe (Nig.) Ltd* [1964] 1 W.L.R. 1326, 1330.
- [861.](#) cf. above, para.4-098.
- [862.](#) *Re Selectmove* [1995] 1 W.L.R. 474, 481, where the debtor's promise was not to pay *less* but to pay *late*. Cf. *Burrows v Brent LBC* [1996] 1 W.L.R. 1448, where decision was based on lack of contractual intention and not on want of consideration. For this case, see also *Knowsley Housing Trust v White* [2006] UKHL 70, [2009] 1 A.C. 636 (above, para.2-196); there was no reference to the equitable doctrine here under discussion in either the *Burrows* or the *Knowsley* case.
- [863.](#) [1966] 2 Q.B. 617; above para.4-118; *Winder* (1966) 82 L.Q.R. 165; cf. *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98, 102.
- [864.](#) Below, paras 8-015, 8-020.
- [865.](#) The same would be true where the creditor's promise had been obtained by misrepresentation, e.g. as to the debtor's ability to pay. In the *D & C Builders* case, above n.817, Danckwerts L.J. at 626 suggested that there had been such a misrepresentation by the defendant's wife on his behalf, while Winn L.J. said that there was no finding to this effect. If such a false representation were now made dishonestly and induced the creditor to accept part payment in full settlement, the representor could be criminally liable under s.2 of the Fraud Act, 2006.
- [866.](#) Above, para.4-068.
- [867.](#) *Pao On v Lau Yiu Long* [1980] A.C. 614, 634. cf. *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep. 620, where the requirement of consideration was satisfied (above para.4-120); and there was no duress (below para.8-023). It was said at 629 that "the submissions relating to consideration and duress inter-relate". No separate argument seems to have been advanced that, in the absence of duress, the agreement might be open to attack on the ground that it had been "improperly obtained".

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## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 11. - Proprietary Estoppel

### (a) - Nature of the Doctrine

#### Introductory

#### 4-139

Proprietary estoppel is said to arise in certain situations in which a person has done acts in reliance on the belief that he has, or that he will acquire, rights in or over another's property. Usually, but not invariably, that property will be land <sup>868</sup> and the acts in question will consist of erecting buildings on, or making other improvements to, that land. Where the requirements of proprietary estoppel are satisfied, the landowner is precluded from denying the existence of the rights in question, and may indeed be compelled to grant them. Because the estoppel precludes him from denying the existence of rights in property, it has come to be known as "proprietary estoppel." <sup>869</sup> It is distinct <sup>870</sup> from promissory estoppel, both in the conditions which must be satisfied for it to come into operation and in its effects. But under both doctrines some legal effects can be given to promises which are not contractually binding for want of consideration; and it is this aspect <sup>871</sup> of proprietary estoppel which calls for discussion in the present chapter.


#### Scope of proprietary estoppel

#### 4-140

⚠ Proprietary estoppel operates in a variety of situations so disparate that it was once described by Robert Goff J. as "an amalgam of doubtful utility." <sup>872</sup> The cases can be divided broadly <sup>873</sup> ⚠ into two categories. In the first, one person acts under a mistake as to the existence or as to the extent of his rights in or over another's land. The landowner might then, even though the mistake was in no way induced by him, be prevented from taking advantage of it, particularly if he "stood by" knowing of the mistake, or actively encouraged the mistaken party to act in reliance on his mistaken belief. <sup>874</sup> These cases of so-called "acquiescence" <sup>875</sup> do not raise any questions as to the enforceability of promises and therefore do not call for further discussion in this chapter. <sup>876</sup> In the second situation, there is not merely "acquiescence" by the landowner, but "encouragement" <sup>877</sup> in the sense of conduct by the landowner, or a representation by him, from which a promise to the other party (the promisee) can be inferred <sup>878</sup> to the effect that the promisee has a legally enforceable <sup>879</sup> interest in the land or that one will be created in his favour. If the promisee acts in reliance on such a promise, the question will arise to what extent the promise can be enforced, even though it may not be supported by consideration, or fail to satisfy the other requirements (such as those of certainty or form <sup>880</sup>) of a binding contract.

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<sup>1.</sup> Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

- [868.](#) See para.4-157 below.
- [869.](#) *Jones v Jones* [1977] 1 W.L.R. 438, 442; *Pascoe v Turner* [1979] 1 W.L.R. 431, 436; *Re Sharpe* [1980] 1 W.L.R. 219, 233; *Greasley v Cooke* [1980] 1 W.L.R. 1306, 1311; cf. *Midland Bank plc v Cooke* [1995] 4 All E.R. 564, 573 (“equities in the nature of an estoppel”). In *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [3] and [14]–[29] Lord Scott uses the expression “proprietary estoppel” to refer to the doctrine, while Lord Walker generally refers to the doctrine simply as “equitable estoppel”. In that case he uses the expression “proprietary estoppel” only when quoting from or summarising other sources in which it occurs (e.g., at [48], [67], [73] and [78]); and where he so uses it he does without disapproval. In *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [29] and passim, Lord Walker uses the words “proprietary estoppel” to refer to the doctrine. For the use of “equitable estoppel” to mean “proprietary estoppel,” see also *Secretary of State for Transport v Christos* [2003] EWCA Civ 1073, (2004) 1 P. & C.R. 17, e.g. at [42].
- [870.](#) *Fontana N.V. v Mautner* (1980) 254 E.G. 199, 207; and see below, paras 4-181—4-184.
- [871.](#) For wider discussions see Davies (1979) 8 Sydney L.Rev. 200 and (1980) 7 Adelaide L.Rev. 200; Moriarty (1984) 100 L.Q.R. 376; Smith in (ed. Rose) *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel*, p.235 (1996).
- [872.](#) *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84, 103.
- [873.](#)  A proprietary estoppel does not “have to fit neatly” into the “pigeon holes” of the “pure acquiescence” or “assurance” (or “encouragement”) categories discussed in para.4-140 of Vol.I: *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782, [2015] H.L.R. 43 at [72]. In this case a finding that the claimant company was entitled to a right of way on the basis of proprietary estoppel, partly by reason of the defendant’s encouragement and partly by its acquiescence in allowing use of the right of way for three years, was accordingly upheld by the Court of Appeal: see at [71]–[78]. It was further held that a party (A) could be found to have encouraged the other’s (B) belief in the existence of the right claimed even though A was not aware of that belief: it sufficed for A’s conduct to be consistent only with B’s having the right in question (at [73]). See also *Caldwell v Bryson* [2017] NICH 9 where the proprietary estoppel was based on both “acquiescence” (at [10(ii)]) and “encouragement” (at [18(a)]).
- [874.](#) *Wilmott v Barber* (1880) 15 Ch.D. 96; cf. *Taylor’s Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133 note; *Coombes v Smith* [1986] 1 W.L.R. 808; *Matharu v Matharu*, *The Times*, May 13, 1994. In *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764, Lord Neuberger at [62] said that these “standing by” cases provided the “classic example” of proprietary estoppel.
- [875.](#) *Wilmott v Barber* (1880) 15 Ch.D. 96, 105; in *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17 the alleged estoppel was likewise based on acquiescence, so that no question arose as to the enforceability of any promise. The claim failed as the defendant had drawn the claimant’s attention to his (the defendant’s) interest in good time and so had not acted unconscionably in asserting that interest against the claimant.
- [876.](#) See below, para.29-169.
- [877.](#) *Ramsden v Dyson* (1866) L.R. 1 H.L. 129, 170; cf. *Att.-Gen. of Hong Kong v Humphreys Estates (Queen’s Gardens)* [1987] 1 A.C. 114 (where this requirement was not satisfied: below, para.4-147).
- [878.](#) See *Lloyd’s Bank plc v Rosset* [1991] 1 A.C. 107; *Keelwalk Properties Ltd v Walker* [2002] EWCA Civ 1076 at [63], where this requirement was not satisfied; *Walsh v Singh* [2009] EWHC 3219 (Ch), [2010] F.C.R. 117, where a claim based on “constructive trust or estoppel” (before [14]) was rejected because the claimant had failed to establish that any relevant promise had been made to her; *MacDonald v Frost* [2009] EWHC 2276 (Ch), [2009] W.T.L.R. 1815 where again the requirement of a promise or assurance was not satisfied; and *Williams v Lawrence*



[2011] EWHC 2001, where a house sharing agreement between parents and their son did not give rise to a proprietary estoppel in favour of the son (who had spent money on improvements) since there had been neither any express promise by the parents to create any property interest in the son's favour, nor any conduct on their part from which such a promise could be inferred.

[879.](#) *Coombes v Smith* [1986] 1 W.L.R. 808 (where there was no belief in the existence of a *legally enforceable* right); and cf. *Brinand v Ewens* (1987) 19 H.L.R. 415.

[880.](#) See, e.g. below, para.4-142, n.844.

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### Section 11. - Proprietary Estoppel

### (b) - Bases of Liability

#### Expenditure on another's land in reliance on a promise

#### 4-141

⚠ In *Dillwyn v Llewelyn* <sup>881</sup> a father executed a memorandum "presenting" a named estate to his son "for the purpose of furnishing himself with a dwelling house." The son spent £14,000 in building a house on the land; and it was held (after the father's death) that he was entitled to have the fee simple of the estate conveyed to him. Many later cases similarly give some degree of legal enforceability to a promise by a landowner in reliance on which the promisee has spent money on making improvements to the promisor's land: for example, where A built a bungalow on B's land in reliance on B's promise that A could stay there for the rest of his life <sup>882</sup>; where B purported to make a gift of a cottage to her son A "provided he did it up" and A incurred considerable expense in doing so <sup>883</sup>; where A spent money on extending or improving B's house in reliance on a similar promise by B <sup>884</sup> ⚠; where, in reliance on such a promise, A actually did the work of improvement him- or herself <sup>885</sup>; and where a tenant, whose lease had been terminated, spent money on improving the premises in reliance on the landlord's promise to grant him a new lease. <sup>886</sup> Cases of this kind can be explained on the basis of unjust enrichment: in all of them, the landowner would benefit unjustly if he were allowed to disregard his promise and to take back the land after he had induced the promisee to make improvements to it. But the unjust enrichment explanation will not account for cases in which the doctrine has been applied even though the promisee's expenditure on another's land did not result in any benefit to the owner of that land. <sup>887</sup> It follows that, although unjust enrichment of the promisor may be the most obvious basis of proprietary estoppel, it cannot provide complete explanation of the doctrine.

#### Proprietary estoppel and constructive trust

#### 4-142

⚠ The explanation of proprietary estoppel as a mechanism for preventing unjust enrichment <sup>888</sup> perhaps accounts for the view that liability, where such an estoppel operates, is based on "an implied or constructive trust." <sup>889</sup> While this view does not assert that the two concepts "can or should be completely assimilated", <sup>890</sup> ⚠ it recognises that there is a significant area of overlap between them. <sup>891</sup> Many of the cases in which the relationship between the two concepts was considered were concerned, not with want of consideration, but with the question whether proprietary estoppel could be a ground on which a person could be held liable on a transaction which failed to comply with formal requirements, such as those imposed by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. <sup>892</sup> This question is discussed in Chapter 5 below <sup>893</sup>; here it suffices to say that the relation between the two concepts depends on a distinction between two types of cases. The first is that in which one of the elements capable of giving rise <sup>894</sup> to proprietary estoppel is an "agreement, or at least an expression of common understanding, exchanged between the parties as to the

existence, or intended existence, of a proprietary interest ... “<sup>895</sup> The second type of case is that in which proprietary estoppel can arise without any such element of agreement: e.g., where “a landowner stands by while his neighbour mistakenly builds on the former’s land.”<sup>896</sup> In cases of the first kind, the two concepts overlap in the sense that the same facts can give rise, not only to a proprietary estoppel, but also to a constructive trust.<sup>897</sup> ⚠ It is also possible, in cases of the first kind

described in para.4-142<sup>898</sup> ⚠ for relief to be given on the ground of proprietary estoppel<sup>899</sup> ⚠ even though the facts do *not*, for want of a sufficiently “clear agreement”, give rise to any constructive trust.<sup>900</sup> ⚠ In cases of the second kind, there is no such overlap, so that, even if the requirements of proprietary estoppel are satisfied, there will not, for this reason alone, be a constructive trust.<sup>901</sup>

#### Other acts done in reliance on the promise

### 4-143

The operation of proprietary estoppel is not confined to cases in which the promisee has incurred expenditure on, or done work to, the promisor’s land. It can also apply where the promisee has conferred some other benefit on the promisor<sup>902</sup>, and even where no work has been done on the promisor’s land and he has not received any other benefit. This indeed appears from one of the illustrations given by Lord Westbury in *Dillwyn v Llewelyn*: if “A gives a house to B, but makes no formal conveyance, and the house is afterwards included, with the knowledge of A, in the marriage settlement of B, A would be bound to complete the title of the parties claiming under the settlement.”<sup>903</sup> Similarly, the doctrine operated in the absence of any expenditure on the promisor’s land in *Crabb v Arun DC*<sup>904</sup>. In that case A (a local authority) by its conduct represented to B that B had a right of way from his land over adjoining land owned by A. In reliance on that representation, B sold part of his own land, so that the only access from the remainder to the nearest public highway was by means of the right of way across A’s land. It was held that B had a right to cross A’s land for the purpose of access to his retained land. Detrimental reliance by the promisee here gave rise to a proprietary estoppel even though no benefit was conferred on the promisor.<sup>905</sup>

#### Alternative explanation: contract

### 4-144

In *Dillwyn v Llewelyn* Lord Westbury, while referring to the parties of the transaction as “donor” and “donee” also said that the son’s expenditure “supplied a valuable consideration originally wanting”<sup>906</sup>, and in discussing a hypothetical example similar to the facts of the case before him he concluded “that the donee acquires a right from the subsequent transaction to call upon the donor to perform that contract and to complete the imperfect donation.”<sup>907</sup> These passages may suggest that he regarded the memorandum as a kind of unilateral contract<sup>908</sup> by which the father promised to convey the land if the son built a house on it. The terms of the memorandum make it improbable that a modern court would so regard it; it is more likely that these terms would now be regarded as negating contractual intention.<sup>909</sup> However, in a number of later cases the rights of a person who has expended money on the property of another have been explained as being based on contract<sup>910</sup>, and such an explanation is sufficiently plausible to make reliance on a doctrine of proprietary estoppel unnecessary.<sup>911</sup> A unilateral contract to transfer an interest in land has been held to arise out of a promise to make the transfer if the promisee would pay instalments due under a mortgage on the house<sup>912</sup>; it can equally arise out of a promise to make the transfer if the promisee will make improvements to the land, or indeed do any other act.<sup>913</sup>

### 4-145

But there are, it is submitted, obstacles to treating all cases of proprietary estoppel as depending on contract. One is that the promises in cases of this kind are often made in a family context and lack contractual force because they were made without contractual intention.<sup>914</sup> Another is that the promise may lack consideration because the party relying on the estoppel made no counter-promise and so incurred no obligation, and that the arrangement was one in which it would not be in

accordance with the intention of the parties to treat it as a unilateral contract.<sup>915</sup> A third is that the terms of the alleged contract are often too vague to satisfy the requirement of certainty.<sup>916</sup> This difficulty accounts for the view of the Court of Appeal that there was no contract in *Crabb v Arun DC*<sup>917</sup>; there may have been an implied promise to grant the claimant some right of way across the defendant's land, but no financial or other terms were specified in that promise, so that it would not (even if supported by consideration) have been sufficiently certain to give rise to a contract. A fourth is that, even if the promise or representation has the force of a contract, that contract can bind only the promisor and so cannot be enforced against any third party, against whom a proprietary estoppel may nevertheless arise. The point is illustrated by *Stallion v Albert Stallion Holdings (Great Britain) Ltd*<sup>918</sup> where a husband had, in a "Divorce Settlement Agreement"<sup>919</sup> represented to his wife that, if she consented to a divorce from him, she would be allowed to live rent free in a specified house. This agreement may well have amounted to a unilateral contract between the husband and the wife; but the point is not discussed in the judgment, presumably because any such contract would not have bound the company (controlled by the husband) which owned the house.<sup>920</sup> But, as the representation on which the wife had relied<sup>921</sup> had also been made on behalf of that company, it was found that "the conscience of [the company] was also affected",<sup>922</sup> so as to give rise to a proprietary estoppel against it. A fifth is that many arrangements which can give rise to proprietary estoppel are made without any attempt to comply with the stringent formal requirements now imposed on the making of contracts for the disposition of interests in land.<sup>923</sup> Failure to comply with these requirements does not prevent such arrangements from giving rise in certain circumstances to a proprietary estoppel,<sup>924</sup> but it does prevent them from taking effect as contracts. The possibility of explaining proprietary estoppel on the basis of contract is therefore in practice likely to be restricted to cases where the arrangement does *not* purport to dispose of an interest in land.<sup>925</sup> A sixth is that the explanation of proprietary estoppel as based on contract also fails to take account of the fact that the promisee's remedy in cases of proprietary estoppel may fall short of awarding him the full amount of the expectation interest to which he is in principle entitled for breach of contract, at least where the value of that interest can be established with sufficient certainty. In cases of proprietary estoppel the court may, under the principles discussed in paragraph 4-173 below, award less than the value of his expectations. This fact (among others),<sup>926</sup> supports the view that remedies based on proprietary estoppel are distinct from those for breach of contract. A final and related point follows from a difference between contract and proprietary estoppel explained in the unreported case of *Walton v Walton*,<sup>927</sup> where Hoffmann L.J. said that, while "a contract, subject to the narrow doctrine of frustration, must be performed, come what may", what he called "equitable" estoppel "looks backwards from the moment when the promise fails to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."<sup>928</sup> This process of looking backwards may lead not only to the conclusion of awarding the promisee less than the value of his expectation,<sup>929</sup> but also to that of awarding him nothing at all.<sup>930</sup>


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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

881. (1862) 4 D.F. & G. 517.

882. *Inwards v Baker* [1965] 2 Q.B. 507.

883. *Voyce v Voyce* (1991) 62 P. & C.R. 290; Q v Q [2008] EWHC 1874, [2009] 1 F.L.R. 935.

884.  *Hussey v Palmer* [1972] 1 W.L.R. 1286; *Pascoe v Turner* [1979] 1 W.L.R. 431; *Durrant v Heritage* [1994] E.G.C.S. 134; cf. *Arif v Anwar* [2015] EWHC 124 (Fam), [2016] 1 F.L.R. 359, where the person claiming to be entitled to the benefit of the proprietary estoppel had allowed money to which he was entitled to be used in improving the property; and this fact was held to be sufficient detrimental reliance (at [68]) to give rise to the proprietary estoppel (at [69]); for this requirement, see Vol.I, para.4-158); *semble* spending money on mere maintenance would not suffice: *Griffiths v Williams* [1978] E.G.D. 919. cf. *Maharaj v Chand* [1986] A.C. 898 (where, because of local legislation, proprietary estoppel was not argued).

885. *Eves v Eves* [1975] 1 W.L.R. 1338; *Jones v Jones* [1977] 1 W.L.R. 438; *Ungurian v Lesnoff* [1990] Ch. 206; *Clough v Kelly* (1996) 72 P. & C.R. D22 (where the claimant had also spent


money on the premises); cf. *Jiggins v Brisley* [2003] EWHC 841; [2003] 1 W.T.L.R. 1141 (provision of purchase money and money to pay for improvements); see also *Van Leathen v Brooker* [2006] EWHC 1478, [2006] 1 F.C.R. 697, below para.4-158.

886. *J.T. Developments v Quinn* (1991) 62 P. & C.R. 33.

887. *Canadian Pacific Railway v The King* [1931] A.C. 414; *Armstrong v Sheppard & Short* [1959] 2 Q.B. 384.

888. See para.4-141 above, after n.838.

889. *Sen v Headley* [1991] Ch. 425, 440; *Re Dale* [1994] Ch. 31, 47; *Lloyd's Bank plc v Carrick* [1996] 4 All E.R. 632, 640; cf. *Drake v Whipp* (1996) 28 H.L.R. 531; *Yaxley v Gotts* [2000] Ch. 162 at 176, 193; *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch. 372 at 382 where the agreement (if any) lacked contractual force, not for want of consideration, but on account of its incompleteness (above, para.2-123). For a difference of judicial opinion as to the basis of the *Banner Homes* case, see *Crossco No.4 Unlimited v Jolan Ltd*, Note [2011] EWCA Civ 1619, [2012] 2 All E.R. 754; further discussion of this difference (which did not affect the outcome of the *Crossco* case) is beyond the scope of this Chapter. For reference to the relationship between proprietary estoppel and constructive trust, see also *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, [2014] 1 W.L.R. 1163, where nothing turned on the distinction, so that the Supreme Court did not find it necessary further to discuss the point: see at [28]. The actual decision in that case was that, under relevant provisions of the Land Registration Act 2002, the person in whose favour the estoppel arose did not have priority over a lender whose loan was secured by a legal charge on the property. This point, too, is beyond the scope of this Chapter.

890.  *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [13]; in this passage, Lord Walker is reported as having referred to “common interest constructive trust.” Quaere whether “interest” is not here a misprint for “intention”: cf. the reference to “common intention” *ibid.* at [17], [18], [25], [30] and [37]; see also *Matchmove Ltd v Dowding and Church* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 at [29] (“common intention constructive trust”). In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 there was neither a proprietary estoppel (see below, paras 4-161 to 4-162) nor a constructive trust but it is significant that Lord Scott treats these issues in separate parts of his speech, paras [14]–[29] being devoted to proprietary estoppel and paras [30]–[38] to constructive trust. Lord Walker at [93] briefly dismisses the constructive trust claim, having devoted the bulk of his speech to proprietary (or “equitable” estoppel): see above, para.4-139 n.822. For the recognition of the distinction between the two doctrines, see also the *Cobbe* case [2008] UKHL 55 at [24] and [29]; and *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776, where Lord Scott, while agreeing that the claim succeeded on the basis of proprietary estoppel (see below, especially paras 4-149 to 4-152, 4-163 to 4-166 and 4-172), found it “easier and more comfortable to regard [that claim] as established via a remedial constructive trust” (at [14] and see [20]).

891. *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 45 at [24]; cf. *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [128]; *Q v Q* [2008] EWHC 1874 (Fam), [2009] 1 F.L.R. 934 at [112], [113]; *Herbert v Doyle* [2010] EWCA Civ 1095, [2009] W.T.L.R. 589 at [54]–[55]; *Williams v Lawrence* [2011] EWHC 2001 (Ch), [2011] W.T.L.R. 1455 at [26].

892. e.g., *Yaxley v Gotts* [2000] Ch. 162; *Kinane v Mackie-Conteh*, above n.843.

893. See above, para.2-180 n.958; and paras 5-040, 5-045 below.

894. i.e., if the conditions specified in paras 4-146 to 4-158 below are satisfied.

895. *Kinane v Mackie-Conteh*, above n.843 at [51]; cf. *ibid.*, at [50], citing *Yaxley v Gotts*, above n.844, at 180.

896. *ibid.*, at [176], cited in *Kinnane v Mackie-Conteh*, above n.843 at [47].

897.

!ibid., at [51]; *S v S* [2006] EWHC 2892 (Fam), [2007] F.L.R. 1123 at [59]; *Brightlingsea Haven v Morris* [2008] EWHC 1928, [2009] 2 P & C.R. 11 at [40] (“the creation and operation of a constructive trust through proprietary estoppel”) but even in such cases it should be emphasised the two concepts cannot be “completely assimilated” (above at n.842); in particular, their legal effects may differ: *Stack v Dowden* above n.842 at [37]; Lord Neuberger *ibid.*, at [128] more cautiously says that “it may well be that facts which may justify a proprietary estoppel ... would give rise to a constructive trust.” In *Stallion v Albert Stallion Holdings (Great Britain) Ltd* [2009] EWHC 1950 (Ch), [2010] 2 F.L.R. 78 (below, para.4-145) the claim was originally based on proprietary estoppel and constructive trust but the second of these bases was not pursued (at [3], [4]). Conversely, in *Matchmove Ltd v Dowding and Church* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 relief was given at first instance to buyers of land which they had bought without complying with the formal requirement of Law of Property (Miscellaneous Provisions) Act 1989 s.2(1) (Main Work, Vol.I, para.5-011) on the ground of “both proprietary estoppel and constructive trust” ([2016] EWCA Civ 1233 at [28]), but on appeal counsel for the buyers “was content to rely solely upon constructive trust” (*ibid.*) so that the Court of Appeal, in upholding the decision below, was able to avoid “the issue whether section 2(5) of the 1989 Act can apply to claims based upon proprietary estoppel as distinct from constructive trust” [2016] EWCA Civ 1233 at [28]. For this problem, see Main Work, Vol.I, para.4-115 n.686, para.4-160 n.981 and paras 5-044 to 5-048.

898.

!At note 847.

899.

!Arif v Anwar [2015] EWHC 124 (Fam) at [69].

900.

!At [47], [68].

901.

This follows from the reasoning of *Kinane v Mackie-Conteh*, above n.843 at [51] and of *S v S*, above n.849 at [59].

902.

e.g. *Tanner v Tanner* [1975] 1 W.L.R. 1346 (services rendered to promisor in managing his property); *Greasley v Cooke* [1980] 1 W.L.R. 1306 (personal and nursing services); *Wayling v Jones* (1993) 69 P. & C.R. 170 (services rendered to promisor for virtually no pay); *Campbell v Griffin* [2001] EWCA Civ 999; [2001] W.T.L.R. 981 (lodger caring for elderly couple); *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 (gardener-handyman caring for childless widow, below, para.4-175); *Stallion v Albert Stallion Holdings (Great Britain) Ltd* [2009] EWHC 1950 (Ch), [2010] 2 F.L.R. 78 (wife consenting to divorce and making no claim to ancillary relief); cf. *Plimmer v Mayor of Wellington* (1884) 9 App. Cas. 699 and *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379 (where the landowner benefited from improvements to his land but also—and more significantly—in other ways); *Grant v Edwards* [1986] Ch. 638, 657; contrast *Howard v Jones* (1988) 19 Fam. Law 231 (contribution to running costs of another property insufficient).

903.

(1862) 4 D.F. & G. 517, 521.

904.

[1976] Ch. 179. The case was described in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84, 121 as one of “estoppel by convention”; but this would require a dealing between A and B on the basis of a common assumption (above, paras 4-109, 4-110) while in *Crabb*’s case the dealing was between B and the purchaser from him. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387, 403, *Crabb*’s case was described as one of “promissory estoppel” (see above, para.4-086); but the requirements of that doctrine (in particular, the requirement of a pre-existing legal relationship: above, para.4-089) were not satisfied in *Crabb*’s case, and the effect of the estoppel differed from promissory estoppel in giving rise to a new right: cf. above, para.4-099.

905.

cf. *Hammersmith & Fulham BC v Top Shop Centres Ltd* [1990] Ch. 237; *Evans v HSBC Trust Co (UK) Ltd* [2005] W.T.L.R. 1289 (as to which see also para.4-160 below, n.983) and *Joyce v Epsom and Ewell Borough Council* [2012] EWCA Civ 1398, [2013] 1 E.G.L.R. 21, where the detriment consisted of work done by the promisee in the expectation of being granted a right of way over adjoining land owned by the defendants: see at [21]. This “encouragement” (at [39]



and see above para.4-140) gave rise to the proprietary estoppels described in para.4-170 below.

[906.](#) (1862) 4 D. F. & G. 517, 521.

[907.](#) *ibid.*, at 522.

[908.](#) Above, para.2-082.

[909.](#) Above, para.2-177.

[910.](#) e.g. *Plimmer v Mayor of Wellington* (1884) 9 App. Cas. 699 as explained in *Canadian Pacific Railway v The King* [1931] A.C. 414, 428; *Eves v Eves* [1975] 1 W.L.R. 1338; *Tanner v Tanner* [1975] 1 W.L.R. 1346; cf. *Re Sharpe* [1980] 1 W.L.R. 219, 224; and see *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379 (where there was a contract between the defendant and the claimant's predecessor in title).

[911.](#) See *Lloyd's Bank plc v Carrick* [1996] 4 All E.R. 632, where the existence of a contract of sale precluded reliance by the purchaser on proprietary estoppel, even though that contract was, as against a bank to which the property had been charged as security, void for non-registration. Contrast *Yaxley v Gotts* [2000] Ch. 162 at 179, when there was *no* such contract but, at most, an agreement lacking contractual force. See also *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam. 211 at [35]–[36], distinguishing between cases of proprietary estoppel and those in which parties, *before* acquiring property, reach “an agreement, arrangement or understanding ... that each is to have a beneficial share in the property.”

[912.](#) *Errington v Errington* [1952] 1 Q.B. 290; above, para.2-084.

[913.](#) e.g. *Tanner v Tanner* [1975] 1 W.L.R. 1346; merely to maintain the house in repair could be sufficient for the present purpose, even if it did not suffice to raise a proprietary estoppel: see above, para.4-141, n.836.

[914.](#) *Walton v Walton* (April 14, 1994, unreported) per Hoffmann L.J., cited in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [57] (“in many cases of promises made in a family or social context, there is no intention to create an immediately binding contract”).

[915.](#) *J.T. Developments v Quinn* (1991) 62 P. & C.R. 33.

[916.](#) Above, para.2-145. See *Gillett v Holt* [2001] Ch. 210 at 230; *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch. 372; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367, at [10], [49], [50]; if the party claiming the benefit of a proprietary estoppel *knows* that the agreement has no contractual force because it lacks certainty or is incomplete, this fact may prevent the estoppel from arising, as in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752, below, paras 4-161 to 4-162. See also paras 4-149 to 4-152 below for the discussion in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 of the degree of certainty which a non-contractual promise or representation must have to give rise to a proprietary estoppel; and paras 4-165 and 4-166 for the relationship on this point between the *Thorner* case and the *Cobbe* case, above.

[917.](#) [1976] Ch. 179; above, para.4-143. Atiyah (1974) 92 L.Q.R. 174 criticises the view that there was no contract but the argument is based on the fallacy that, merely because a promise has some legal effects, it must necessarily have *all* the effects of a contract: cf. above, paras 4-013, 4-106 and below, para.4-185. The alleged contract in *Crabb's* case would, quite apart from lacking consideration, be impossibly vague: see above, para.2-147 and cf. Millett (1976) 92 L.Q.R. 342; *Duncanson* (1976) 39 M.L.R. 268. See also *Joyce v Epsom and Ewell Borough Council* [2012] EWCA Civ 1398, [2013] 1 E.G.L.R. 21 where the “mutual understanding” between the relevant parties “even if falling short of a contractual bargain” (at [46]) gave rise to a proprietary estoppel.

[918.](#) [2009] EWHC 1950 (Ch), [2010] 2 F.L.R. 78.

- [919.](#) *ibid.*, at [29].
- [920.](#) *ibid.*, at [12].
- [921.](#) See above, at n.868.
- [922.](#) [2009] EWHC 1950 (Ch) at [20].
- [923.](#) Law of Property (Miscellaneous Provisions) Act 1989, s.2(1)–(3). Previously the contract could be *made* informally, but Law of Property Act 1925, s.40 (replacing part of Statute of Frauds 1677, s.4, and now repealed) had required either a note or memorandum in writing as evidence of the contract, or “part performance” of the contract. The latter requirement could be satisfied by the conduct of the promisee giving rise to proprietary estoppel. cf. the reference to “part performance” in *Dillwyn v Llewelyn* (1862) 4 D.F. & G. 517, 521.
- [924.](#) See above, para.4-115 n.686. cf. Law Com. No.164 (1987) para.5.5.
- [925.](#) For the view that proprietary estoppel can apply where the subject-matter of the promise is property other than land, see below, para.4-157. For the definition of “interest in land” within s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 s.2, see *ibid.*, s.2(6). An irrevocable licence can be a sufficiently certain “interest in land” for the purpose of satisfying the second of the requirements of proprietary estoppel stated in para.4-162 below: see *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [21], [22], per Lord Scott.
- [926.](#) Such as the discretionary nature of the remedy: below, paras 4-173, 4-185.
- [927.](#) April 14, 1994, cited in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [52].
- [928.](#) Cited *ibid.*, at [57] and [101]; the context indicates that “equitable” in the passage so cited refers to proprietary estoppel.
- [929.](#) See above, at n.875.
- [930.](#) See below, para.4-179.

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**Consolidated Mainwork Incorporating Second Supplement**  
**Volume I - General Principles**  
**Part 2 - Formation of Contract**  
**Chapter 4 - Consideration <sup>1</sup>**  
**Section 11. - Proprietary Estoppel**  
**(c) - Conditions giving rise to Liability**

**Main elements of proprietary estoppel**

**4-146**

⚠ There are said to be “three main elements” of proprietary estoppel: a representation made or assurance given to the claimant, reliance by the claimant on that representation or assurance, and detriment suffered by the claimant in consequence of such reliance. <sup>931</sup> ⚠ These requirements are discussed in paras 4-147 to 4-166 of this Chapter. Our concern in these paragraphs will be with situations in which the representation or assurance is one which amounts to a promise, <sup>932</sup> or one from which a promise can be inferred, but that promise is one which for some reason (such as want of consideration, the absence of contractual intention or failure to comply with formal requirements) lacks contractual force. There can be no proprietary estoppel of the kind here under discussion where the statement relied on was not a promise at all: for example, where that statement was contained in a letter which “did not promise anything”. <sup>933</sup>

**Kinds of promises capable of giving rise to a proprietary estoppel**

**4-147**

⚠ A promise may give rise to a proprietary estoppel even though it is not express but is implied: for example, from the fact that the parties acted on the common assumption that one of them was to have the right to reside on the other's property. <sup>934</sup> The promise must be of such a kind that it is reasonable for the promisee to rely on it; the promisor must have been aware of the fact that the promisee would so rely on it, though “the particular act of [the promisee's] reliance” <sup>935</sup> need not have been known to, or foreseen by, the promisor, and the promisor must have intended that the promisee would so rely on it. <sup>936</sup> Whether this last requirement is satisfied depends on “an objective assessment” <sup>937</sup> of the promisor's intention or, to put the same point in another way, on whether the promisee had reasonably understood the promise or representation to be one on which he could rely. <sup>938</sup> It has been said that, in that event, “what [the promisor] intended is not really germane” <sup>939</sup>: the reference here seems to be to the promisor's actual or subjective intention. The promise must also induce the promisee to believe that a legal right has been, or will be, created in his favour. <sup>940</sup> There can normally be no such belief, and hence no proprietary estoppel, if the promise expressly disclaims legal effect: for example, in one case <sup>941</sup> it was held that no proprietary estoppel arose out of an agreement for the transfer of a number of flats “subject to contract,” it being well known that the effect of these words was to negative the intention to be legally bound. <sup>942</sup> ⚠ The promisee may have formed “the confident and not unreasonable hope” <sup>943</sup> that the promise would not be withdrawn; but no *belief* to this effect had been encouraged <sup>944</sup> by the promisor or relied on by the promisee. It seems that a proprietary estoppel could arise out of such an agreement if one of the parties *did* encourage such a belief in the other and the other acted to his detriment in reliance on that belief. <sup>945</sup> Similar reasoning applies where the promise in terms reserves a right to the promisor wholly to revoke the

promise. Thus where a landowner promised her part-time gardener to leave him her house in her will but told him “not to count his chickens before they were hatched”, it was held that no proprietary estoppel arose when, after having made a will in his favour, she then revoked it and made another leaving the property to someone else: in these circumstances it was not unconscionable for the landowner to revoke the promise.<sup>946</sup> The position is the same where the promise, even though it does not in terms reserve a power to revoke, is in its nature revocable and this is a matter of common knowledge so that the promisee must be taken to have been aware of the risk of its being revoked. This will often be the position where the promise is one to make a will in favour of the promisee; but it does not follow as a matter of law that such a promise cannot give rise to proprietary estoppel. In *Gillett v Holt*<sup>947</sup> the claimant had worked for nearly 40 years in the defendant’s farming business in reliance on the defendant’s frequently repeated promises to leave him the bulk of his estate; the claimant had also in various other ways relied on those promises. It was held that the promises were “more than a statement of revocable intention<sup>948</sup>”; and that they were capable of giving rise, and did give rise, to a proprietary estoppel.

❗ Where the property in question was held in trust by two trustees, it was held that the promise of only one of the trustees, who had no authority to bind the other, did not give rise to a proprietary estoppel on which the promisee sought to rely by way of defence to a claim for possession of the property, that claim having been made by both trustees.<sup>949</sup> ❗ On appeal, the appellant also put forward a new claim based on estoppel by convention,<sup>950</sup> ❗ but this claim failed on the ground stated above, para.4-108.

## Silence and inaction

### 4-148

Proprietary estoppel by “acquiescence” or “standing by” can no doubt arise from “silence and inaction”; but the further question here to be discussed is whether proprietary estoppel by “encouragement”<sup>951</sup> can also arise in this way. One passage from Lord Walker’s speech in *Thorner v Major*<sup>952</sup> could be interpreted as giving an affirmative answer to this question; but in a later passage in the same speech he refers, in the context of proprietary estoppel by “encouragement”, to a requirement of assurances given “expressly, impliedly or, in standing by cases tacitly.”<sup>953</sup> A distinction seems here to be drawn between an *implied* assurance, inferred from conduct, which can give rise to a proprietary estoppel by “encouragement”<sup>954</sup> and a *tacit* one, based, as Lord Neuberger said in the same case, on “silence and inaction, rather than any statement or action.”<sup>955</sup> Such a tacit assurance can give rise to proprietary estoppel by “acquiescence” or “standing by”; but this possibility is, in both these speeches, *restricted* to cases of this kind, so that the “encouragement” cases are left to be governed by the general principle, applied in other legal contexts, that “silence” is, in general, too equivocal to be given the weight of a positive assurance. The policy reasons for applying this principle in cases of promissory estoppel are stated in para.4-093 above; in cases of proprietary estoppel by acquiescence they are, or may be, outweighed by the need to strip a landowner, who has “stood by” in silence, of the unjust enrichment<sup>956</sup> that would, but for such an estoppel, accrue to him.

## “Character or quality” of the promise

### 4-149

The “character or quality of the representation or assurance made to the claimant” in a case of alleged proprietary estoppel by “encouragement” was said by Lord Walker to have been the “main issue” in *Thorner v Major*.<sup>957</sup> In a later passage,<sup>958</sup> he amplified this statement by putting the question whether the representation or assurance must (as in cases of promissory estoppel and estoppel by representation)<sup>959</sup> be “clear and unequivocal” and, if so, just what this requirement meant in cases of proprietary estoppel. In *Thorner v Major*, David Thorner had, from 1976, worked without pay on a farm belonging to his father’s cousin Peter Thorner. David continued to work there without pay (receiving only pocket money from his father until Peter’s death in 2005). Before then, Peter (who was “taciturn”, “a man of few words” and “not given to direct talking”)<sup>960</sup> had on a number of occasions extending over many years given David to understand that he would, on Peter’s death, inherit the

farm, but Peter had never made any explicit promise to this effect to David. In reliance on Peter's conduct and statements, David had reasonably formed the expectation that he would inherit the farm on Peter's death and had forborne from pursuing "one of the other opportunities ... available to him." <sup>961</sup> On Peter's death intestate, David brought a claim against Peter's personal representatives <sup>962</sup> based on proprietary estoppel <sup>963</sup> (no attempt being made to argue that there was any contract between Peter and David). In upholding this claim, the House of Lords considered two main issues. The first was whether Peter's representation that David would inherit the farm was sufficiently clear to give rise to proprietary estoppel: this issue will be discussed in paras 4-150 to 4-152 below. The second was whether, even assuming that Peter had clearly represented that David would inherit something, that representation was sufficiently clear with respect to exactly what it was that David would inherit or (in the words of Lord Scott in the *Cobbe* case) whether the requirement of "clarity as to the interest in the property in question" <sup>964</sup> was satisfied: this issue will be discussed in para.4-163 below.

### "Clear enough" in context

#### 4-150

❗ In upholding the proprietary estoppel claim in *Thorner v Major*, <sup>965</sup> Lord Walker referred to the view that, in cases of such an estoppel, there was no requirement of any "clear and unequivocal" representation <sup>966</sup>; and that, indeed, where such an estoppel was based on mere "acquiescence", <sup>967</sup> there was no requirement of any representation at all. <sup>968</sup> The latter point was not strictly necessary for the decision, since *Thorner v Major* itself was "not a case of acquiescence or standing by" <sup>969</sup> but one in which the estoppel was based, not on mere inactivity, but on a positive representation or assurance. <sup>970</sup> With regard, apparently, to such cases, Lord Walker said that he would "prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be *clear enough*. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context." <sup>971</sup> ❗ The words here italicised were approved by Lord Rodger who pointed out that they gave rise to the further question: clear enough "To whom" <sup>972</sup>; and, it may be added, for what purpose? Both these questions were answered by Lord Walker's adoption <sup>973</sup> of a passage from the judgment of Hoffmann L.J. in the unreported case of *Walton v Walton* <sup>974</sup>: "The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made." <sup>975</sup> The second of these sentences is reflected in Lord Hoffmann's speech in *Thorner v Major* itself where he said that the trial judge had found "not only that it was reasonable for David to have understood Peter's words and acts to mean that 'he would be Peter's successor to [the farm]' but that it was reasonable for him to rely upon them. These findings of fact were in my opinion sufficient to support the judge's decision." <sup>976</sup> Lord Hoffmann's further statement that it would be "unrealistic" to try to "pin point the date at which the assurance became unequivocal" <sup>977</sup> may seem by implication to accept the requirement of an "unequivocal" assurance in the "encouragement" cases, but his earlier and later remarks <sup>978</sup> indicate a preference for the more flexible requirement that the assurance must be one on which it was reasonable for the person to whom it was given to rely.

### Three qualifications of "clear and unequivocal" requirement

#### 4-151

Lord Neuberger in *Thorner v Major* accepts the proposition "that there must be some sort of an assurance which is 'clear and unequivocal' before it can be relied on to found an estoppel" <sup>979</sup>; but he subjects that proposition to three qualifications. First, he expresses his agreement with Lord Walker's emphasis on the principle that "the effect of words must be assessed in their context", adding that "a sentence, which would be ambiguous and unclear in one context, [can] be a clear and unambiguous assurance in another context" and that this point was underlined by the fact that "perhaps the classic case of proprietary estoppel is based on silence or inaction, rather than statement or action" <sup>980</sup> —factors that (for reasons given in para.4-093 above) would not normally give rise to promissory estoppel or estoppel by representation. <sup>981</sup> Secondly, "it would be quite wrong to be unrealistically rigorous when applying the 'clear and unambiguous' test." <sup>982</sup> This test is then, in effect, reformulated:

“at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely.”<sup>983</sup> Thirdly, there may be cases in which the assurance “could reasonably be understood as having more than one possible meaning”<sup>984</sup> or, in other words, was ambiguous: in such cases Lord Neuberger, perhaps somewhat cautiously,<sup>985</sup> suggests that “the ambiguity should not deprive the person who reasonably relied on the assurance of all relief: it may well be right, however, that he should be accorded relief on the basis of the interpretation least beneficial to him.”<sup>986</sup> This interesting suggestion is not in terms or in substance repeated in any of the other speeches; but it can, with respect, be said to reflect the flexibility of the principled discretion which enables the courts to fashion the remedy in cases of proprietary estoppel.<sup>987</sup> The suggestion also derives some support from the similar rule (discussed in para. 26-075 below) governing the assessment of damages for breach of alternative obligations.

#### **Conclusion on “character or quality”<sup>988</sup>**

### **4-152**

The requirement of a “clear and unequivocal” assurance, representation or promise forms the starting point of the discussions in *Thorne v Major*<sup>989</sup> by Lords Walker and Neuberger of the question whether, in that case Peter’s conduct and statements were such as to give rise to a proprietary estoppel in favour of David. But, in giving an affirmative answer to that question, these speeches so much qualify the requirement (in ways described in paras 4-150 and 4-151 above) that it may respectfully be doubted whether the requirement will in future cases continue to be the best starting point for the discussion of the character or quality of the assurance necessary to give rise to a proprietary estoppel. The qualifications of the “clear and unequivocal” requirement all lead to the conclusion that the crucial questions in cases of proprietary estoppel by “encouragement”<sup>990</sup> are whether the person invoking the estoppel can establish that (in Lord Neuberger’s words) “he reasonably understood the statement or action to be an assurance on which he could rely”<sup>991</sup> and whether he did then reasonably rely on it to his detriment. Similar statements can be found in the speeches Lords Hoffmann, Scott, Rodger and Walker<sup>992</sup>; and it is of particular interest that Lord Hoffmann in his speech in *Thorne v Major* treats this as the decisive question without expressly<sup>993</sup> insisting on any further requirement that the assurance must be “clear and unequivocal.” It is respectfully submitted that, in any consideration of the “character and quality” of the representation, discussion of the “clear and unequivocal” point as a separate requirement amounts to an unnecessary intermediate stage in deciding whether an assurance or promise is such as to be capable of giving rise to a proprietary estoppel. If the nature of the assurance or promise is such as to give the promisee reasonable grounds for thinking that he could rely on it, and if he did reasonably rely on it, then there is no point in insisting on any *further* requirement that the assurance must be “clear and unequivocal.” Both these requirements pose essentially the same question; and to treat the second as if it imposed a requirement additional to the first is not only unnecessary but also potentially misleading. It should be added that when Lord Scott accepts “the requirement that a representation, if it is to found a claim based on proprietary estoppel must be clear and unequivocal”<sup>994</sup> he does so in the context of other questions than those discussed in the present paragraph: that is, of the questions whether the representation adequately identifies the property alleged to be affected by the estoppel and whether the operation of any such estoppel may be affected by a supervening change of the representor’s circumstances. The effect of *Thorne v Major* on these questions is discussed in paras 4-163 and 4-180 below.

#### **Promise must be one to create rights in or over property**

### **4-153**

To give rise to a proprietary estoppel, the promise or representation must contain a statement to the effect that the promisee either has an interest in the property in question or that such an interest will be created in his favour. This requirement was not satisfied in *Newport City Council v Charles*<sup>995</sup> where the defendant had succeeded to his mother’s secure tenancy of premises owned by the claimant housing authority and had, after his mother’s death, by “deliberate dishonesty”<sup>996</sup> induced the claimant to believe that she was still alive. The claimant in consequence acted to its detriment<sup>997</sup> in failing to exercise its statutory right to obtain an order for possession of the premises within the period specified by the statute. It was held that the doctrine of proprietary estoppel did not apply so as



to enable the claimant to obtain such an order after the end of that period. Laws L.J. said <sup>998</sup>: “The housing authority is not claiming an interest in land. Its interest as landlord and as freeholder is not in question.” It sought merely “to raise a strictly statutory claim to possession in a strictly statutory context. That ambition cannot ... be fulfilled as the fruit of a proprietary estoppel. The appellant <sup>999</sup> has not created any expectation that the appellant <sup>1000</sup> will enjoy any kind of interest in land.” Laws L.J. accepted counsel’s submission “that a proprietary estoppel may require a tenant to surrender his interest” but added that “the present situation cannot be catalogued in such a manner.” <sup>1001</sup> The reason why it could not be so catalogued appears to have been that no promise or representation to make such a surrender could be inferred from the defendant/appellant’s conduct described above. <sup>1002</sup>

### **The property in question must generally be that of the promisor**

#### **4-154**

The rights which the promisee believes to have been created must, as a general rule, be rights in or over the property of the promisor. Thus a representation by a planning authority to the effect that a landowner does not need permission to carry out development on his *own* land is not capable of giving rise to a proprietary estoppel. <sup>1003</sup>

### **Exceptions**

#### **4-155**

There are, however, a number of exceptions, or apparent exceptions, to the general rule stated in para.4-154 above. One such exception may apply where the promisor makes two promises, of which the first relates to his own land while the second relates to that of the promisee; and the two promises may be so closely linked as to form in substance a single transaction. If the doctrine of proprietary estoppel applies to that transaction as a whole, then it can provide the promisee with a remedy in respect of the second promise even though that promise, standing alone, could not have given rise to proprietary estoppel because it related only to the promisee’s land. In one case, <sup>1004</sup> for example, A promised B (1) to sell Blackacre to B to enable B to build on it, and (2) to buy Whiteacre from B so that B could pay for the building operations on Blackacre. B carried out the building work envisaged in the first of A’s promises and it was held that the doctrine of proprietary estoppel provided B with a remedy in respect of the second promise (which had no contractual force), even though that promise related only to B’s land. But it was recognised that the doctrine could not have applied to the second promise if it had stood alone and not formed part of a transaction also relating to A’s land. <sup>1005</sup> It could not, for example, have applied if A had simply made a non-contractual promise to B to buy Whiteacre from B, knowing that B intended to use the proceeds of the sale to buy shares from C, and if B had then entered into a contract to that effect with C. Normally, the doctrine applies to promises to *grant* rights in property to the promisee; it only applies to promises to *acquire* such rights from him where such promises are inextricably linked with promises of the former kind. The doctrine has also been invoked to prevent the promisor from asserting rights against the promisee in land which the latter had acquired from a third party <sup>1006</sup>; and from enforcing a charge which had been created in the promisor’s favour over the promisee’s land. <sup>1007</sup>

### **Promise not to enforce easement over promisee’s land**

#### **4-156**

Another situation in which a representation or assurance can give rise to a proprietary estoppel, although its subject-matter might at first sight seem to be the land of the promisee, is illustrated by *Lester v Woodgate*, <sup>1008</sup> where A owned a right of way over B’s land and had by words or conduct represented to B that he (A) had no objection to B’s interfering with that right by erecting a structure which had the effect of blocking the right of way. It was held that B’s reliance on A’s (implied) assurance made it unconscionable for A to assert the right of way and that proprietary estoppel operated so as to prevent A (or his successor in title) from asserting or reasserting that right. Although A’s representation or assurance could, in one sense, be said to have related to the land of the

promisee (B), it was equally plausible to regard it as affecting A's own proprietary interest as owner of an easement in or over that land. As Patten L.J. said in that case: "Although proprietary estoppel ... is largely concerned with cases in which the defendant acquires some right over the claimant's property as a result of the latter's conduct towards him, I can see no reason why the principles involved are not of equal application to cases in which the defendant is alleged to have committed an act of nuisance by interfering with an easement over his own land. In both cases, the claimant's conduct *relates to his property rights* and the estoppel bars the enforcement of the claimant's legal rights." <sup>1009</sup> Although usually the doctrine may have the effect of creating a new right in B's favour, in or over A's land, it may thus equally extinguish a right which had previously (i.e. before the occurrence of the circumstances giving rise to the estoppel) been vested in A and have fettered B's unrestricted ownership of the land.

### Subject-matter of the promise

#### 4-157

In the cases to which the doctrine has so far been applied, the subject-matter of the promise has almost always been <sup>1010</sup> (or at least included <sup>1011</sup>) land, but the prevailing view is that the doctrine can also apply where the subject-matter of the promise is property of some other kind, <sup>1012</sup> e.g., "in relation to chattels or choses in action" <sup>1013</sup> or to intellectual property: it has, for example, been held to be capable of applying to a promise relating to a licence to publish a magazine in a specified geographical region. <sup>1014</sup> But, even where the doctrine applies to promises relating to such kinds of property, it will in one respect remain narrower than that of so-called promissory estoppel <sup>1015</sup>: the promise must relate to the acquisition of an interest in the property that is the subject-matter of the promise. It is not enough that the promise should merely (in some other way) relate to property: for example, the doctrine of proprietary estoppel would not apply on the facts of *Central London Property Trust Ltd v High Trees House Ltd*. <sup>1016</sup>

### Detrimental reliance by promisee

#### 4-158

The promisee must have relied on the promise or representation to his detriment. <sup>1017</sup> Although "reliance and detriment may in the abstract be regarded as different concepts, in applying the principles of proprietary estoppel, they are often intertwined", <sup>1018</sup> so much so that they will here be treated as a single requirement. This requirement has been doubted <sup>1019</sup>; but in the absence of any such reliance it is hard to see why failure to perform a merely gratuitous promise should be regarded as giving rise to any legal liability. The element of detrimental reliance is necessary to satisfy "the essential test of unconscionability" <sup>1020</sup> which is a necessary condition for the operation of proprietary estoppel; and the existence of the requirement is further supported by the rules (to be discussed in para.4-168 below) as to the revocability of the promise. The detriment must be "substantial," i.e. such as to make it "unjust or inequitable to allow the assurance to be disregarded" <sup>1021</sup>; and the question whether it has this character is to be judged "as at the moment when the person who has given the assurance seeks to go back on it." <sup>1022</sup> Where a promise has been made which is capable of inducing detrimental reliance, and which is in fact followed by such reliance, the question may arise whether the reliance was actually induced by the promise. The burden on this issue is on the promisor: that is, it is up to the promisor, in order to escape liability, to show that the promisee would have done the acts in question anyway (even if the promise had not been made). <sup>1023</sup> The position appears to be different where a proprietary estoppel arises because both parties have acted under a mistake as to their rights in the land. <sup>1024</sup> Here it seems to be up to the party relying on the proprietary estoppel to show that his conduct in relation to the property was in fact induced by his belief that he had an interest in it. <sup>1025</sup>

### Balance of detriment and benefit

#### 4-159

The promisee's conduct in reliance on the promise may result in his both suffering a detriment and gaining a benefit. This was the position in *Henry v Henry*,<sup>1026</sup> where the owner of a share in the relevant land promised one of her younger relations that the share would be his if he cultivated the land and cared for her (the promisor) until her death. The promisee had complied with these requirements; and by doing so he had not only suffered a detriment in that he "deprived himself of the opportunity of a better life elsewhere"<sup>1027</sup> but also gained the benefit of living rent free on the land "for decades"<sup>1028</sup> and taking part of the produce for his own benefit. The Privy Council held that the detriment suffered by the promisee must be weighed against the "countervailing advantages which he enjoyed as a consequence of [his] reliance"<sup>1029</sup> and that, as the detriment was "not outweighed"<sup>1030</sup> by those advantages, a proprietary estoppel arose in his favour.<sup>1031</sup>

#### **Whether promise or reliance must relate to specific property**

#### **4-160**

The authorities are divided on the further question whether, to give rise to a proprietary estoppel, the promise or reliance must relate to identifiable property. According to one case, the promisee's conduct must relate to "some specific asset" in which an interest is claimed; so that proprietary estoppel did not arise merely because B rendered services to A in the expectation of receiving some indeterminate benefit under A's will.<sup>1032</sup> But in another case reliance on a similar expectation (induced by A's promise) was held to be sufficient even though it did not relate to any "particular property."<sup>1033</sup> The latter case can perhaps be explained on the ground that the promise did to some extent identify the property.<sup>1034</sup> It is submitted that the view that the promise must relate to identified or identifiable property<sup>1035</sup> is to be preferred<sup>1036</sup>, for without some such limitation on the scope of proprietary estoppel the doctrine could extend to any gift promise on which the promisee had relied to his detriment. Such a very broad doctrine would be fundamentally inconsistent with the doctrine of consideration<sup>1037</sup> and, indeed, with the rule that the doctrine of promissory estoppel gives rise to no new rights.<sup>1038</sup>

#### **Unconscionable conduct by promisor**

#### **4-161**

Reference has been made in para. 4-158 above to the point that the "essential test of unconscionability"<sup>1039</sup> is a necessary condition for the operation of proprietary estoppel; and the function of this requirement calls for further consideration in the light of the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd.*<sup>1040</sup> In that case an oral agreement "in principle" had been reached between a landowner (D) and a property developer (C). The purpose of the agreement was to secure the redevelopment and disposal of residential property owned by D, but the agreement lacked contractual force as it left significant aspects of the scheme to be settled by further negotiation,<sup>1041</sup> and then to be embodied in a formal agreement, between the parties, each of whom regarded the agreement at this stage as binding in honour only. C made considerable efforts and incurred considerable expense in securing the necessary planning permission; but on the day when the planning authority resolved to grant the permission D withdrew from the agreement. In the lower courts,<sup>1042</sup> this conduct on D's part was, by reason of its unconscionableness, regarded as "sufficient to justify the creation of a 'proprietary estoppel equity' "<sup>1043</sup> in favour of C. Their decision was reversed by the House of Lords which unanimously held that C had no such proprietary claim.

#### **4-162**

In rejecting the proprietary estoppel claim, Lord Scott<sup>1044</sup> said that "to treat a 'proprietary estoppel equity' as requiring ... simply unconscionable behaviour" was a "recipe for confusion"<sup>1045</sup> and he listed two further

"ingredients for a proprietary estoppel ... These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or

some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting.” <sup>1046</sup>

He in substance repeated these points in a later passage:

“Proprietary estoppel requires ... clarity as to what it is that the object of the estoppel [i.e., the defendant] is to be estopped from denying, or asserting, and clarity as to the interest in the property <sup>1047</sup> in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will ... risk becoming unprincipled and therefore unpredictable, if it has not already done so.” <sup>1048</sup>


In the *Cobbe* case, neither requirement was satisfied since the “agreement in principle”, was, as C knew, incomplete and binding in honour only, so that C could not allege that D was bound by it; and since, at the time of D’s withdrawal, C was not asserting any expectation that he would acquire a proprietary right. <sup>1049</sup> His expectation was “the wrong sort of expectation” <sup>1050</sup>, namely one that further negotiations between him and D would fill the gaps in the “agreement in principle” and that the agreement, thus completed, would be embodied in a formal written agreement and so become a binding contract. He was expecting to get a contractual, rather than a proprietary, right. <sup>1051</sup>

#### 4-163

The question whether there was sufficient “clarity as to the interest in the property in question” <sup>1052</sup> arose again in *Thorner v Major*, <sup>1053</sup> where Peter’s assurances (the nature of which is discussed in paras 4-150 to 4-152 above) were to the effect that David would inherit “the farm” (i.e. Steart Farm); and where the area to which that expression referred changed, as a result of disposals and acquisitions during the years in which that assurance had repeatedly been made. This fact was held not to be an obstacle to David’s proprietary estoppel claim since (in Lord Walker’s words) the parties’ “common understanding was that Peter’s assurance related to whatever the farm consisted of at Peter’s death ... This fits in with the retrospective operation of proprietary estoppel noted in *Walton v Walton*”, <sup>1054</sup> an unreported decision of the Court of Appeal referred to with approval in *Thorner v Major*. <sup>1055</sup> Hoffmann L.J. had there (in a passage already quoted in para.4-145 above) said that “equitable estoppel” (an apparent reference to proprietary estoppel) “looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have happened, it would be unconscionable for the promise not to be kept.” <sup>1056</sup> Such “circumstances” could, therefore, either reduce or increase the extent of the property known as “Steart Farm”, to which the proprietary estoppel related. Lord Neuberger similarly said that “the extent of the farm might change, but ... there is ... no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter’s death.” <sup>1057</sup> That was also the view of Lord Scott: “Peter’s representation that David would inherit Steart Farm speaks, at least where Peter remained the owner of an agricultural entity known as Steart Farm, as from his death and if, at that time, evidence were available to identify Steart Farm with certainty, David’s claim in equity cannot ... be rejected for want of certainty of subject-matter.” <sup>1058</sup> The fact that Lord Scott took this view is of particular significance as he evidently saw no inconsistency between it and his rejection of the proprietary estoppel claim in the *Cobbe* case on the ground of lack of “clarity as to the interest in the property in question.” <sup>1059</sup>

#### 4-164

⚠ In the *Cobbe* case, Lord Walker <sup>1060</sup> also rejected the claim based on proprietary estoppel (which he there called “equitable estoppel”). <sup>1061</sup> His policy reasons for so doing seem to resemble (though they are not expressed in the same language as) Lord Scott’s. While accepting the flexibility of the doctrine, Lord Walker starts with the point that it is “not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side” <sup>1062</sup> since, if it were so used, it would impair the certainty which was important in property transactions, especially in those of a commercial nature. <sup>1063</sup> This reasoning can be said to resemble Lord Scott’s view that such a broad application of proprietary estoppel would be a “recipe for confusion” <sup>1064</sup>, but

Lord Walker's more specific reasons for rejecting the proprietary estoppel claim seem to differ in a number of important respects <sup>1065</sup> from those given in support of the same conclusion by Lord Scott. First, Lord Scott's two "ingredients for a proprietary estoppel" (discussed in para.4-162 above) have no counterpart in Lord Walker's speech. Secondly (and conversely) Lord Walker's main ground for dismissing the proprietary estoppel claim has no counterpart in Lord Scott's speech. That ground was stated by Lord Walker to be that C's proprietary estoppel claim "seems to me to fail on the simple but fundamental point that, as persons experienced in the property world, both parties knew that there was no legally binding contract, and that either was free to discontinue the negotiations without legal liability, that is liability in equity as well as at law. [C] was therefore running a risk ... He ran a commercial risk with his eyes open," <sup>1066</sup> Lord Scott makes no express reference to *this* risk, though it may be reflected in his discussion of the reasons why the first of the "ingredients" of proprietary estoppel (discussed in para.4-162 above) had not been established. The only "risks" to which Lord Scott expressly refers as having been taken by C were the different risks "that planning permission might be refused" and that the enterprise "might leave him with an inadequate profit or even none at all." <sup>1067</sup> Thirdly, Lord Scott rejects the proprietary estoppel claim in spite of the fact that D's conduct was "unconscionable", regarding that circumstance as not "sufficient to justify the creation of a 'proprietary estoppel equity' ". <sup>1068</sup> Lord Walker, by contrast, rejects that claim, not only on the ground given above (i.e. that C "ran a commercial risk with his eyes open") <sup>1069</sup> but also on the further ground that C "knew that [D] was bound in honour only, and so in the eyes of equity her [D's] conduct, although unattractive, was *not unconscionable*". <sup>1070</sup> One possible explanation of this difference between the two speeches is that Lord Scott's concern was to deny that unconscionable conduct, even if proved, was a *sufficient*, while Lord Walker's was to emphasise that such conduct was a *necessary*, condition (which had not been satisfied) for the operation of proprietary estoppel. Another possibility is that while Lord Scott denied that even actually unconscionable conduct was sufficient for this purpose, Lord Walker was, more narrowly, concerned to deny the sufficiency of conduct that was not *actually* unconscionable but only unconscionable "in the eyes of equity", <sup>1071</sup> or, in other words, by virtue of a legal fiction. On the first of these views, the question then arises what *further* requirement, other than unconscionable conduct, must be satisfied as a necessary condition of the operation of proprietary estoppel. As the foregoing discussion in paras 4-161 and 4-162 shows, the answer to this question given by Lord Scott differs from that given by Lord Walker, though on the facts of the *Cobbe* case both answers led to the same result. <sup>1072</sup> 

## Relationship between the *Cobbe* and *Thorner* cases

### 4-165

On the issue of proprietary estoppel, the outcome of the *Cobbe* case <sup>1073</sup> differed from that of *Thorner v Major* <sup>1074</sup> and the question arises whether this difference in outcome reflects a difference in legal principle between the two cases. In discussing this question, a number of preliminary points must be made. First, of the five members of the Appellate Committee of the House of Lords in the *Cobbe* case, three (Lords Hoffmann, Scott and Walker) were also members of that Committee in *Thorner v Major*. Of those three, only one (Lord Walker) commented on the former decision in his speech in the latter, the most detailed discussion of the relationship between the two cases being contained in Lord Neuberger's speech in *Thorner v Major*. Secondly the respondents (i.e., the defendants) in *Thorner v Major* "did not contend that this House's decision in *Cobbe v Yeoman's Row Management* ... has severely curtailed, or even virtually extinguished, the doctrine of proprietary estoppel." <sup>1075</sup> In *Thorner v Major* Lord Walker described the view that this was the effect of the *Cobbe* case as a "rather apocalyptic one" <sup>1076</sup> though he accepted that the *Cobbe* case was "certainly relevant to the second issue" <sup>1077</sup> in the *Thorner* case; but on that issue the two cases were distinguished on their facts and not considered to give rise to any conflict of legal principle. <sup>1078</sup> Thirdly, Lord Neuberger in *Thornton v Major* said that "Concentrating on the perceived morality of the parties' behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in *Cobbe* ..." <sup>1079</sup> This statement of the underlying policy is in substance the same as that contained in passages from the speeches of Lords Scott and Walker in the *Cobbe* case which are cited in paras 4-162 and 4-164 above, so that, on this point at least, there is no conflict of policy between the two cases. But in the same paragraph of his speech Lord Neuberger also said that "it would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case." <sup>1080</sup> It is accordingly under the heading of the alleged "Uncertainty as to the extent of the property" <sup>1081</sup> that Lord Neuberger discusses the distinction between the two cases.



There is no such discussion under his heading of “Reasonable reliance” <sup>1082</sup> where he deals with the question (described by Lord Walker as “The main issue before the House”) <sup>1083</sup> whether Peter’s assurance had been sufficiently clear to make it reasonable for David to act in reliance on it. It may not always be easy to distinguish between these two issues, but the distinction is, with respect, at least helpful for purposes of exposition.

#### 4-166

A useful starting point for concluding this discussion of the distinction between the two cases is perhaps that the facts of each of them were said by Lord Neuberger to be “unusual”, <sup>1084</sup> though, as might be expected where this was the case, they were unusual in different ways. The unusual feature of *Thorner v Major* lay in the oblique, indirect nature of the utterances by which Peter induced David to believe that David would inherit Steart Farm <sup>1085</sup>; the unusual feature of the *Cobbe* case lay in “the total uncertainty as to the nature or terms of any benefit (property interest, contractual right or money) and, if a property interest, as to the nature of that interest (freehold, leasehold or charge) to be accorded to Mr Cobbe.” <sup>1086</sup> There was “no doubt about the physical identity of the property”, <sup>1087</sup> as there was in *Thorner v Major*, where that doubt was resolved in the way explained in para.4-163 above. A second distinction between the two cases lay in the nature of the relationship between the parties. In the *Cobbe* case, that relationship was an “entirely at arm’s length and commercial” one, in which “the parties could well have been expected to enter into a contract” but had “consciously chosen not to do so”. <sup>1088</sup> In those circumstances it would have been wrong to allow estoppel to be used as, in effect, a mechanism to enforce an agreement which had deliberately been left incomplete <sup>1089</sup> and which also failed to comply with the formal requirements for contracts for the disposition in land. In *Thorner v Major*, by contrast, the relationship between the parties “was familial and personal” and “at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter’s death.” <sup>1090</sup> It is true that, from a legal point of view, the non-contractual nature of Peter’s assurance could be said to result from lack of contractual intention and that the same explanation could be used to account, at least in part, for the non-contractual nature of the relationship of the parties in the *Cobbe* case. But there this conclusion followed from a deliberate choice of the parties, while in *Thorner v Major* it followed as a matter of course from the nature of the relationship between them. In such cases of “familial and personal” relationships, the fact that the relevant promise or assurance was not intended to be legally binding has never been regarded as an obstacle to giving effect to it by way of proprietary estoppel. On the contrary, in cases of this kind, the fact that the promise had no contractual force for want of contractual intention has traditionally and typically been the precise ground for equitable intervention by way of proprietary estoppel. <sup>1091</sup> This point is further supported by Lord Neuberger’s explanation of the reason why s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 (which lays down the formal requirements for the making of a contract for the disposition of an interest in land) was regarded as relevant to the outcome in *Cobbe*’s case <sup>1092</sup> but was not relevant in *Thorner v Major*, where the claim was “a straightforward estoppel claim without any contractual connection.” <sup>1093</sup>

#### Quantum meruit

#### 4-167

Although in *Cobbe v Yeoman’s Row Management Ltd* <sup>1094</sup> C’s proprietary estoppel claim failed for the reasons given in paragraphs 4-162 and 4-164 above, C was not sent away empty handed. Such an outcome would have had the effect of leaving D with an enrichment in the form of the enhanced value of D’s property as a result of the planning permission; and this enrichment, having been obtained at the expense of C, would have been unjust. <sup>1095</sup> C was therefore entitled to a quantum meruit on the basis of having rendered services in pursuance of a contract which was expected to materialise but never came into existence. <sup>1096</sup> This quantum meruit was to cover, not only the value of C’s services, but also his expenses reasonably incurred in making and prosecuting the planning application (those expenses being necessary to secure the planning permission which had enhanced the value of the property); it was, on the other hand, subject to C’s making the architect’s plans used to secure that permission available to D. <sup>1097</sup> Some care is, however, needed in defining the limits of such a remedy in cases of this kind. Such a quantum meruit might not be available where a party to an anticipated contract which failed to materialise had taken the risk of events that turned out to his disadvantage. In the *Cobbe* case, C took two such risks: that planning permission might be refused <sup>1098</sup> and that no binding contract might come into existence. <sup>1099</sup> In the first of those situations, D would not be



enriched so that there would seem to be no basis for the quantum meruit claim. In the second situation, there was such an enrichment and the enrichment was unjust on account of the unconscionable <sup>1100</sup> or at least the unattractive <sup>1101</sup> conduct of D. It was this combination of circumstances that justified the remedy by way of a quantum meruit in the *Cobbe* case. There would, on the other hand, be no quantum meruit claim where C had “never intended to charge for her services” <sup>1102</sup> since, in such a case, though D might be enriched, the enrichment would not be unjust; but in the *Cobbe* case this was not the position <sup>1103</sup> since there C “did not intend to act gratuitously, nor did [D] believe the contrary.” <sup>1104</sup>

1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>931.</sup>

❗ *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [15], [29], [42]; *Crossco No.4 Unlimited v Jolan Ltd*, Note [2011] EWCA Civ 1629, [2012] 2 All E.R. 754 at [114]; *Burton v Liden* [2016] EWCA Civ 275, [2017] 1 F.L.R. 310 at [16]; *Davies v Davies* [2014] EWCA Civ 565 at [29], also making the point that such “main elements” could not “be treated as subdivided into three or four watertight compartments” (at [30], quoting Walker L.J. in *Gillett v Holt* [2001] Ch. 210 at 232) and illustrating ways in which these elements relate to or overlap with each other; see also *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P. & C.R. 10, restating the main elements of proprietary estoppel and repeating the point that they could not be divided into “watertight compartments” (at [38]); *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607 at [19], where Arden L.J. states the above three requirements and adds a fourth: “the relief granted by the court”. As appears from these words, this fourth requirement is concerned with the legal effects of, or remedies for, proprietary estoppel, to be discussed in paras 4-168 to 4-180 below. The first three requirements, by contrast, are those which have to be satisfied before a proprietary estoppel can arise. In *Davies v Davies*, above, the requirements of reliance and detriment were held to have been satisfied, but the scope of the remedy was left over to be determined in later proceedings (see at [57] and [26]). For a case in which a daughter’s claim against her mother’s estate, based on proprietary estoppel, was rejected because none of the three requirements stated in para.4-146 of Vol.I had been satisfied, see *Wright v Waters* [2014] EWHC 3614, [2015] W.T.L.R. 353. See also *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604, where the “three main elements” of proprietary estoppel are stated at [65] but it was held that no such estoppel arose because (1) the right claimed by the person relying on the estoppel was not “a proprietary right” and (2) that person had not “suffered any detriment.” For a further statement of the requirements of proprietary estoppel, see *Moore v Moore* [2016] EWHC 2202 (Ch), where the requirements were held to have been satisfied. At [16], this form of estoppel is referred to as “equitable” estoppel; but it is clear from the authorities cited that the reference is to proprietary estoppel; see also the use of the expression “proprietary” at (e.g.) [16], [18], [184], [194]. The reference to “promissory” estoppel at [174] may be a misprint; in any event it is clear from the remedy granted by the Court in *Moore v Moore* (see below, para.4-169) that the outcome was not affected by the restriction on the effect of the estoppel discussed in Main Work, Vol.I, para.4-101.

<sup>932.</sup> See [2009] UKHL 18 at [2] (“promise or assurance”).

<sup>933.</sup> *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [31] and [34]; for the facts of this case (so far as here relevant) see above, para.4-090 n.468.



<sup>934.</sup> e.g. *Re Sharpe* [1980] 1 W.L.R. 219; *Ashby v Kilduff* [2010] EWHC 2034 (Ch), [2010] 3 F.C.R. 80 at [72].

<sup>935.</sup> *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [5].

<sup>936.</sup> *Gillett v Holt* [2001] Ch. 210, 229.

<sup>937.</sup> *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [17]; cf. at [60].

938. *ibid.*, at [5], [26]; *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875 at [42]; *affirmed* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, where the trial judge's finding that a promise had been made was not challenged on appeal (see at [28]) and the Court of Appeal concluded that "there was sufficient reliance and detriment" (at [38]).
939. *Thorner v Major*, above n.884, at [78].
940. See *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345 at [29] (requirement of a representation "that the agreement created an enforceable obligation").
941. *Att.-Gen. of Hong Kong v Humphreys Estates (Queen's Gardens)* [1987] 1 A.C. 114; the case was said in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387, 404 to be "not a case of proprietary estoppel" but (apparently) one of *promissory* estoppel. But most of the authorities relied on in the *Humphreys Estates* case were cases of proprietary estoppel; the leading cases on promissory estoppel were not cited; and if the requirements of encouragement and reliance had been satisfied the estoppel would have created a new right, which in English law is not the effect of promissory estoppel: above para.4-101. cf. *Saloman v Akiens* [1993] 1 E.G.L.R. 101 (no proprietary estoppel arising from agreement "subject to lease"); *Pridean Ltd v Forest Taverns* (1998) 75 P. & C.R. 447 (no proprietary estoppel arising from work done during negotiations which failed to lead to a contract); *Edwin Shirley Productions v Workspace Management Ltd* [2001] 23 E.G. 158 (negotiations "subject to contract" and "without prejudice" held not to give rise to proprietary estoppel); *London & Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355, [2002] All E.R.(D) 360 (Mar) (no estoppel or constructive trust where agreement was "subject to contract"); for the same view, see *Spring Finance Ltd v H S Real Co LLC* [2011] EWHC 57 at [40] and [70]; *Secretary of State for Transport v Christos* [2003] EWCA Civ 1073, [2004] 1 P. & C.R. 17 where "equitable estoppel" is used (e.g. at [42]) to refer to proprietary estoppel; *Haq v Island Homes Housing Association* [2011] EWCA Civ 805, [2011] 2 P & C.R. 17 (no proprietary estoppel held to arise from allowing prospective lessee to enter the premises to start work there while the agreement was still subject to contract (at [73])); *Crossco No.4 Unlimited v Jolan Ltd*, Note [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [133] ("where parties have been dealing on the basis that their negotiations are 'subject to contract', proprietary estoppel will not ordinarily be available"). Cf. the discussion of *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 in paras 4-162 and 4-164 below.
942. **!**Above, para.2-171. But where an oral agreement for the sale of land was intended to be legally binding by the parties to it as soon as it was made it was arguable that the agreement could give rise to a proprietary estoppel even though *later* correspondence between solicitors instructed by the contracting parties "was headed 'subject to contract'". This was the position in *Matchmove Ltd v Dowding and Church* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 where relief was granted at first instance "on the basis of proprietary estoppel and constructive trust" (at [21]). On appeal, the decision below was affirmed (at [46]), though on the basis of constructive trust only: at [28], [48]; above, para.4-142 n.849.
943. *Humphreys Estates* case, above n.890, [1987] 1 A.C. 114, 124.
944. cf. above para.4-140; *Brinnand v Ewens* (1987) 19 H.L.R. 415; and (in a different context) *Kelly v Liverpool Maritime Terminals* [1988] I.R.L.R. 310, where authorities on proprietary estoppel are cited in a case unconnected with property.
945. This is assumed in the *Humphreys Estates* case, n.890, above, where the Privy Council at 124 stresses that there had been *no* such encouragement.
946. *Taylor v Dickens* [1998] F.L.R. 806, as explained in *Gillett v Holt* [2001] Ch. 210 at 227.
947. [2001] Ch. 210.
948. *ibid.* p.228.
949. **!***Preedy v Dunne* [2015] EWHC 2713 (Ch), [2015] W.T.L.R. 1795.

950.  [2016] EWCA Civ 805, [2016] C.P. Rep. 44 at [61].
951. For the distinction between these two types of proprietary estoppel, see above, para.4-140.
952. [2009] UKHL 18, [2009] 1 W.L.R. 776 at [55]: “if all cases of proprietary estoppel (including cases of acquiescence or standing by) are to be analysed in terms of assurance, reliance and detriment, then the landowner’s *standing by in silence* serves as the assurance” (italics supplied). This does not amount to a statement *that* all cases of proprietary estoppel are to be so analysed.
953. At [61].
954. See above, para.4-147.
955. At [84].
956. Proprietary estoppel by encouragement can arise without any element of enrichment of the promisor: see above, para.4-143.
957. [2009] UKHL 18, [2009] 1 W.L.R. 776 at [30].
958. At [52].
959. See above, para.4-091, below, para.7-103.
960. [2009] UKHL at [37], quoting from [31] and [32] of the judgment at first instance.
961. [2009] UKHL at [40].
962. At [32].
963. At [1], [2].
964. *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28]; below, para.4-162.
965. [2009] UKHL 18, [2009] 1 W.L.R. 777.
966. At [54], where Lord Walker noted that this view had been expressed in a number of editions of “Treitel, Law of Contract”, including the then current 12th edition by Peel. The same view (as that quoted by Lord Walker) was stated in para.3-162 of the 30th edition of the present book.
967. See above, para.4-140.
968. [2009] UKHL 18 at [55]; and see below, para.4-183.
969. [2009] UKHL 18 at [55].
970. See above, para.4-140.
971.  At [56], italics supplied. See also *Burton v Liden* [2016] EWCA Civ 275, [2017] 1 F.L.R. 310 at [24], where the context in which the representation was made was said to be “hugely important” and Lord Walker’s test of reasonable clarity in that context (stated in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [56], quoted in para.4-150 of Vol.I) was held to have been satisfied.
972. At [36].
973. At [57].

- [974.](#) See above para.4-145 n.876.
- [975.](#) Quoted in *[2009] UKHL 18* at [57].
- [976.](#) At [6]. The judge's decision was in favour of David. See also *Suggitt v Suggitt* *[2011] EWHC 903 (Ch)*, *[2011] 2 F.L.R. 875*, where it was said at [53] that the facts were "not nearly as clear cut as they were in *Thorner v Major*" (above n.912), but that it was "more likely than not that Frank did make some kind of repeated promise or assurance to [his son] John that led him [John] reasonably to expect that someday at least the farmland (and, by implication if not expressly somewhere to live) would definitely be his" after the father's death. When *Suggitt v Suggitt* was affirmed (*[2012] EWCA Civ 1140*, *[2012] W.T.L.R. 1607*) the trial judge's finding that there had been a promise or assurance capable of giving rise to a proprietary estoppel was referred to by Arden L.J. with apparent approval: see at [20].
- [977.](#) *[2009] UKHL 18* at [8].
- [978.](#) At [6], quoted above at n.923; and the last sentence of [8].
- [979.](#) *[2009] UKHL 18* at [84].
- [980.](#) At [84] referring to the "acquiescence" cases (above, para.4-140).
- [981.](#) See further para.4-183 below.
- [982.](#) *[2009] UKHL 18* at [85].
- [983.](#) At [84].
- [984.](#) At [86].
- [985.](#) See the words "it seems to me that, at least normally ..." (at [86]).
- [986.](#) At [86]. In the unreported case of *Walton v Walton* (April 14, 1994) Hoffmann L.J. had, in a passage quoted in *Thorner v Major* *[2009] UKHL 18* at [56] said that "the promise must be unambiguous"; but the fact that he does not refer in the latter case to this requirement may indicate that he no longer strictly insisted on it.
- [987.](#) See below, paras 4-172 to 4-179.
- [988.](#) *Thorner v Major* *[2009] UKHL 18*, *[2009] 1 W.L.R. 776* at [30].
- [989.](#) *[2009] UKHL 18*, *[2009] 1 W.L.R. 776*. Lord Hoffmann at [9] expressed his agreement with the speeches of Lords Walker and Neuberger on the "identifiable property" issue (discussed in para. 4-163 below); Lord Scott at [11] expressed his "broad agreement" with the same speeches; and Lord Rodger at [18] expressed his agreement with those speeches.
- [990.](#) See above para.4-140.
- [991.](#) *[2009] UKHL 18* at [85].
- [992.](#) At [5], [17], [26], [60].
- [993.](#) Lord Hoffmann's statement at [6] (quoted in para.4-150 at n.923 above) contains no reference to any need for an "unequivocal" assurance. Nor does his discussion at [8], read as a whole, support any such requirement: see the last sentence of para.4-150 above.
- [994.](#) At [18].
- [995.](#) *[2008] EWCA Civ 1541*, *[2009] 1 W.L.R. 1884*; see also para.4-102, n.564 above.

- [996.](#) [2008] EWCA Civ 1541 at [13].
- [997.](#) At [9].
- [998.](#) At [27].
- [999.](#) i.e. the defendant.
- [1000.](#) Sic—an evident misprint for “respondent” (i.e. the claimant housing association).
- [1001.](#) At [27].
- [1002.](#) That conduct was said to “bear all the marks of estoppel by representation”; but this type of estoppel was of no avail to the claimant for the reason given in para.4-102 above.
- [1003.](#) *Western Fish Products Ltd v Penwith DC* [1981] 2 All E.R. 204 (decided in 1978); cf. *Lloyd’s Bank plc v Carrick* [1996] 4 All E.R. 632 (no proprietary estoppel in favour of a purchaser of land as by virtue of the contract he had become equitable owner of the land).
- [1004.](#) *Salvation Army Trustee Co v West Yorks Metropolitan CC* (1981) 41 P. & C.R. 179.
- [1005.](#) *ibid.*, at 191; the case was approved but distinguished in *Att.-Gen. of Hong Kong v Humphreys Estates (Queen’s Gardens)* [1987] A.C. 114, 126–127.
- [1006.](#) *J.S. Bloor (Meacham) Ltd v Calcott (No.2)*, *The Times*, December 12, 2001.
- [1007.](#) *S v S* [2006] EWHC 2892 (Fam), [2007] F.L.R. 1123.
- [1008.](#) [2010] EWCA Civ 199, [2010] 2 P. & C.R. 21.
- [1009.](#) *ibid.*, at [3] italics supplied.
- [1010.](#) See below, n.959.
- [1011.](#) *Re Basham* [1987] 1 W.L.R. 1498.
- [1012.](#) *Western Fish* case, above, n.950 at 217; cf. the reference *ibid.* at 218, and in *Crabb v Arun DC* [1976] Ch. 179, 187, to the decision of the Court of Appeal in *Moorgate Mercantile Co v Twitchings* [1976] Q.B. 225; that decision was reversed by the House of Lords: [1977] A.C. 890.
- [1013.](#) *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [14] per Lord Scott (“in principle equally available in relation to chattels or choses in action”); for example, in *Strover v Strover* [2005] EWHC 860 (Ch), [2005] W.T.L.R. 1245, where “proprietary estoppel” (at [39]) operated in relation to an insurance policy. The estoppel in this case arose from a mistake, and so was one that arose from “acquiescence” as opposed to an “assurance” or “encouragement”; and it is with cases of the latter kind that the discussion of proprietary estoppel in this chapter is concerned (see above, para.4-140).
- [1014.](#) *Motivate Publishing FZ LLC v Hello Limited* [2015] EWHC 1554 (Ch) at [61]; the actual decision in this case was that *no* proprietary estoppel arose since other requirements of the doctrine were not satisfied: see at [72], [75].
- [1015.](#) See above, paras 4-086, 4-102, 4-130.
- [1016.](#) [1947] K.B. 130; above, para.4-130.
- [1017.](#) This was the view of the majority of the Court of Appeal in *Greasley v Cooke* [1980] 1 W.L.R. 1306; the requirement is assumed to exist in *Taylor’s Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133n, and stated in *Grant v Edwards* [1986] Ch. 638, 657; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [21], [42]; cf. *Lloyds Bank plc v Rosset* [1991] 1



A.C. 107, 132; *Hammond v Mitchell* [1991] 1 W.L.R. 1127; *Van Leathem v Booker* [2005] EWCA Civ 1478, [2006] F.C.R. 697. The fact that there was no such reliance was one reason why the claim based on proprietary estoppel failed in *Western Fish Products Ltd v Penwith DC* [1981] 2 All E.R. 204, see *ibid.*, at 217; in *Coombes v Smith* [1986] 1 W.L.R. 808; in *Att.-Gen. of Hong Kong v Humphreys Estates (Queen's Gardens)* [1987] A.C. 114; and in *H v M (Property Occupied by Wife's Parents)* [2004] EWHC 625, [2004] F.L.R. 16. cf. *Mecca Leisure v The London Residuary Body* [1988] C.L.Y. 1375; *Jones v Stones* [1999] 1 W.L.R. 1739; *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [40], where the actual decision was that the statements in question “did not promise anything” (at [31], [34] and see above para.4-090 n.468); and where it is not entirely clear whether the discussion of “Reliance” (at [36]–[40]) was concerned with the defence of the promissory estoppel or with the claim based on proprietary estoppel. See also *Lloyd v Dugdale* [2001] EWCA Civ 1754; [2001] 48 E.G.C.S. 129, where the detrimental reliance was mainly by a company controlled by the promisee but also by the promisee himself and the actual result was that the promisee’s claim failed against a third party to whom the land had been transferred and who had become registered proprietors of it.

[1018.](#) *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988 at [55]; cf. *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875 at [59], affirmed [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, where the Court of Appeal concluded at [38] that “there was sufficient reliance and detriment”.

[1019.](#) By Lord Denning M.R. in *Greasley v Cooke*, above n.963 at 1311.

[1020.](#) *Gillett v Holt* [2001] Ch. 210 at 232, a dictum cited with approval by Lord Neuberger in *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764 at [63], stating the requirement of detriment to be “part of a broad enquiry into unconscionability.” In that case the requirement was not satisfied: see at [63], [71] and [11]; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [21], [42]; *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345 at [29]; *Hopper v Hopper* [2008] EWHC 228 (CL), [2008] 1 F.C.R. 557 at [111].

[1021.](#) *Gillett v Holt*, above n.966, at 232.

[1022.](#) *ibid.* For the question, by reference to what time the test of unconscionability is to be applied, see also *Mulholland v Kane* [2009] N.I.Ch. 9 where a man had assured a woman 27 years his junior, with whom he had formed a relationship which became sexual, and which endured for 30 years during which she had helped him on his farm and cared for him, that “she would always have a roof over her head and some land” (at [5]; cf. at [19]). She had acted to her detriment in various ways in reliance on these assurances; and although he had not deliberately deprived her of the expectations he had created, his “inertia and failure to make some ... disposition for her” by will was unconscionable and gave rise to a proprietary estoppel, on his death intestate, against his estate.

[1023.](#) *Greasley v Cooke*, above n.963; *Grant v Edwards* [1986] Ch. 638, 657; *Re Basham* [1986] 1 W.L.R. 1498; *Hammersmith & Fulham BC v Top Shop Centres Ltd* [1990] Ch. 237; *Wayling v Jones* (1993) 69 P. & C.R. 170, 172; *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P. & C.R. 16 at [94].

[1024.](#) Above, para.4-140.

[1025.](#) *Taylor's Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133 note; cf. *Coombes v Smith* [1986] 1 W.L.R. 808.

[1026.](#) [2010] UKPC 3, [2010] 1 All E.R. 988.

[1027.](#) *ibid.*, at [61].

[1028.](#) *ibid.*, at [27] citing [12] of the judgment at first instance.


[1029.](#) [2010] UKPC 3 at [51]; see also at [53].

[1030.](#) *ibid.*, at [61].



- [1031.](#) For the remedy giving effect to the estoppel, see below, para.4-175.
- [1032.](#) *Layton v Martin* [1986] 2 F.L.R. 277, cited with apparent approval, but distinguished by Lord Walker in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [63]; for discussion of the present requirement in that case, see below, para.4-163.
- [1033.](#) *Re Basham* [1986] 1 W.L.R. 1498, 1508.
- [1034.](#) By referring to the promisor's cottage. In *Gillett v Holt* [2001] Ch. 210 the property was likewise identified, if not very precisely; cf. *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367, at [50], where the promise again related in part to the promisor's house.
- [1035.](#) In *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [61], Lord Walker uses the expression "identified property" but is not, at this stage, concerned with any distinction between identified and identifiable property. Other cases support the view that identifiability (as opposed to identification) suffices. One such case is *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, where a promise that the promisee was to have "somewhere to live" was held to give rise to a proprietary estoppel since these words identified the property as the house occupied by the promisee during the promisor's life-time and at his death (at [48], where "a place to leave" seems to be a misprint for "a place to live"). Another is *Herbert v Doyle* [2010] EWCA Civ 1095, where an agreement provided for the property to be "identified" by the claimant and his failure to make the choice within a reasonable time did not deprive the agreement of legal force since it was an implied term of the agreement that, on such failure, the selection could be made by the court: at [72], [87] and see above, para.2-138. The decision was that the agreement gave rise to a constructive trust within Law of Property (Miscellaneous Provisions) Act 1989, s.2(5); and it seems that it could also have given rise to a proprietary estoppel.
- [1036.](#) This view is supported, though perhaps not conclusively, by repeated references in Lord Scott's speech in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [18], [19], [20] to a "certain interest in land" and at [28] to "clarity as to the interest in the property". If there is no certainty or clarity in "the property" it is unlikely for this requirement to be satisfied with regard to the "interest" in it.
- [1037.](#) e.g. above, paras 4-002, 4-026. For this reason, *Evans v HSBC Trust Co (UK) Ltd* [2005] W.T.L.R. 1298 may, with respect, be doubted. The promise which was held there to have given rise to a proprietary estoppel was one that the promisee would inherit the whole of promisor's estate. This did indeed, at least in general terms, identify the relevant property. But the acts done in reliance on the promise did not in any way either relate to the property or benefit the promisor. While the latter factor is not decisive (see above, para.4-143) the combination of both of them seems to reduce the case to one of mere action in reliance on a gratuitous promise. The judgment recognises that mere change of position does not suffice to give rise to proprietary estoppel (at [73]) but does not explain what additional factors in the case justified the application of the doctrine.
- [1038.](#) Above, para.4-099.
- [1039.](#) Above, para.4-158 at n.966.
- [1040.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752. For an extended discussion of this case and of *Thorner v Major* [2005] UKHL 18, [2009] 1 W.L.R. 776 (above para.4-149), see *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch), where estoppel claims failed as their factual bases were not established; the decision in the *Crossco* case was affirmed on appeal: [2011] EWCA Civ 1619, [2012] 2 All E.R. 754.
- [1041.](#) Above, para.2-117.
- [1042.](#) [2005] EWHC 266 (Ch), [2005] W.T.L.R. 625; [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964.
- [1043.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28].

- [1044.](#) With whose speech Lord Hoffmann; Brown and (except on a point relating to the amount of the quantum meruit claim: see at [44], [96]) Lord Mance agreed.
- [1045.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [16].
- [1046.](#) *ibid.*, at [16].
- [1047.](#) See also *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2, where a proprietary estoppel claim was rejected on the ground that there was not sufficient certainty in the interest in the property in question (at [36]–[40]); *Crossco No 4 Unlimited v Jolan Ltd*, Note [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [114].
- [1048.](#) [2008] UKHL 55 at [28]. The passage quoted in the text gives rise to the further difficulty that (as the words “these requirements” in the sentence following it make clear) it states *two* requirements of “clarity”, the first of which (“clarity as to what it is that [the defendant] is estopped from denying or asserting”) is not altogether easy to interpret. It may be a reference to the requirement that the representation alleged to give rise to the estoppel must be “clear and unequivocal” (above, paras 4-149 to 4-152). But when, in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [15] Lord Scott discusses this requirement, he makes no reference to the (first) “clarity” requirement as formulated in the phrase from the *Cobbe* case quoted earlier in this note; while in the *Thorner* case Lords Walker (at [31]) and Neuberger [90] treat the *Cobbe* case as turning on lack of certainty in the property interest claimed, i.e. to the second “clarity” requirement stated by Lord Scott in the passage (from the *Cobbe* case) quoted in the text above. It seems that, though Lord Scott’s first “clarity” requirement may be related to the “clear and unequivocal” requirement, the two requirements are not identical. Perhaps the distinction between them is that, in proprietary estoppel cases, the promisor is prevented from denying, not the *fact* that he made the statement in question, but its *effect* in giving rise to an expectation on the part of the promisee that he would acquire a property interest in the subject-matter. This formulation would leave scope for the further requirement of “clarity” as to the nature or extent of that interest (cf. below, para.4-166 at n.1032). The concluding words of the passage quoted in the text above (“if it has not already done so”) may contain an implied criticism of recent decisions but it is not clear at which, if any, such decisions that criticism is directed. Lord Walker at [66] cites a number of such cases without adverse comment. One of these cases is *Gillett v Holt* [2001] Ch. 2010 and in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [100] Lord Neuberger says that it was “unlikely in the extreme” that in the *Cobbe* case Lord Scott “was intending impliedly to disapprove of any aspect of the reasoning of the Court of Appeal in *Gillett*.” This view derives some indirect support from the fact that in *Thorner v Major* at [18] and [19] Lord Scott refers to *Gillett v Holt* with apparent approval, though at [21] he includes it in a list of cases that are “more comfortably viewed as constructive trust [than as proprietary estoppel] cases.”
- [1049.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [15]. C’s constructive trust claim also failed (at [30]–[38]) for reasons beyond the scope of this chapter.
- [1050.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [20].
- [1051.](#) C’s claim for specific performance of the “agreement in principle” had been abandoned as that agreement was not enforceable: [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [9], so that it was not open to him to argue that he had, by virtue of that agreement, become owner in equity of the property.
- [1052.](#) *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28].
- [1053.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776, above, para.4-149.
- [1054.](#) [2009] UKHL 18 at [62]; cf. at [101], per Lord Neuberger.
- [1055.](#) At [57] and see above para.4-145.
- [1056.](#) See the passage quoted in *Thorner v Major* [2008] UKHL 18 at [57].

- [1057.](#) At [95]. Lord Hoffmann at [9] agreed with Lords Walker and Neuberger on this point. Lord Rodger express his agreement with Lord Walker's speech "on the first point" (i.e. on that discussed in paras 4-149 to 4-152 above); and at [28] with Lord Neuberger's reasons.
- [1058.](#) At [18].
- [1059.](#) *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28]; above, para.4-162.
- [1060.](#) With whose speech Lord Brown agreed.
- [1061.](#) See above, para.4-139 n.822.
- [1062.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [46].
- [1063.](#) *ibid.*, at [81].
- [1064.](#) *ibid.*, at [16]; above para.4-162 at n.991.
- [1065.](#) In *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988 at [41] and [42], Sir Jonathan Parker quotes from the speech of Lord Walker, but makes no reference to that of Lord Scott, in the *Cobbe* case. Too much should not be made of this point as *Henry v Henry* did not raise any issue as to the differences between these cases discussed in para.4-162 above and in the present paragraph. In *Mulholland v Kane* [2009] N.I.Ch. 9 (above, para.4-158 n.968) at [17] and [18] Deeny J. likewise refers to the speech of Lord Walker, but not to that of Lord Scott, in the *Cobbe* case, and it may, with respect, be doubted whether Lord Scott's requirement of "clarity as to the interest in question" (*Cobbe* case at [28]) was satisfied in *Mulholland v Kane*. For a possible synthesis of the two speeches, see below, n.1018.
- [1066.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [91].
- [1067.](#) *ibid.*, at [6].
- [1068.](#) *ibid.*, at [28].
- [1069.](#) i.e. in addition to the ground stated by him at [91], above at n.1012.
- [1070.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [92] (italics supplied).
- [1071.](#) *ibid.*
- [1072.](#)  See also the discussion of the *Cobbe* case by Arden L.J. in *Herbert v Doyle* [2010] EWCA Civ 1095. Her conclusion (at [57]) is that "there is a common thread running through the speeches of Lord Scott and Lord Walker." This is that parties cannot rely on proprietary estoppel or constructive trust to make their agreement binding if the relevant interest in property "is not clearly identified, or if the parties did not expect their agreement to be immediately binding ...". As the word here italicised shows, even this synthesis does not wholly reconcile the difference between the two speeches. For further discussion of the passage of Arden L.J.'s judgment in *Herbert v Doyle* [2010] EWCA Civ 1095, [2015] W.T.L.R. 1573, see *Matchmove Ltd v Dowding and Church* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 at [30]-[32]. The latter case differed from the *Cobbe* case [2008] UKHL 55, [2008] 1 W.L.R. 1752 in that in the *Matchmove* case the parties did intend their agreement "to be immediately binding" ([2016] EWCA Civ 1095 at [36]) even though it was oral and so did not satisfy the requirement of Law of Property (Miscellaneous Provisions) Act 1989, while in the *Cobbe* case the parties did not "expect their agreement to be immediately binding" (see Arden L.J. in *Herbert v Doyle* [2010] EWCA Civ 1095 at [57]).
- [1073.](#) *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752, above, paras 4-161 to 4-164; below, para.4-167.

- [1074.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776; above, paras 4-149 to 4-152, 4-163. In *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607 Arden L.J. (with whose judgment Sullivan L.J. and Sir Nicholas Wall agreed) at [29] cites *Thorner v Major* but makes no reference to *Cobbe v Yeoman's Row Management Ltd*. For other cases relevant to the relationship between the *Cobbe* and *Thorner* cases, see *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988 (above, para.4-164, n.1011); *Herbert v Doyle* [2010] EWCA Civ 1095, esp. at [57]; *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch), affirmed [2011] EWCA Civ 1619, [2012] 2 All E.R. 754; and *Mulholland v Cane* [2009] N.I.Ch. 9.
- [1075.](#) [2009] UKHL 18 at [31].
- [1076.](#) At [31].
- [1077.](#) At [31]. The “second issue” was that of clarity as to the interest in the property in question; it is discussed in para.4-162 above.
- [1078.](#) [2009] UKHL 18 at [63], [64] and see para.4-166 above.
- [1079.](#) At [98]; and at [92]: it was not enough for Mr Cobbe to be “simply seeking a remedy for the unconscionable behaviour of Yeoman's Row”.
- [1080.](#) [2009] UKHL 18 at [98].
- [1081.](#) Before [90].
- [1082.](#) Before [74].
- [1083.](#) Before [52].
- [1084.](#) At [81] (referring to the *Thorner* case) and [99] (referring to the *Cobbe* case).
- [1085.](#) See paras 4-149 to 4-152 above.
- [1086.](#) [2009] UKHL 18 at [94].
- [1087.](#) At [94].
- [1088.](#) At [96].
- [1089.](#) Cf. the rule that a proprietary estoppel cannot generally arise out of an agreement expressed to be “subject to contract” (above, para.4-147 at n.891).
- [1090.](#) [2009] UKHL 18 at [97]. For the “distinction between domestic and commercial cases” in the present context, see also *Crossco No.4 Unlimited v Jolan Ltd*, Note [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [80], [121].
- [1091.](#) See, for example, above para.4-141.
- [1092.](#) *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [29].
- [1093.](#) *Thorner v Major* [2009] UKHL 15, [2009] 1 W.L.R. 776 at [99]; above, para.4-115.
- [1094.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752.
- [1095.](#) *ibid.*, at [40] and see below at nn.1046 and 1047.
- [1096.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [42].
- [1097.](#) *ibid.*, at [45] and [93].

[1098](#). *ibid.*, at [6].

[1099](#). *ibid.*, at [91]; above, para.4-164.

[1100](#). [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [40], where “the circumstances that I need not again rehearse” (per Lord Scott) seem to refer back to [13] and [16].

[1101](#). *ibid.*, at [92] (per Lord Walker).

[1102](#). *Walsh v Singh* [2009] EWHC 3219 (Ch), [2010] F.L.R. 1658 at [65], [67].

[1103](#). *ibid.*, at [65].

[1104](#). *Cobbe* case, above n.1046 at [42].

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 11. - Proprietary Estoppel

### (d) - Effects of the Doctrine

#### Revocability

#### 4-168

We have seen that proprietary estoppel will not arise at all where the promise to confer a benefit on the promisee is revocable in the sense that it reserves a power to the promisor wholly to deprive the promisee of that benefit. <sup>1105</sup> But even where the promise does not allow the promisor to do this, and so is capable of giving rise to a proprietary estoppel, the extent of the promisee's rights under the estoppel may be limited by terms of the promise giving the promisor a power of putting an end to those rights. Thus if the landowner promises to allow the promisee to stay on the land "until I decide to sell," then the promisee cannot, merely by spending money on improvements to the land, acquire any right to stay there for a longer period. <sup>1106</sup> Even where the promise is not expressed to be revocable, it can be revoked before the promisee has acted on it. Thus in *Dillwyn v Llewelyn* <sup>1107</sup> it seems that the father could have revoked his promise before the son had started to build on the land <sup>1108</sup>; in *Crabb v Arun DC* <sup>1109</sup> the promise to grant a right of way could have been revoked before the promisee, by selling off part of his land, had made it impossible for himself to obtain access to the retained land except by means of the promised right of way <sup>1110</sup>; and in *Thorner v Major* <sup>1111</sup> Peter could not, in the absence of any "clear indication that [his] statement was revocable", "freely" have gone back on it "once [it] ... had been maintained by Peter and acted on by David for a substantial period." <sup>1112</sup> In this respect proprietary estoppel resembles so-called promissory estoppel (under which promises are similarly revocable <sup>1113</sup>) and differs from contractually binding promises which are not revocable unless they expressly, or impliedly, provide that they are revocable. The cases on proprietary estoppel assume that, once the requisite action in reliance on the representation has taken place, the promisee cannot be restored to his original position. Where he has made improvements to land, this will generally be the case. Where a restoration of the status quo is physically possible, it seems that a promise giving rise to a proprietary estoppel could be revoked, even after the promisee had acted on it, if the promisor had in fact restored the promisee to the position in which he was before he had acted in reliance on the promise, or (it seems) if the promisee has made it clear that he does not wish to be restored to that position. <sup>1114</sup>

A promise which has given rise to proprietary estoppel may also be none the less revocable, because the court considers it appropriate in this way to limit the effect to be given to the promise. This situation is discussed in para.4-170 below. <sup>1115</sup>

#### Operation of a proprietary estoppel

#### 4-169

⚠ Where the conditions required to give rise to a proprietary estoppel have been satisfied, the effect of the doctrine is said to be to confer an "equity" <sup>1116</sup> ⚠ on the promisee. Two further questions then arise: namely, what is the extent of that "equity," and what are the remedies for its enforcement. <sup>1117</sup> In



practice these questions tend to merge into each other; but an attempt to discuss them in turn will be made in paras 4-170 to 4-172 and 4-173 to 4-180 below.

### Extent of the equity

#### 4-170

At one extreme, the promisee may be entitled to conveyance of the fee simple in the property which is the subject-matter of the promise, as in *Dillwyn v Llewelyn*.<sup>1118</sup> On the other hand, in *Inwards v Baker*,<sup>1119</sup> where a son had also built a house for himself at his father's suggestion on the latter's land, the result of the estoppel was only to entitle the son to occupy the house for life. Similar results were reached in a number of later cases in which the promisee made improvements to the promisor's property (or otherwise acted to his detriment) in reliance on a promise, or common understanding, that the promisee would be able to reside in the property for as long as he or she wished to do so,<sup>1120</sup> or for some shorter period: e.g. until her children had left school<sup>1121</sup>; or that a lease of the premises would be granted to him<sup>1122</sup>; or that he was entitled to an equitable charge on the land.<sup>1123</sup> Such cases can be reconciled with *Dillwyn v Llewelyn* by reference to the terms of the respective promises<sup>1124</sup>: in the former case, the promise was expressed in terms of a gift of the property, while in the latter cases it amounted to no more than an assurance that the promisee would be entitled to reside in the property for the specified period. Another way of giving effect to a promise of the latter kind is by the grant of a long, non-assignable lease at a nominal rent, on terms that ensured that the right of occupation was personal to the promisee.<sup>1125</sup> In other cases, not concerned with rights of personal occupation but with the right to keep and use structures on promisor's land, the promisee has been held entitled only to a revocable licence.<sup>1126</sup> On a similar principle, it has been held that, where proprietary estoppel gave rise to a right of way over the promisor's land, that right was limited to serving the single house which existed on the original promisee's land at the time when the circumstances giving rise to the estoppel arose<sup>1127</sup> and did not extend to buildings which the claimant<sup>1128</sup> might wish to erect on the dominant land, no such development having been

contemplated at that time.<sup>1129</sup> There is also the possibility that "a statement relied on to found an estoppel<sup>1130</sup> could amount to an assurance which could reasonably be understood as having more than one possible meaning."<sup>1131</sup> In *Thorner v Major*<sup>1132</sup> Lord Neuberger suggested that at least limited relief should be available to a person who had acted in reliance on such an ambiguous representation. The extent of such relief is discussed in para.4-151 above.<sup>1133</sup>

### Availability of estoppel against third parties


#### 4-171

Where the circumstances are such as to give rise to an estoppel against the landowner, the estoppel is equally available against a third party who claims later to have obtained title to the land by way of gift from the landowner.<sup>1134</sup> Proprietary estoppel may also be available against a purchaser from the promisor: e.g. where the purchaser had notice of the promisee's equity or knew of facts giving rise, under legislation governing land registration, to an overriding interest.<sup>1135</sup>

### Estoppel may operate conditionally



#### 4-172

⚠ The estoppel may operate conditionally where the promisee has acted in reliance on the promise but the terms of the promise show that the promisor did not intend to give up his title to the land gratuitously. This was the position in *Lim Teng Huan v Ang Swee Chuan*<sup>1136</sup> where A built a house on land owned by him jointly with L, who had agreed that he was to have no title to the house and would exchange his share in the land for other land. The arrangement had no contractual force as the other land was not identified with sufficient certainty; and it was held that L was estopped from asserting title to the house but that he was entitled to be compensated for the loss of his share in the land.

Similarly, where the promise is one to allow the promisee access to his own land over that of the promisor, the effect of the proprietary estoppel will be to entitle the promisee to an easement or licence <sup>1137</sup> which may be subject to terms. Such terms, if not agreed between the parties, may be imposed by the court: they can specify the extent of the permitted user <sup>1138</sup> as well as any payment that the promisee may be required to make for the exercise of the right. <sup>1139</sup> In *Thorner v Major* <sup>1140</sup> the order stated that David should receive Steart Farm (and related assets) but required him to indemnify Peter's personal representatives "in respect of inheritance tax payable on Steart Farm." <sup>1141</sup>  But an order for a payment by the promisee may not be appropriate where the promisor has already obtained other benefits under the agreement. <sup>1142</sup> It may also be inappropriate for other reasons to be discussed in para.4-176 below. <sup>1143</sup>

#### Remedy: principled discretion

### 4-173

 The remedy in cases of proprietary estoppel is "extremely flexible", its object being "to do what is equitable in all the circumstances." <sup>1144</sup> Although the court thus has a considerable discretion with regard to the remedy in cases of proprietary estoppel, that discretion is not a "completely unfettered" <sup>1145</sup> one and a "principled approach" <sup>1146</sup> must be taken to its exercise. In giving effect to the "equity" <sup>1147</sup> account must be taken, not only of the claimant's expectations "but also of the extent of his detrimental reliance" <sup>1148</sup>, and there must also be "proportionality between the expectation and the detriment." <sup>1149</sup>  For the purpose of achieving such "proportionality" regard must be had to the degree of precision of the promise giving rise to the expectation. Where this amounts to an assurance that an interest in specific property will be transferred in return for specified acts, then an order for the specific enforcement of that promise (once the acts have been done) may be the appropriate remedy. <sup>1150</sup> Where, on the other hand, the terms of the promise are less precise, amounting only to an assurance that some indeterminate benefit will be conferred on the promisee, so that the expectations reasonably arising from it are, at least objectively, uncertain, then the court will not give effect in full to expectations which the promisee may in fact have formed if they are "uncertain or extravagant or out of all proportion to the detriment which the claimant has suffered." <sup>1151</sup> In such cases, compensation in money is likely to be the more appropriate remedy. That compensation must be proportionate to the detriment, but need not be its precise equivalent <sup>1152</sup>: the fact that the detriment was incurred in response to a promise indicating (though in vague terms) some higher level of recompense is also to be taken into account.

#### Starting point: terms of the promise

### 4-174

In exercising its discretion with regard to the proper remedy in cases of proprietary estoppel, the court will obviously take as its starting point the terms of the assurance or promise, as reasonably interpreted by the promisee. Thus in *Thorner v Major* <sup>1153</sup> the promise made by Peter to David was that David would on Peter's death inherit the farm owned by Peter (Steart Farm). David's proprietary estoppel claim had originally extended to the whole of Peter's net estate <sup>1154</sup> but the order in his favour was confined to Steart Farm and certain related assets. <sup>1155</sup> Peter had indeed at one stage made (and then revoked) a will leaving the whole of his residuary estate to David but as "David knew nothing about this" <sup>1156</sup> the estoppel did not extend to parts of that estate unconnected with the farm.

#### Illustrations of exercise of the discretion

### 4-175

The balancing of the factors discussed in paragraph 4-173 above is well illustrated by *Jennings v Rice* <sup>1157</sup> where for some 17 years the claimant had worked as gardener-handyman for an elderly widow without pay and had also provided personal care for her in the years of increasing frailty towards the end of her life. He had done so in response to her statements that "he would be alright" and that "all

this will be yours one day". <sup>1158</sup> The latter statement referred to her house and its contents, valued on her death at £435,000 out of a total estate of £1.285 million. The Court of Appeal upheld an award of £200,000 as being properly proportionate to the detriment suffered by the claimant in reliance on the assurances given to him. In cases of this kind, the amount recoverable may be further reduced by the amount of life-time gifts made by the promisor to the promisee. <sup>1159</sup> The court may also take account of other benefits derived by the promisee as a result of his action in reliance on the promise, even though they may not fall readily into the category of gifts from the promisee. This was the position in *Henry v Henry*. <sup>1160</sup> The promise in that case was that the whole of the promisor's share of the land in question would be the promisee's if he cultivated it and looked after the promisor. His acting in reliance on the promise to his detriment <sup>1161</sup> gave rise to a proprietary estoppel; but his "equity" was "satisfied" by an award of one half of the promisor's share in the land. The reason for so reducing the award below the amount specified in the promise appears (though this is not expressly stated in the Privy Council's advice) to be that the promisee had not only suffered detriment, but also derived benefits from his action in reliance on the promise: in particular, he had occupied the land for many years rent free and had been allowed to keep some of the produce of it, to sell any surplus, and to keep the proceeds.

### Conduct of promisor

#### 4-176

Apart from the factors discussed in paras 4-173 to 4-175 above the court may also take into account the conduct of the promisor after the facts giving rise to the estoppel. Thus in *Crabb v Arun DC* <sup>1162</sup> the defendants had acted without warning in blocking the claimant's access to his land. In view of this "high-handedness" <sup>1163</sup> and the resulting loss to the claimant, he was not required to make the payment that would otherwise have been a condition of the exercise of the right of way. Similarly, in *Pascoe v Turner* <sup>1164</sup> a proprietary estoppel arose when a man told a woman with whom he had formerly cohabited that the house in which they had lived was hers, and she later spent some £230 of her limited resources on repairs and improvements to it. The Court of Appeal relied on the man's "ruthlessness" <sup>1165</sup> in seeking to evict the promisee as a ground for ordering him to convey the fee simple to her. The submission that she should have no more than a licence to occupy the house was rejected since this would not protect her against a bona fide purchaser from the promisor. The result seems, with respect, unduly punitive; and it seems that intermediate possibilities (such as granting the promisee a long lease <sup>1166</sup>) were not put before the court.

### Compensation in money

#### 4-177

*Pascoe v Turner* illustrates the possibility that the grant of an irrevocable licence to remain on the property may constitute an unsatisfactory remedy because it will not adequately secure the promisee's possession. It may also be unsatisfactory on account of its inflexibility: thus in *Inwards v Baker* <sup>1167</sup> this remedy would have been of no use to the promisee, had he wanted to move elsewhere; nor would his dependants have had any remedy, had he died shortly after completing the house. In such cases a remedy by way of compensation in money would be more satisfactory for the promisee; and it would also have the advantage for the promisor that he would not be impeded in dealing with the property for an indefinite time. <sup>1168</sup> Such a remedy was granted in *Dodsworth v Dodsworth* <sup>1169</sup> where the promisees spent £700 on improvements to the promisor's bungalow in reliance on an implied promise (not intended to have contractual force) that they could live there as if it were their home. The Court of Appeal held that to give the promisees a right of occupation for an indefinite time would confer on them a greater interest than had been contemplated by the parties; and that the most appropriate remedy was to repay them their outlay on the improvements. Compensation in money will also be the more appropriate remedy where, as a practical matter, the promise which gave rise to the estoppel cannot be specifically enforced: for example, where its performance would involve joint occupation of premises by, and co-operation between, members of a family who later quarrel, <sup>1170</sup> or between a couple whose relationship has broken down. <sup>1171</sup> Compensation in money may, again, be the most appropriate remedy because it will achieve a result that is fair, not only between the promisee and the deceased promisor's estate, but also between beneficiaries who share that estate on the promisor's death. <sup>1172</sup> Where there is evidence that the

improved property has increased in value by reason of market fluctuations, it is submitted that the amount recoverable by the promisee should be increased correspondingly; conversely, it should be reduced where the market value of the property has declined. <sup>1173</sup>

#### 4-178

In *Dodsworth v Dodsworth* <sup>1174</sup> the court awarded compensation even though, when the action was brought, the promisee was still in possession of the improved property. More commonly this form of remedy is granted where the promisee is no longer in possession, having either left voluntarily <sup>1175</sup> or been lawfully ejected as a result of legal proceedings. <sup>1176</sup> Where the promisee has been wrongly ordered to give up possession, compensation in money is similarly available, <sup>1177</sup> though in such a case the court may alternatively order the promisee to be put back into possession of the premises. <sup>1178</sup> The compensation has been assessed in a variety of ways: at the cost of improvements made with the promisee's money <sup>1179</sup>; at a proportionate interest in the property <sup>1180</sup>; at the reasonable value of the right of occupation, based (presumably) on the cost to the promisee of equivalent alternative accommodation <sup>1181</sup>; or by applying the more general principle that the remedy in cases of proprietary estoppel must reflect the reasonable expectations of the promisee and the detriment suffered by him in reliance on the promise. <sup>1182</sup> The flexibility of the remedy also enables the court to combine monetary compensation with specific relief: for example, in *Gillett v Holt* <sup>1183</sup> the promisee was awarded part of the property to which the promise referred, together with a cash payment to compensate him for his exclusion from the farming business on that property.

#### Balance of hardship

#### 4-179

The court may deny the promisee a remedy where, on balance, greater hardship would be produced by giving effect to the promise than by allowing the promisor to go back on it. This was the position in *Sledmore v Dalby*, <sup>1184</sup> where the promisee had contributed to major improvements to the property but at the time of the proceedings had already enjoyed 20 years' rent-free occupation and was gainfully employed, while the promisor was a widow living on social security benefits. The promisee's claim to be entitled to a licence for life to stay in the house was in these circumstances rejected and the promisor was held entitled to possession. The case may be compared with *Henry v Henry* <sup>1185</sup> where the benefits obtained by the claimant <sup>1186</sup> in consequence of his action in reliance on the promise were taken into account in reduction, but not in extinction of his proprietary estoppel claim. *Sledmore v Dalby* <sup>1187</sup> was not cited; but the two cases can be reconciled on the ground that in *Henry v Henry* the detriment suffered by the promisee was "not outweighed by the advantages" <sup>1188</sup> obtained by him. In fashioning the appropriate remedy, the court can also take account of the interests of third parties, for example, of blood relatives of the promisor with whom the latter had been on close terms <sup>1189</sup>; of the promisor's wife, who, as well as the promisee, lived in the house which was the subject of the estoppel <sup>1190</sup>; and of one of the promisor's daughters where the promise had given rise to a proprietary estoppel in favour of his son. <sup>1191</sup>

#### Change of circumstances

#### 4-180

One situation in which a change of circumstances, after the events capable of giving rise to a proprietary estoppel, may affect either the existence or the extent of the promisee's remedies for proprietary estoppel is that discussed in para.4-179 above, in which the relevant change was that the promisee had not only suffered detriment but had also obtained benefits in consequence of the events relied on to establish the estoppel. Other situations in which different changes of circumstances may either curtail <sup>1192</sup> or extend <sup>1193</sup> the rights of the person relying on the estoppel were discussed in *Thorner v Major* <sup>1194</sup> in the context of the argument there advanced that the area of land comprised in "Steart Farm" (the property to which Peter's assurance related) varied between the time when Peter first made that assurance and the time when it fell to be performed, i.e. at Peter's death. That argument was there rejected for the reasons discussed in para.4-163 above. The overriding principle there stated was that proprietary estoppel "looks backward from the moment

when the promise falls due to be performed”, as opposed to the time when it was made, and “asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept” <sup>1195</sup>; another way the point was put was that “Peter’s representation that David would inherit Steart Farm speaks, at least where Peter remained the owner of an agricultural entity known as Steart Farm, as from his death”. <sup>1196</sup> It is inherent in these formulations that, in cases of proprietary estoppel, events between the making of the promise and the time when the promise falls to be performed are relevant to the extent of the promisee’s equity. In *Thorner v Major* this principle operated in David’s favour, Steart Farm having increased (if only slightly) in size between the time when Peter first made the promise and the time when he died; but the speeches in that case also consider the possibility of the converse situation of a decrease of the size of the farm during that time: e.g. because Peter had needed to dispose of part of the land to pay for nursing care “in a decrepit old age.” <sup>1197</sup> No definite answer needed to be, or was, given to such questions in *Thorner v Major*, but the discussions there of such hypotheses seem to accept the possibility that such changes of circumstances could be taken into account in shaping the remedy for proprietary estoppel. This view is also supported by a number of factors recognised in the earlier authorities as being relevant to that issue. For example, in the cases discussed in para.4-176 above the rights of the promisee were extended (perhaps sometimes unduly) because, after making the promise, the promisor had conducted himself in a way that had incurred the disapproval of the court. Conversely, those rights could be curtailed in the exercise of the “principled discretion” described in paras 4-173 and 4-175 above, and in particular by the principle that there must be “proportionality between the [promisee’s] expectation and the detriment [suffered by him].” <sup>1198</sup> If, for example, in *Thorner v Major* the value of Steart Farm had, after Peter’s original assurance but before his death, increased by a hundredfold because planning permission had in that interval been given to develop the whole of Steart Farm as a new housing estate, <sup>1199</sup> then it might have been arguable that David’s claim should have been scaled down so as to give him reasonable, or even generous, compensation for his detrimental reliance on Peter’s promise, or at least that the resulting windfall should be shared in reasonable or fair proportions between David and the persons entitled to Peter’s estate on his intestacy. Where A’s promise leads B to form an expectation of inheriting A’s property, there is also the possibility that the promise might be subject to an express or implied condition of survivorship so that B’s death during A’s life-time would defeat the proprietary estoppel claim on behalf of B’s estate. <sup>1200</sup> There is finally the point that a promise giving rise to proprietary estoppel may, within the limits discussed in para.4-168 above, be revocable; and, where this is the position, the revocation of the promise within those limits will prevent the operation of the estoppel.

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>1105</sup>. Above, para.4-147.

<sup>1106</sup>. *E. & L. Berg Homes v Gray* (1979) 253 E.G. 473.

<sup>1107</sup>. (1862) D. F. & G. 517; above, para.4-141.

<sup>1108</sup>. cf. *Pascoe v Turner* [1979] 1 W.L.R. 431, 435 (where before the promisee’s action in reliance on the promise she was said to have been only a licensee at will).

<sup>1109</sup>. [1976] Ch. 179; above, para.4-142.

<sup>1110</sup>. Cf. *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [20], commenting on the *Crabb* case (above at n.1055) and specifying when “it was too late for the Council to change its mind.”

<sup>1111</sup>. Above, n.1056; for the facts of this case, see above, para.4-149.

<sup>1112</sup>. *Thorner v Major*, above n.1056 at [89].


<sup>1113</sup>. Above, para.4-097. The point that the promise giving rise to proprietary estoppel may be revocable may, at first sight, appear to be inconsistent with the statement in *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 at [43] that “the effects of



proprietary estoppel are permanent in that they result in the Court ordering the representor to transfer property or to make compensation ...". But it is submitted that there is no such inconsistency. The dictum here quoted refers to the position *after* the Court has made its order. The point made in the text above refers to the position *before* any such order has been made. The first of the above two points, in other words, refers to the *effects* and the second to the *existence* of the estoppel. The second point receives some support from *Kim's* case (above) at [20] and [45].

- 1114. See *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 where the claimants had "made it clear that they do not want their money back" (at [45]). For the actual ground for the decision in this case, see above, para.4-146.
- 1115. At n.1071.
- 1116.  Cf. *Moore v Moore* [2016] EWHC 2202 (Ch) at [194] ("an equitable interest" in the farm which was the subject-matter of a promise (made by a father to his son) that the farm "would be his [i.e., his son's] one day" (at [13], [168]).
- 1117. *Crabb v Arun DC* [1976] Ch. 179, 193, per Scarman L.J.
- 1118. (1862) *D. F. & G.* 517; above, para.4-141; *Durant v Heritage* [1994] E.G.C.S. 134; *Q v Q* [2008] EWHC 1874 (Fam), [2009] 1 F.L.R. 935 at [143]–[147]; *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607 at [27], [45]–[50], [52]; *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] W.T.L.R. 29 (as to the remedy in this case, see also below, para.4-172 n.1086); or, in the exceptional cases discussed in para.4-154, nn.951–953, to orders enforcing the promises in those cases.
- 1119. [1965] 2 Q.B. 507; above, para.4-141, n.834.
- 1120. *Jones v Jones* [1977] 1 W.L.R. 438; *Re Sharpe* [1980] 1 W.L.R. 219; *Greasley v Cooke* [1980] 1 W.L.R. 1306.
- 1121. *Tanner v Tanner* [1975] 1 W.L.R. 1346 (where there was a contract: cf. above, para.4-144); *Yaxley v Gotts* [2000] Ch. 162 (where the remedy was based on constructive trust).
- 1122. *J.T. Developments v Quinn* (1991) 62 P. & C.R. 33.
- 1123. As in *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345: see at [1], [36]; cf. *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P. & C.R. 24 at [47] where a charge on the property in question was held to be the appropriate way of satisfying the equity arising by virtue of the proprietary estoppel.
- 1124. cf. *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] W.T.L.R. 345 at [33] ("a remedy appropriate to the expectations that the defendant has indeed"; the last word of this phrase appears to be a misprint, probably for "induced").
- 1125. *Griffiths v Williams* [1978] E.G.D. 919; cf. *Jones v Jones* [1977] 1 W.L.R. 438.
- 1126. *Canadian Pacific Railway v The King* [1931] A.C. 414; *Armstrong v Sheppard & Short* [1959] Q.B. 384; cf. *Clark v Clark* [2006] EWHC 275, [2006] 1 F.C.R. 421 (proprietary estoppel held to give rise to temporary right of access to land for so long as it continued to be used by one party for the purpose of a business originally carried on by both parties jointly).
- 1127. *Joyce v Epsom and Ewell Borough Council* [2013] EWCA Civ 1398, [2013] 1 E.G.L.R. 21 at [54].
- 1128. A successor in title of the original promisee.
- 1129. [2013] EWCA Civ 1398 at [51].



- [1130.](#) The reference is to proprietary estoppel: see *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [72].
- [1131.](#) [2009] UKHL 18 at [86].
- [1132.](#) [2009] UKHL 18 at [86].
- [1133.](#) After n.932.
- [1134.](#) *Voyce v Voyce* (1991) 62 P. & C.R. 290.
- [1135.](#) *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 988: see at [34].
- [1136.](#) [1991] 1 W.L.R. 113.
- [1137.](#) *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379; *Crabb v Arun DC* [1976] Ch. 179.
- [1138.](#) As in *Joyce v Epsom and Ewell Borough Council* [2013] EWCA Civ 1398, [2013] 1 E.G.L.R. 21 (the here relevant facts of which are summarised in para.4-170 above).
- [1139.](#) *Crabb v Arun DC*, above n.1082, at 199.
- [1140.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776, above para.4-149.
- [1141.](#)  *Thorner v Major*, above n.1085 at [48]; cf. *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] W.T.L.R. 29 at [52], affirming the trial judge's conclusion that there was a proprietary estoppel in favour of the promisees "subject to their paying the inheritance tax attributable to" the property; cf. *Moore v Moore* [2016] EWHC 2202 (Ch) where the promisee's "equitable interest" in the farm which was the subject matter of the promise (see above, para.4-169 n.1061a) was held to be subject to the right of the promisor (who was the promisee's father) and the promisor's wife (who was the promisee's mother) to continue to reside in a house on the farm "for so long as that meets their needs", with the promisee being "responsible for maintaining and repairing it" (at [177], [193]). See also *Malik v Kalyan* [2010] EWCA Civ 113, where the Court of Appeal (at [31] to [33]) in principle approved the trial judge's method of satisfying the "equity" by awarding ownership of the disputed property to the person claiming the benefit of the estoppel, subject to his paying half of the pecuniary legacies left by the will of the former owner of the property. The actual decision was to order a limited retrial on a point not here relevant.
- [1142.](#) As in *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379, where no question of imposing terms was discussed.
- [1143.](#) In *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 779 at [19], Lord Scott said that "it is an odd sort of estoppel that is produced by representations that are in a sense conditional." The exact point of this statement is not entirely clear. If the phrase "produced by representations ..." is taken literally, it might seem to deal with the question, what sort of representation is necessary to give rise to a proprietary estoppel. If so understood, the dictum would not be easy to reconcile with cases in which a promise by A to B to transfer an interest in property to B if B engaged in a specified conduct, and B then performed that condition, has been held to give rise to a proprietary estoppel (see above, para.4-141). But the context in which the dictum occurs is that of a discussion of the effect of supervening events on a promissory estoppel assumed to have previously arisen (see below, para. 4-180) and hence with the court's power to impose conditions in the exercise of its discretion in fashioning the remedy in cases of proprietary estoppel (see below, paras 4-173 et seq.). Such conditions are imposed ab extra, rather than because the representation giving rise to the estoppel is itself "conditional." In *Thorner v Major* none of the other members of the House of Lords expressed any view on the point made in the dictum here under discussion.
- [1144.](#) *Roebuck v Mungovin* [1994] 2 A.C. 224 at 235; *Henry v Henry* [2010] UKPC 3, [2010] 1 All E.R. 998 at [52] ("wide discretion"); cf. the remedy granted in *Gillett v Holt* [2001] Ch. 210, below, para.4-178. Gardner, (1999) 115 L.Q.R. 348. For the flexibility of the remedy in cases of


proprietary estoppel, see also *Clark v Clark* [2006] EWHC 725, [2006] 1 F.C.R. 421, above, para.4-170; *Thorner v Curtis* [2007] EWHC 2422 (Ch), [2008] W.T.L.R. 155; *Hopper v Hopper* [2008] EWHC 228 (Ch), [2008] 1 F.C.R. 557; *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [2013] H.L.R. 24 (above, para.4-090 n.468) at [45]; the actual decision was that, for the reason given in para.4-146 above, no proprietary estoppel had arisen.

[1145.](#) *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367 at [43].

[1146.](#) *ibid.*

[1147.](#) See above, para.4-170.

[1148.](#) *Jennings v Rice*, above, n.1090 at [49].

[1149.](#)  *Jennings v Rice*, above, n.1090 at [36]; cf. *ibid.* at [56] (“proportionality between remedy and detriment”); *Henry v Henry* [2010] UKPC 3 at [66] (“Proportionality lies at the heart of proprietary estoppel”); *Fischer v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1761 at [11], where the estoppel claim failed for want of proof of detrimental reliance: above, para.4-158. For the importance of “proportionality” in assessing the amount of monetary relief available to the promisee, see also *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P. & C.R. 10 at [38], quoting from the Court below. On appeal, it was no longer disputed that compensation in money was in this case the appropriate form of relief. *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, where it is not altogether clear whether the proportionality of the remedy must be with (i) the detriment suffered by the promisee in reliance on the promise (at [44]) or (ii) the promisee’s reasonable expectations generated by the promise (at [45]). The distinction between the two views is not clear cut since the terms of the promise form the starting point of both. But in *Suggitt v Suggitt* itself the considerable value of the property (see at [50]) seems to have exceeded the promisee’s detriment but was nevertheless awarded (see at [27], [52] as “the values only reflect the assurances” at [50]), thus supporting the second of the above views. For the relevance of the promisor’s conduct *after* the facts giving rise to the estoppel, see below, para.4-176.

[1150.](#) *Jennings v Rice*, above n.1090 at [45]. Cf. *Joyce v Epsom and Ewell Borough Council* [2012] EWCA Civ 1398, [2013] 1 E.G.L.R. 24, where the remedy was by way of a declaration that the party relying on the estoppel was entitled to the grant of the promised right of way (for the scope of which see above, para.4-170).

[1151.](#) *Jennings v Rice* [2002] EWCA Civ 159 at [50].

[1152.](#) *ibid.*, at [51].

[1153.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776; above, para.4-149.

[1154.](#) [2009] UKHL 18 at [13].

[1155.](#) At [9], [13], [48] and [66].

[1156.](#) At [44].

[1157.](#) [2002] EWCA Civ 159, [2005] W.T.L.R. 367. For the flexibility of the remedy, see also the decision of the Court of Appeal in *Cobbe v Yeoman’s Row Management Ltd* [2006] EWCA 1139, 2006 1 W.L.R. 2964. This decision was reversed by the House of Lords ([2008] UKHL 55, [2008] 1 W.L.R. 1752, above paras 4-161 to 4-162, 4-164) on the ground that, on the facts, no proprietary estoppel arose. The speeches in the House of Lords therefore contain no discussion of what remedy might have been appropriate if a proprietary estoppel had arisen.

[1158.](#) At [9].

[1159.](#) *Evans v HSBC Trust Co (UK) Ltd* [2005] W.T.L.R. 1289, as to which see above, para.4-160 n.983. See also *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764 at [11] (“giving weight

to countervailing advantages received by” the promisee), illustrating this point by reference to *Sledmore v Dalby* (1996) 72 P. & C.R. 196, stated below, para.4-179.

[1160.](#) [2010] UKPC 3, [2010] 1 All E.R. 988.

[1161.](#) See para.4-158 above.

[1162.](#) [1976] Ch. 179; above, para.4-143.

[1163.](#) [1976] Ch. at 199; cf. *ibid.*, at 189.

[1164.](#) [1979] 1 W.L.R. 431.

[1165.](#) *ibid.* at 439. cf. the reference in *Gillett v Holt* [2001] Ch. 210 at 235 to the promisee’s “bitter humiliation” on being summarily dismissed and made the subject of a police investigation for allegations of dishonesty which the promisor made no attempt to justify at the trial of the civil action.

[1166.](#) As in *Griffiths v Williams* [1978] E.G. 919; above, para.4-170.

[1167.](#) [1965] 2 Q.B. 507; above, para.4-141.

[1168.](#) cf. criticisms of the law by Browne-Wilkinson J. in *Re Sharpe* [1980] 1 W.L.R. 219, 226.

[1169.](#) [1973] E.G.D. 233; to the extent that the reasoning is based on the provisions of Settled Land Act 1925, s.1, it is criticised in *Griffiths v Williams* [1978] E.G.D. 919. cf. *Campbell v Griffin* [2001] EWCA Civ 990, [2001] W.T.L.R. 981; *Jennings v Rice* [2002] EWCA Civ 159; [2002] W.T.L.R. 367, above para.4-176; *Evans v HSBC Trust (UK) Ltd* [2005] W.T.L.R. 1299, above, para.4-160.

[1170.](#) *Burrows and Burrows v Sharp* (1991) 23 H.L.R. 82; cf. *Baker v Baker* (1993) 25 H.L.R. 408 (where the action was for damages).

[1171.](#) *Clough v Kelly* (1996) 72 P. & C.R. D22.

[1172.](#) See *Mulholland v Kane* [2009] N.I.Ch. 9, [2009] W.T.L.R. 1521 at [20], [21]; for this case, see above, para.4-158.

[1173.](#) cf., in a case of undue influence, *Cheese v Thomas* [1994] 1 W.L.R. 129.

[1174.](#) above, at n.1114.

[1175.](#) As in *Hussey v Palmer* [1972] 1 W.L.R. 1286 and *Eves v Eves* [1975] 1 W.L.R. 1328.

[1176.](#) As in *Plimmer v Mayor of Wellington* (1884) 9 App. Cas. 699.

[1177.](#) *Tanner v Tanner* [1975] 1 W.L.R. 1346 (where there was a contract).

[1178.](#) *ibid.*

[1179.](#) *Hussey v Palmer* [1972] 1 W.L.R. 1286; *Burrows and Burrows v Sharp* (1991) 23 H.L.R. 82.

[1180.](#) *Eves v Eves* [1975] 1 W.L.R. 1338.

[1181.](#) *Tanner v Tanner* [1975] 1 W.L.R. 1346; *Baker v Baker* (1993) 25 H.L.R. 408.

[1182.](#) Above, paras 43-173 to 4-175.

[1183.](#) [2001] Ch. 210; above, para.4-146.

- [1184.](#) (1996) 72 P. & C.R. 196.
- [1185.](#) [2010] UKPC 3, [2010] 1 All E.R. 988.
- [1186.](#) For these benefits, see above, para.4-175.
- [1187.](#) Above, at n.1129.
- [1188.](#) [2010] UKPC 3 at [61].
- [1189.](#) *Evans v HSBC Trust Co (UK) Ltd* [2005] W.T.L.R. 1299, above para.4-160.
- [1190.](#) *Stallion v Albert Stallion Holdings (Great Britain) Ltd* [2009] EWHC 1950 (Ch) at [136].
- [1191.](#) *Suggitt v Suggitt* [2011] EWHC 903 (Ch), taking into account the demands of “fairness and justice to all” (at [65]); affirmed [2012] EWCA Civ 1140, [2012] W.T.L.R. 1607, without further reference to the “balance of hardship” point discussed in the text above.
- [1192.](#) e.g., above, para.4-175.
- [1193.](#) e.g., above, para.4-176.
- [1194.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776; above para.4-149.
- [1195.](#) [2009] UKHL 18 at [57] and [101], quoting from the judgment of Hoffmann L.J. in the unreported case of *Walton v Walton* (April 14, 1994), above, paras 4-145, 4-163.
- [1196.](#) [2009] UKHL 18 at [18].
- [1197.](#) At [19]; cf. at [65], [107].
- [1198.](#) Above, para.4-173 at n.1094.
- [1199.](#) At [48] parts of Steart Farm are said to have had development value, but there is no suggestion that this had, at any relevant time, increased the value of the farm dramatically (as in the example given in the text above).
- [1200.](#) When at [74] Lord Neuberger said that there was “nothing special, as a matter of principle, in relation to a statement about leaving property in a will” he was, as the context indicates, referring to a different point from that mentioned in the text above: i.e., to the point whether a statement by A that he would leave property to B amounted to a “commitment” by A or only to a “statement of A’s current intention.”

**Chitty on Contracts 32nd Ed.**  
**Consolidated Mainwork Incorporating Second Supplement**  
**Volume I - General Principles**  
**Part 2 - Formation of Contract**  
**Chapter 4 - Consideration <sup>1</sup>**  
**Section 11. - Proprietary Estoppel**  
**(e) - Comparison with other Doctrines**

**Proprietary and promissory estoppels**

**4-181**

Proprietary and promissory estoppels have a number of points in common. Both can arise from promises <sup>1201</sup>; consideration is not, while action in reliance is, a necessary condition for their operation <sup>1202</sup>; and both are, within limits, revocable. <sup>1203</sup> Perhaps for this reason, Lord Scott has described “proprietary” estoppel as “a sub-species of ‘promissory’ estoppel—if the right claimed is a proprietary right”. <sup>1204</sup> But Lord Walker has said that he had “some difficulty” <sup>1205</sup> with this observation; and there are also important differences <sup>1206</sup> between the two doctrines.

**Proprietary estoppel in some respects narrower than promissory estoppel**

**4-182**

The scope of proprietary is in two respects narrower than that of promissory estoppel. First, proprietary estoppel is restricted to situations in which one party acts under the belief that he has or will be granted an interest in or over “identified property” <sup>1207</sup> (generally land) of another. This requirement has been judicially described as “one of the main distinguishing features” <sup>1208</sup> between the two kinds of estoppel since a promissory estoppel may arise out of *any* promise that strict legal rights will not be enforced: there is no need for those rights to relate to land or other property. Secondly, proprietary estoppel requires the promisee to have acted to his detriment, <sup>1209</sup> while promissory estoppel may operate even though the promisee merely performs a pre-existing duty and so suffers no detriment in the sense of doing something that he was not previously under a legal obligation to do. <sup>1210</sup> This difference between the two doctrines follows from the fact that promissory estoppel is (unlike proprietary estoppel) concerned only with the variation or abandonment of rights arising out of a pre-existing legal relationship between promisor and promisee.

**Proprietary estoppel in other respects wider than promissory estoppel**

**4-183**

On the other hand, the scope of proprietary is in two other respects wider than that of promissory estoppel. First, promissory estoppel arises only out of a representation or promise that is “clear” or “precise and unambiguous.” <sup>1211</sup> Proprietary estoppel, by contrast, can arise where there is no actual promise: for example, in cases of so-called “acquiescence”, where one party makes improvements to another’s land under a mistake and the other either knows of the mistake <sup>1212</sup> or seeks to take unconscionable advantage of it. <sup>1213</sup> This type of proprietary estoppel is typically based on “silence and inaction rather than on any statement or action.” <sup>1214</sup> That would not normally be true of promissory estoppel. <sup>1215</sup> Even where proprietary estoppel is based on “encouragement”, <sup>1216</sup> so that some statement in the nature of a promise, representation or assurance must be established to give

rise to it, the requirement that such a statement must be “clear enough” <sup>1217</sup> falls short of any requirement that it must be “precise” <sup>1218</sup>; and since a proprietary estoppel can be based on an “assurance which can reasonably be understood as having more than one meaning”, <sup>1219</sup> there can be no requirement for the purpose of proprietary (as there is for the purpose of promissory) <sup>1220</sup> estoppel that the representation must be “unambiguous.” Secondly (and most significantly), while promissory estoppel is essentially defensive in nature, <sup>1221</sup> proprietary estoppel can give rise to a cause of action. <sup>1222</sup> The promisee is not merely entitled to raise the estoppel as a defence to an action of trespass or to a claim for possession: the court can make an order for the land to be conveyed to him, <sup>1223</sup> or for compensation <sup>1224</sup> or for such other remedy as it regards as appropriate in the exercise of its “principled discretion”. <sup>1225</sup> Although the authorities support this second distinction between the two kinds of estoppel, they have not, as yet, provided any convincing explanation or justification for it. <sup>1226</sup> It is submitted that the explanation is in part historical and terminological. In the early cases, proprietary estoppel was explained in terms of *acquiescence* <sup>1227</sup> or *encouragement*. <sup>1228</sup> Hence no conflict with the requirement that *promises* must be supported by consideration was perceived; or where it was perceived the facts were said to give rise to a contract. <sup>1229</sup> Promissory estoppel, on the other hand, dealt principally with the renegotiation of contracts; it obviously depended on giving binding effect to promises, and did so in the context of releases and variations, in which the common law requirement of consideration had long been established. <sup>1230</sup> The rule that promissory estoppel gives rise to no cause of action was evolved to prevent what would otherwise have been an obvious conflict between promissory estoppel and consideration. <sup>1231</sup> In cases of proprietary estoppel there was no such conflict where liability was based on “acquiescence”; and where it was based on “encouragement” the conflict, though sometimes real enough, was at least less obvious. There are, moreover, two aspects of proprietary estoppel which help to justify the distinction. These are that the acts done by the promisee are not ones which he was under any previous legal obligation to perform; and that generally their effect would be unjustly to enrich the promisor if he were allowed to go back on his promise. <sup>1232</sup> In these respects, the facts on which proprietary estoppel is based provide more compelling grounds for relief <sup>1233</sup> than those commonly found in cases of promissory estoppel.

#### Common basis of proprietary and promissory estoppel?

#### 4-184

While these two doctrines are in the respects discussed in para.4-183 above distinct it can also be argued that they have a common basis, viz. that it would be unconscionable for the promisor to go back on his promise after the promisee has acted in reliance on it; and that the precise labels to be attached to them are “immaterial.” <sup>1234</sup> It is perhaps for these reasons that the distinction between the two kinds of estoppel was described as “not ... helpful” by Scarman L.J. in *Crabb v Arun DC*. <sup>1235</sup> That decision was, in a later case, said to illustrate “a virtual equation of promissory and proprietary estoppel,” <sup>1236</sup> perhaps because it extended the operation of proprietary estoppel beyond the situations originally within its scope, viz. those in which the promisor would be unjustly enriched by the work done by the promisee on the promisor’s land unless some legal effect were given to the promise. Nevertheless it is submitted that the doctrines are distinct in the respects stated above. <sup>1237</sup> Attempts to unite them by posing “simply” the question whether it would be “unconscionable” <sup>1238</sup> for the promisor to go back on his promise are, for reasons given earlier in this chapter, <sup>1239</sup> unhelpful, <sup>1240</sup> insofar as they detract attention from the other conditions which must also be satisfied to bring each of the two doctrines into operation <sup>1241</sup> and from the differences in their respective legal effects. <sup>1242</sup>

#### Proprietary estoppel and contract contrasted

#### 4-185

We have seen that some cases which have been said to support the doctrine of proprietary estoppel have been explained on the alternative basis that there was a contract between the parties. <sup>1243</sup> But often no such explanation is possible; for proprietary estoppel can operate even though the conditions required for the creation of a contract are not satisfied. <sup>1244</sup> The need to discuss the doctrine in this chapter arises precisely because a promise may give rise to a proprietary estoppel even though it is not supported by consideration; and it can also have this effect even though it cannot take effect as a contract because it is not sufficiently certain, because there is no contractual intention or (sometimes) because it fails to comply with formal requirements. Moreover, the effect of a proprietary estoppel



differs from that of a contract. Sometimes, indeed, the result of a proprietary estoppel is to give effect to the promise in the terms in which it was made <sup>1245</sup>, but such a result does not follow as of right. We have seen that the promisee's remedy may depend, not only on the terms of the promise, but also on other factors, such as the extent of the promisee's detrimental reliance on it; the proportionality of that reliance to his reasonable expectations induced by the promise; and changes of circumstances, such as the conduct of the promisor after the facts giving rise to the estoppel. Thus in *Crabb v Arun DC* the promisee would have had to make some payment for the right of way but for the "high-handedness" <sup>1246</sup> of the promisor; and in *Pascoe v Turner* the promisee would not have been entitled to the fee simple of the house (but only to an irrevocable licence for life) if the promisor had not shown a "ruthless" <sup>1247</sup> determination to evict her. The rights arising under a binding contract are fixed at its formation and not subject to such variation in the light of the court's approval or disapproval of the subsequent conduct of one of the parties. For this reason, and because proprietary estoppel may be revocable, <sup>1248</sup> it will generally be more advantageous to a party to show (if he can) the existence of a binding contract than to rely on a proprietary estoppel.

1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>1201</sup>. Above, paras 4-090, 4-140. For use of the expression "promissory estoppel" see above, para.4-104.

<sup>1202</sup>. Above, paras 4-094, 4-141.

<sup>1203</sup>. Above, paras 4-097, 4-168.

<sup>1204</sup>. *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [14]; the dictum does not go on to consider the differences between the two doctrines discussed in paras 4-182 and 4-183 below.

<sup>1205</sup>. *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [67].

<sup>1206</sup>. Discussed in paras 4-182 and 4-183 below.

<sup>1207</sup>. *Thorner v Major* [2009] UKHL 18, [2007] 1 W.L.R. 776 at [61].

<sup>1208</sup>. *ibid.*

<sup>1209</sup>. Above, para.4-158.

<sup>1210</sup>. Above, para.4-095.

<sup>1211</sup>. Above, para.4-091.

<sup>1212</sup>. Above, para.4-140; *Wilmott v Barber* (1880) 15 Ch.D. 96, 105 (the claim in that case failed as the party against whom it was made did not know of the extent of his own rights or of the other party's mistake).

<sup>1213</sup>. *Taylor's Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133.

<sup>1214</sup>. *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [84], per Lord Neuberger.

<sup>1215</sup>. Above, para.4-093.

<sup>1216</sup>. For the distinction between cases of "acquiescence" and cases of "encouragement", see above, para.4-140.

<sup>1217</sup>. See para.4-150 above and see the submission made in para.4-152 above.

- [1218.](#) In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (above paras 4-161, 4-162) it was held that no proprietary estoppels arose out of an agreement which lacked contractual force because it was incomplete (and so not sufficiently precise) but the crucial point in that case was that the party claiming the benefit of the estoppels *knew* that the agreement was binding in honour only: see above, para.4-162.
- [1219.](#) *Thorner v Major*, above, at [86], per Lord Neuberger; above, para.4-151.
- [1220.](#) Above, para.4-091; an ambiguous representation can scarcely be “unequivocal.”
- [1221.](#) Above, para.4-099.
- [1222.](#) *Crabb v Arun DC* [1976] Ch. 179, 187; *Taylor's Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133, 148; *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] H.L.R. 18 at [23] (where proprietary estoppel was, in this respect, contrasted, not with promissory estoppel, but with estoppel by representation); *Thorner v Major* [2008] UKHL 18, [2009] 1 W.L.R. 779 at [61].
- [1223.](#) e.g. *Dillwyn v Llewelyn* (1862) 4 D. F. & G. 517.
- [1224.](#) e.g. *Eves v Eves* [1975] 1 W.L.R. 1338.
- [1225.](#) See above, paras 4-173 to 4-175.
- [1226.](#) In *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [61], Lord Walker relies, as a justification for the rule that proprietary estoppel can give rise to a cause of action, on *Crabb v Arun DC* [1976] Ch. 179, 187, where Lord Denning M.R. based the rule that “some estoppels [for example, proprietary estoppel] do *give rise to a cause of action*” (italics supplied) on his own earlier judgment in *Moorgate Mercantile Co Ltd v Twitchings* [1976] Q.B. 225. He had there said at 242 that the effect of an estoppel of, apparently, this kind was that the true owner's “own title in the property ... has been held to be limited or extinguished and *new rights* and interests *have been created therein*” (italics supplied). Read together, these passages from Lord Denning's two judgments amount to this, that proprietary estoppel “give[s] rise to a cause of action” because “new rights ... have been created therein” (i.e. the property). But this explanation seems (with respect) simply to restate in different words the proposition which it seeks to prove. In relation to promissory estoppel, statements that such an estoppel gives rise to no cause of action, and that it creates no new rights (above, para.4-099) are merely two ways of saying the same thing; and the same is (with respect) true of the statements that proprietary estoppel does create a cause of action and that it can create new rights.
- [1227.](#) *Wilmott v Barber* (1880) 15 Ch.D. 96, 105.
- [1228.](#) *Ramsden v Dyson* (1866) L.R. 1 H.L. 129, 170. Cf. the repeated use in *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 777 of the word “assurance” (in apparent preference to “promise”) as one of the three main elements of proprietary estoppel (e.g. at [15], [25], [72]), though the expression “promise or assurance” is also used (e.g. at [12]) by Lord Hoffmann, who in his earlier unreported judgment in *Walton v Walton*, quoted in *Thorner v Major* at [57], had repeatedly used “promise” in this context. In *Thorner v Major* “assurance” outnumbers “promise” by 61 to 24.
- [1229.](#) *Dillwyn v Llewelyn* (1862) 4 D. F. & G. 517, 522; above, para.4-144.
- [1230.](#) Above, paras 4-078—4-081.
- [1231.](#) See above, para.4-099.
- [1232.](#) See the reference to the landowner's “profit” in *Ramsden v Dyson* (1866) L.R. 1 H.L. 129, 141 and cf. above, para.4-141.
- [1233.](#) See Fuller and Eisenberg, *Basic Contract Law* (3rd ed.), p.70; “Unjust enrichment presents a

more urgent case for judicial intervention than losses through reliance which do not benefit the defendant.” cf. Fuller and Perdue (1936) 46 Yale L.J. 52, 56.

- [1234.](#) *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] Q.B. 133, 153, cf. above, para.4-181 at n.1149; where, however, a distinction is also drawn between “promissory estoppel” and the principle in *Ramsden v Dyson* (1866) L.R. 1 H.L. 129 (i.e. proprietary estoppel).
- [1235.](#) [1976] Ch. 179, 193.
- [1236.](#) *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] Q.B. 133, 153; cf. above, para.4-181 at n.1149; the use of “promissory estoppel” to describe a typical proprietary estoppel situation in *Griffiths v Williams* [1978] E.G.D. 919, 921 may be a misprint.
- [1237.](#) At paras 4-182 and 4-183; cf. above, para.4-158. Lord Scott's dictum in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [14] (quoted in para.4-181 above) falls short of stating that the requirements and effects of the two doctrines are identical.
- [1238.](#) *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] Q.B. 133, 155; cf. *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank* [1982] Q.B. 84, 104, 122. cf. also the reference in *Gillett v Holt* [2001] Ch. 210 at 232 to “the essential test of unconscionability” in cases of proprietary estoppel (above, para.4-158).
- [1239.](#) Above, para.4-104.
- [1240.](#) cf., *Haslemere Estates Ltd v Baker* [1982] 1 W.L.R. 1109, 1119 where Megarry V.-C., rejecting the argument that proprietary estoppel arises “whenever justice and good conscience requires it,” said “I do not think that the subject is as wide and indefinite as that.” See also *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [16], [17], [28] and [46], emphasising that unconscionability (or judicial disapproval) of the conduct of the party alleged to be estopped is not a sufficient (though it may be a necessary) condition of the operation of proprietary estoppel. Dicta emphasising the flexibility of the remedy (above, para.4-173) must be read subject to the requirement of adopting a “principled approach” (ibid.) to this aspect of the doctrine and not be taken to refer to *conditions of liability*.
- [1241.](#) See above, paras 4-081 to 4-096, 4-147 to 4-164.
- [1242.](#) See above, paras 4-097 to 4-103, 4-168 to 4-180.
- [1243.](#) Above, para.4-144.
- [1244.](#) See above, para.4-145.
- [1245.](#) e.g. *Dillwyn v Llewelyn* (1862) 4 D. F. & G. 517, above, paras 4-143, 4-144.
- [1246.](#) [1976] Ch. 179, 199.
- [1247.](#) [1979] 1 W.L.R. 431, 438. For other changes of circumstances, see above, para.4-180.
- [1248.](#) Above, para.4-168.

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 2 - Formation of Contract

### Chapter 4 - Consideration <sup>1</sup>

### Section 12. - Special Cases

#### Defective promises <sup>1249</sup>

#### 4-186

Mutual promises are generally consideration for each other, <sup>1250</sup> but difficulty is sometimes felt in treating one of the promises as consideration for the other if the former suffers from some defect, by reason of which it is not legally binding. The law on this topic is based on expediency rather than on any supposedly logical deductions which might be drawn from the doctrine of consideration. The question whether a defective promise can constitute consideration for a counter-promise depends on the policy of the rule of law making the former promise defective.

#### Policy considerations

#### 4-187

One group of cases concerns contracts made between persons, one of whom lacks contractual capacity. A minor can enforce a promise made to him under such a contract even though the only consideration for it is his own promise, which does not bind him by reason of his minority. <sup>1251</sup> The same rule applies where a person is entitled to avoid a contract on account of his or her mental incapacity, <sup>1252</sup> The reason for these rules is that it is the policy of the law to protect the person under the incapacity, and not the other party, who is therefore not allowed to rely on that incapacity. It has, on the other hand, been said that a promise by which the Crown purported to fetter its discretion would not constitute consideration where, under the principles discussed in Chapter 11 below, <sup>1253</sup> that promise did not bind the Crown. <sup>1254</sup> A contrasting group of cases concerns contracts which are illegal. Obviously the illegal promise cannot be enforced and if both promises are illegal the consequence that neither can be enforced follows from the policy of the invalidating rule or rules rather than from the fact that an illegal promise cannot constitute consideration. <sup>1255</sup> But in some cases of illegal contracts only one of the promises is illegal: this is, for example, often the position where the contract is in restraint of trade. In such a case, the party who makes the illegal promise (e.g. not to compete) cannot enforce the counter-promise (e.g. to pay a sum of money) if the illegal promise constitutes the sole consideration for the counter-promise. <sup>1256</sup> Indeed, where one of the two promises is illegal, the counter-promise cannot be enforced even if there was *some* other consideration for it, but the *main* consideration for it was the illegal promise. The reason for this rule lies in the policy of the law to discourage illegal bargains. <sup>1257</sup>

#### Performance of defective promises

#### 4-188

Where a defective *promise* does not constitute consideration, the *performance* of it can nevertheless sometimes provide consideration for the counter-promise. For example a mere promise to negotiate has no contractual force <sup>1258</sup> and so cannot constitute consideration for a counter-promise; but actually carrying on the negotiations can satisfy the requirement of consideration. <sup>1259</sup> Likewise, where a

promise would not bind the Crown because it purported to fetter the Crown's discretion, the actual performance of the promise can nevertheless constitute consideration for a counterpromise.<sup>1260</sup> A similar principle applies where a victim of fraud, misrepresentation, duress or undue influence can sue but not be sued: by suing, he affirms the contract, makes his own promise binding, and so supplies consideration. But where the promise of one party is illegal even its performance does not entitle that party to enforce the counter-promise,<sup>1261</sup> for the law must not give him any incentive to perform the illegal promise.

### **Promise defective by statute**

#### **4-189**

Where one of the promises is defective by statute, the statute may expressly solve the problem whether the person giving the defective promise can sue on the counter-promise.<sup>1262</sup> Thus a party who gives a promise which is defective under s.4 of the Statute of Frauds 1677, or under s.34 of the Matrimonial Causes Act 1973 may, in spite of not being bound by that promise, be entitled to enforce the counter-promise,<sup>1263</sup> and this may be so even though for other purposes (such as the validity of a disposition) his or her promise, precisely because it is void, cannot constitute consideration.<sup>1264</sup> Where a statute invalidates a promise but does not provide for the effect of its invalidity on the other party's counter-promise, the general rule seems to be that the invalid promise is not good consideration<sup>1265</sup>; but, unless that promise is illegal, the party giving it can sue on the counter-promise if he actually performs his promise.<sup>1266</sup>

### **Both promises defective by statute**

#### **4-190**

A statute may also invalidate *both* promises. Formerly, this was the position with regard to contracts "by way of gaming or wagering", which were "null and void" under section 18 of the Gaming Act 1845. This section has been repealed by the Gambling Act 2005,<sup>1267</sup> section 335(1) of which provides that, as a general rule, "[t]he fact that a contract relates to gambling shall not prevent its enforcement." This subsection does not prejudice "any rule of law preventing the enforcement of a contract on the ground of unlawfulness ..."<sup>1268</sup> so that where (for example) a party had, in relation to the gambling contract committed an offence under the 2005 Act,<sup>1269</sup> then, under the law relating to the effects of illegality on contracts,<sup>1270</sup> the illegality would often, though not necessarily,<sup>1271</sup> prevent that party from enforcing the other party's promise; and where both parties had committed such an offence or such offences, then these rules would often, though again not necessarily,<sup>1272</sup> lead to the result that neither party's promise would be legally enforceable by the other. The promises of each party would also be legally unenforceable where the Gambling Commission was satisfied that a bet was "substantially unfair" and on that ground made an order by virtue of which "any contract ... in relation to the bet [was] void."<sup>1273</sup> It is also possible for the promises of both parties to be void under other legislation: for example, under section 4 of the Marine Insurance Act 1906, by which a contract of marine insurance is void where the assured has no "insurable interest", as defined by the Act.<sup>1274</sup> In such cases, the making or performance of one of the promises would clearly not make the other promise enforceable. This conclusion follows simply from the fact that both promises are void by statute, so that there is no need to enquire whether the making or performance of one of the promises can constitute consideration for the other. The question whether the making or performance of such a void promise could constitute consideration might, however, arise in the context other than that of the enforceability of the counter-promise: for example, in the context of the question whether the performance could constitute consideration for the purpose of a rule of law by which a transfer or disposition of property was effective only if made for valuable consideration. This was the question which arose in *Lipkin Gorman v Karpnale Ltd*<sup>1275</sup> where stolen money had been used by a thief for gambling at a club of which he was a member and it was held that the club had not received the money for valuable consideration so as to be entitled, as against the victim of the theft, to retain it. We have noted that the club had not provided consideration for the member's payment by exchanging the money for gaming chips.<sup>1276</sup> The present point is that the club had not provided consideration for the payments made to it by the member and received by it in good faith by allowing him to gamble in the club or by promising to pay, or actually paying him, in respect of any bets won by him. This aspect of the decision was based on section 18 of the Gaming Act 1845 and is undermined by the repeal of that section by the Gambling

Act 2005 and by the general rule, laid down in that Act, that contracts relating to gambling are legally enforceable. Under that rule, the club's promises to its members, or the performance of those promises, would clearly constitute good consideration for the club's receipt of the member's payments. A number of other problems which could arise under the 2005 Act on facts such as those of the *Lipkin Gorman* case are discussed below in Volume II, paragraphs 41-049 to 41-051.

## Unilateral contracts

### 4-191

In the case of a unilateral contract, <sup>1277</sup> the promisee clearly provides consideration if he completes the stipulated act or forbearance (such as walking to York, or not smoking for a year). <sup>1278</sup> This amounts in law to a detriment to the promisee; and the promisor may also obtain a benefit: e.g. where he promises a reward for the return of lost property and it is actually returned to him. It was suggested in Chapter 2 that commencement of performance can amount to acceptance of an offer of a unilateral contract, <sup>1279</sup> and it is here submitted that such commencement can also amount to consideration; for it may in law be a detriment to the promisee to walk only part of the way to York, or to refrain from smoking for part of the year. Difficult questions of fact may, indeed, arise in determining whether performance has actually begun and whether such a beginning was made "on the strength of" <sup>1280</sup> the promise. This is particularly true where the stipulated performance is a forbearance; but if an actual forbearance to sue can constitute good consideration, <sup>1281</sup> it must in principle be possible to tell when a forbearance has begun. Thus commencement of performance (whether of an act or of a forbearance) may provide both an acceptance and consideration, and may accordingly deprive the promisor of his right to withdraw the promise. <sup>1282</sup> Of course, the promisor's liability to pay the amount promised (e.g. the £100 for walking to York) does not accrue <sup>1283</sup> before the promisee has fully performed the required act or forbearance. The present point is merely that, after part performance by the promisee, the promisor cannot withdraw with impunity. <sup>1284</sup>

### 4-192

The further suggestion has been made that a unilateral contract may be made as soon as the offer is received by the offeree <sup>1285</sup>; and this could be interpreted to mean that the contract was binding even before the offeree had acted on it in any way. But at this stage the offeree has clearly not provided any consideration, and in the case in which the suggestion was made no problem of consideration arose as the offeree had in fact completed the required act <sup>1286</sup> before any attempt to withdraw the offer was made. Except in the case of bankers' irrevocable credits, <sup>1287</sup> the better view is that an offer of a unilateral contract is not binding on receipt of the offer, but only when the offeree has begun to render the required performance.

## Firm offers

### 4-193

A "firm" offer is one containing a promise not to withdraw it for a specified time. Such a promise does not prevent the offeror from withdrawing the offer within that period since prima facie such a promise will be unsupported by consideration. <sup>1288</sup> Consideration for such a promise is most obviously provided if the offeree pays (or promises to pay) a sum of money for the promise and so buys an option. <sup>1289</sup> Consideration may also be provided by some other promise: for example, in the case of an offer to sell a house, the offeree may provide consideration for the offeror's promise to hold the offer open by promising to apply for a mortgage on the house; and, in the case of an offer to buy shares, the offeree may provide consideration for the offeror's promise not to withdraw the offer for a specified time by promising not to dispose of those shares elsewhere during that time. The performance of the offeree's promise in such cases could likewise provide consideration for the offeror's promise to keep the offer open. In one case a vendor of land entered into a so-called "lock-out" agreement <sup>1290</sup> by which he promised a prospective purchaser not to consider other offers if that purchaser would exchange contracts within two weeks; and it was said that "the promise by the [purchaser] to get on by limiting himself to just two weeks" <sup>1291</sup> constituted consideration for the vendor's promise not to consider other offers. The case is not strictly one of a firm offer since the vendor's promise would not in terms have



prevented him from simply deciding not to sell at all; but the practical effect of a binding “lock-out” agreement may be to prevent the vendor from withdrawing his offer; and the reasoning quoted above <sup>1292</sup> could apply to the case of a firm offer. On the facts of the case from which it is taken, the reasoning gives rise to some difficulty since it does not appear that the purchaser made any promise to exchange contracts within two weeks. It seems more plausible to say that the vendor’s promise had become binding as a unilateral contract under which the purchaser had provided consideration by actually making efforts to meet the deadline, even though he had not promised to do so. Similar reasoning can apply if a seller of land promises to keep an offer open for a month, asking the buyer during that period to make efforts to raise the necessary money. If the buyer makes such efforts (without promising to do so), it is arguable that he has by part performance accepted the seller’s offer of a unilateral contract to keep the principal offer open. Similarly, it is possible for a person, to whom a promise not to revoke an offer for the sale of a house has been made, to provide consideration for that promise by incurring the expense of a survey. <sup>1293</sup> Consideration may also be provided by the promisee’s entering into another contract with the promisor. <sup>1294</sup> On the other hand, the equitable doctrine of *Hughes v Metropolitan Ry* <sup>1295</sup> and of the *High Trees* case <sup>1296</sup> will not avail the offeree since it does not create new causes of action where none existed before. <sup>1297</sup> Nor does it seem probable that the offeree will be able to claim damages in tort <sup>1298</sup> under the principles laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. <sup>1299</sup>

## Exceptions

### 4-194

The general rule that a promise to keep an offer open is not binding has been criticised <sup>1300</sup>; indeed, there are some situations in which it has been said that “the market would disdain to take” <sup>1301</sup> the point that such a promise was not binding. The rule does not, of course, apply if the promise does not need to be supported by consideration because it is made in a deed; and it is rejected by the Vienna Convention on Contracts for the International Sale of Goods. <sup>1302</sup> It is also subject to a common law exception in the law of insurance where an underwriter who initials a slip under an “open cover” arrangement is regarded as making a “standing offer” which the insured can accept from time to time by making “declarations” under it. The underwriter’s commitment is regarded as binding even though there is no consideration for his implied promise not to revoke the “standing offer.” <sup>1303</sup> But even with these mitigations, the rule can still cause hardship to an offeree who has acted in reliance on the promise to keep the offer open. <sup>1304</sup> On the other hand, the rule does sometimes provide necessary protection for the offeror: e.g. when an offer is made by a customer on a form provided by a supplier and expressed to be irrevocable; or when the period of irrevocability is not specified, so that the offeror is left subject to an indefinite obligation without acquiring any corresponding right. Any further development of the law on the point will require a balancing of these conflicting factors. <sup>1305</sup>

## Auction sales without reserve

### 4-195

Where goods are put up for auction without reserve, there is no contract *of sale* if the auctioneer refuses to knock the goods down to the highest bidder; but the auctioneer is liable to the highest bidder on a separate promise that the auction will be without reserve. <sup>1306</sup> It can be argued that there is no consideration for this promise as the bidder is not bound by his unaccepted bid. <sup>1307</sup> But it has been held that there is both a detriment to the bidder, since he runs the risk of being bound, and a benefit to the auctioneer, as the bidding is driven up. <sup>1308</sup> Hence there is consideration for the auctioneer’s separate promise, and it makes no difference to the auctioneer’s liability *on this promise* that he would not be liable if he did not put the goods up for sale at all (since an advertisement of an auction is not an offer to hold it), <sup>1309</sup> or that there was no contract *of sale* because of his refusal to accept the highest bid. <sup>1310</sup>

## Novation of partnership debts

### 4-196

When the composition of a partnership changes, it is usual to arrange that liability for the debts owed by the existing partners should be transferred by novation <sup>1311</sup> to the new partners. Two situations call for discussion.

(1) A and B are in partnership; A retires and C is admitted as a new partner; it is agreed between A, B and C, and the creditors of the old firm of A and B, that A shall cease to be liable for the firm's debts, and that C shall undertake such liability. The result is that the creditors can sue C and can no longer sue A. They provide good consideration for C's promise to pay by abandoning their claim against A <sup>1312</sup>; and A provides good consideration for their promise to release him by procuring a substitute debtor, C.

(2) A and B are in partnership; A retires; it is agreed between A, B and the creditors of the firm that A shall cease to be liable and that B shall be solely liable. It seems that the creditors cannot sue A, but it is hard to see what consideration moves from him. In one case it was said that there was consideration in that a remedy against a single debtor might be easier to enforce than one against several, all of whom were solvent <sup>1313</sup>; thus the creditors benefit by the release of A. This is a possible, if invented, <sup>1314</sup> consideration.

## 4-197

The second of the situations discussed in para.4-196 above should be distinguished from that in which the original liability is incurred by an individual who then enters into a partnership. This was the position in *Re Burton Marsden Douglas* <sup>1315</sup> where A, a solicitor, incurred liabilities to a client (X) and then entered into partnership with B and C. It was held that B and C were not liable for the liabilities incurred by A to X before A had entered into the partnership with B and C. There had been no novation of those liabilities since (a) there had been no agreement to novate them and (b) if there had been such an agreement, there would have been no consideration for any promise by B and C to X to discharge those liabilities since there had been no promise by X to release A.

## Gratuitous bailments

## 4-198

A gratuitous bailment may be for the benefit of the bailee or for the benefit of the bailor.

### (1) For benefit of bailee

The first possibility is illustrated by *Bainbridge v Firmstone* <sup>1316</sup> where the defendant asked for and received permission from the plaintiff to weigh two boilers belonging to the plaintiff. In performing this operation, the defendant damaged the boilers, and the plaintiff claimed damages for breach of the defendant's promise to return the boilers in good condition. The defendant argued that, as he was not paid to weigh or look after the boilers, no consideration for his promise had been provided by the plaintiff; but the court rejected this argument. Patten J. said: "I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time." <sup>1317</sup> This consideration would also support some other promise by the defendant, e.g. a promise to repair the boilers. It is more doubtful whether there would be any consideration moving from the defendant for any promise by the plaintiff to allow the defendant to have possession of the boilers. A mere promise to return the boilers might not suffice on the ground that it was no more than a promise to perform a duty imposed by law on all bailees; but a promise to repair the boilers or to improve them in some way, or one to look after them for a fixed time, would probably be regarded as consideration moving from the defendant. <sup>1318</sup>

### (2) For benefit of bailor

The second possibility would, for example, arise where a thing was deposited by A with B, not for use but for safe-keeping, without reward. In such a case, A's parting with the possession is hardly a

detriment to him; and B's duty to look after the thing <sup>1319</sup> does not arise out of a contractual promise <sup>1320</sup> but is imposed by law. <sup>1321</sup> It follows that B's *only* duty is that imposed by law. Thus B is under no obligation before he actually receives the thing; and if he promised to do anything which went beyond the duty imposed by law (for example, to keep the thing in repair) he would be bound by his promise only if A had provided some consideration for it apart from the delivery of the chattel. <sup>1322</sup> To constitute such consideration, it is not necessary to show that B obtained any benefit from the bailment: thus it is enough if A reimburses (or promises to reimburse) B for any expenses that B has incurred for the purpose of performing his promise. <sup>1323</sup> This follows from the principle that consideration may consist *either* in a benefit to the promisor (B) *or* in a detriment to the promisee (A). <sup>1324</sup>

### (3) Promises defining gratuitous bailee's custodial duty

The liability of a gratuitous bailee for breaches of duty as such a bailee calls for further discussion in the light of the decision of the Court of Appeal in *Yearworth v North Bristol NHS Trust*. <sup>1325</sup> In that case, men who had been treated for cancer and had undergone chemotherapy, were told that this might lead to their becoming infertile, and were given the opportunity of having samples of their semen frozen and stored by the defendant, whose fertility unit "extended, and broke, a particular promise to the men, namely that 'the sperm will be stored ... at minus 196C'". <sup>1326</sup> In consequence of the breach, the sperm thawed and became useless. It was held that the defendant had become a gratuitous bailee of the sperm and was liable as such to the men for breach of its duty under the bailment; and this duty was described <sup>1327</sup> as "a breach not just of the duty owed by every gratuitous bailee but of a specific promise extended by the trust to the men." These words may seem to be inconsistent with the view, taken in sub-para.4-198(2) above, <sup>1328</sup> that a gratuitous bailee was subject only to the duty imposed on such as bailees by virtue of the bailment and was not bound by any promise going beyond that duty unless the bailor had provided some consideration for that promise. <sup>1329</sup> It is, however, submitted that there is no such inconsistency since a distinction must be drawn between a "specific promise" which serves merely to define the scope of B's *custodial* duty as bailee and one which purports to impose on B further duties, going beyond that duty. The passage of the judgment (quoted above <sup>1330</sup>) appears to refer back to an earlier statement which deals with the situation "where the gratuitous bailee has extended, and broken, a particular promise to his bailor ... that the chattel will be stored in a particular place or in a particular way" <sup>1331</sup>: e.g., where he has promised to store goods under cover but stored them in the open and they were destroyed or damaged in consequence of having been so stored. Here the bailee would be in breach of the custodial duty which is the central feature of the bailment relationship. The defendant's breach of duty in the *Yearworth* case was of this nature, performance of the promise to keep the sperm at the specified temperature being essential to its preservation. The same could *not* be said of the example, given in the text above, <sup>1332</sup> of a promise to keep the thing bailed in repair. Performance of such a promise would go beyond the essential custodial duty of the bailee since the promise would not merely define the way in which that duty was to be performed <sup>1333</sup> but would impose an additional duty to carry out the repairs and so to improve the thing which has been bailed. It is submitted that the problem here discussed arises at least in part because the distinction drawn in the *Yearworth* case <sup>1334</sup> between breach of "the duty owed by every gratuitous bailee" and breach of a "specific promise" made by such a bailee uses categories of which the first is unduly general and which are not mutually exclusive. Both these points follow from the fact that the scope of the duty owed by a gratuitous bailee may well depend on a "particular promise" of the kind referred to in the judgment, <sup>1335</sup> i.e. on one as to where and how the thing bailed will be stored. That was the type of promise under consideration in the *Yearworth* case; and where such a promise is made there is no distinction of substance between the "particular promise" referred to in one part in the judgment <sup>1336</sup> and the "specific promise" referred to in another. <sup>1337</sup> Whether such a promise is described as a "particular" or as a "specific" one, its effect is to define the custodial duty of the gratuitous bailee; and this is so whether or not the promise has contractual force. It follows that, in such cases, the concept of a "duty owed by every gratuitous bailee" <sup>1338</sup> is (with respect) one of limited practical value.

### Gratuitous services

## 4-199

⚠ Normally a promise to render services without reward is not supported by consideration and is therefore not binding contractually. For example, where A gratuitously promises to insure B's property but fails to do so, A is not liable to B for breach of contract if the property is destroyed or damaged. <sup>1339</sup> A firm of solicitors is likewise not bound by its promise not to charge its client for work done after a specified date, since, without more, such a promise is not supported by any consideration. <sup>1340</sup> Where an architect (A) had provided professional services as such for friends (B) free of charge, one reason <sup>1341</sup> ⚠ why there was no contract between A and B was that the requirement of consideration had not been satisfied. <sup>1342</sup> ⚠ Occasionally, it may be possible to find consideration in the indirect financial benefit which the promisor obtains from the arrangement, e.g. in the form of favourable publicity. <sup>1343</sup>

### Liability in tort for negligent performance

#### 4-200

⚠ Even where the promise is not supported by consideration, the promisor may be liable in tort for negligence if he actually renders the gratuitous services but fails to perform a duty to exercise due care in rendering them and so causes loss. A banker giving a negligent reference or an accountant giving a negligent report on the financial position of a company could be liable in tort on this ground, even though he made no charge to the person to whom the information was given. <sup>1344</sup> Similarly, where A gratuitously promised to insure B's property but did so negligently, with the result that the policy did not cover the loss which occurred, A was held liable to B in tort <sup>1345</sup> and, where the relationship between the supplier (A) of the gratuitous services and their recipient (B) was not contractual for the reasons stated in para.4-199 above, A was held liable to B in tort for having failed to exercise reasonable care in performing the services which A had in fact rendered. <sup>1346</sup> ⚠ In one case, a person was even held liable in damages for negligently giving free advice to a friend in connection with the purchase of a second-hand car which turned out to be seriously defective. <sup>1347</sup>

### Non-feasance and misfeasance

#### 4-201

The most important distinction between the two groups of cases discussed in paras 4-199 and 4-200 above is that between non-feasance and misfeasance in the performance of a promise to render gratuitous service. For this purpose, non-feasance means complete failure to pursue a *promised course of action*, while misfeasance means carelessness in the pursuit of that course of action, leading to failure to achieve a *promised result*. The first group of cases shows that non-feasance does not (in the absence of consideration <sup>1348</sup>) make the promisor liable to the promisee in contract, while the second shows that misfeasance can make him so liable in tort. There is no liability in tort for simply doing nothing after having promised to render services gratuitously; for to impose such liability would amount to holding "that the law of England recognises the enforceability of a gratuitous promise. On the face of it, this would be inconsistent with fundamental principle." <sup>1349</sup> In cases of pure non-feasance, the promisee will therefore have a remedy only if he can show that he provided consideration for the promisor's promise to render the service. If he can show this he may also be in a better position with regard to damages even in cases of misfeasance. <sup>1350</sup> There may be an exception to the general rule that there is no liability in tort for pure omissions. This exception was said to apply in *Lennon v Metropolitan Police Commissioner*, <sup>1351</sup> where A represented to B that A would take steps to safeguard some specified financial interest of B's (in that case B's housing allowance as a police officer on his transfer from one force to another) and that representation amounted to an "express assumption of responsibility for a particular matter." <sup>1352</sup> A's failure to exercise due care in discharging that responsibility could then make him liable to B in tort, and such liability was said to cover "acts of omission." <sup>1353</sup> It may, however, be respectfully doubted whether A's allegedly wrongful conduct in this case did not amount to misfeasance in the sense in which this expression has been used in this paragraph, i.e. to failure to achieve a *promised result*.

#### 4-202

In *Gore v Van der Lann* <sup>1354</sup> a corporation issued a free travel pass to the claimant who “in consideration of my being granted a free pass” undertook that the use of the pass by her should be subject to certain conditions. One of these was that she would not sue the corporation or its servants for loss or injury suffered while she was boarding, alighting from, or being carried in, the corporation’s vehicles. The claimant was injured while boarding a corporation bus; and it was held that the issue and acceptance of the free pass amounted to a contract. <sup>1355</sup> Willmer L.J. said that “Each party gave good consideration by accepting a detriment in return for the advantages gained.” <sup>1356</sup> The parties were, as a result of the issue of the pass, brought into a relationship of passenger and carrier which gave rise to duties quite independently of contract; and it was the promise not to enforce these obligations which constituted the consideration moving from the claimant. In the absence of such a relationship, the person to whom the gratuitous service was promised would not provide consideration for that promise merely by making a counter-promise not to sue for loss or damage caused by the defective performance of the services. It follows that, if in *Gore v Van der Lann* the pass had been issued for a specified period but had been withdrawn before the end of that period, then the holder would have had no claim in contract in respect of that premature withdrawal. Similarly, if A promised to carry B’s goods to London free of charge and B promised not to sue A for negligently damaging them in the course of that operation, then A would not be under any contractual liability for failing to pick up the goods. But he might be liable if he did pick them up and then unloaded them short of the agreed destination.

### Bankers’ irrevocable credits

#### 4-203

Where a banker issues (or confirms) an irrevocable credit, the generally held commercial view is that the banker’s promise to the beneficiary is binding as soon as it is communicated to the beneficiary, and before the latter has acted on it in any way. <sup>1357</sup> If, as seems probable, this view also represents the law, it constitutes a clear exception to the doctrine of consideration. <sup>1358</sup>

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1. Sutton, *Consideration Reconsidered* (1974); Cartwright, *Formation and Variation of Contracts* (2014); Shatwell (1955) 1 Sydney Law Review 289.

<sup>1249</sup>. Treitel (1961) 77 L.Q.R. 83.

<sup>1250</sup>. Above, para.4-009.

<sup>1251</sup>. *Holt v Ward Clarendieux* (1732) Stra. 937; below para.9-049.

<sup>1252</sup>. Below, para.9-093 (“voidable at his or her option”). The circumstances in which such a right of avoidance arises are discussed in paras 9-075 to 9-092 below.

<sup>1253</sup>. Below para.11-009.

<sup>1254</sup>. *R. v Att.-Gen. for England and Wales* [2003] UKPC 22, [2002] E.M.L.R. 24 at [31]. There seems to be no strong policy reason in such a case for allowing enforcement by the Crown of the other party’s promise where the contract remains executory.

<sup>1255</sup>. As suggested in *Nerot v Wallace* (1789) 3 T.R. 17, 23.

<sup>1256</sup>. e.g. *Wyatt v Kreglinger & Fernau* [1933] 1 K.B. 793.

<sup>1257</sup>. See *Goodinson v Goodinson* [1954] 2 Q.B. 118 (the actual decision is obsolete in view of Matrimonial Causes Act 1973, s.34, below, para.4-189).

<sup>1258</sup>. Above, para.2-143.




- [1259.](#) *Sepong Engineering Construction Co Ltd v Formula One Management Ltd* [2000] 1 Lloyd's Rep. 602 at 611, where it was also said that damages for breach of the resulting contract would be no more than nominal. The same reasoning applied when, before the Corporate Bodies Contracts Act 1960, unsealed promises made by a corporation did not bind it: see *Fishmonger's Corp. v Robinson* (1843) 5 Man. & G. 131; *Kidderminster Corp. v Hardwick* (1873) L.R. 9 Ex. 13; *Re Dale* [1994] Ch. 31, 38.
- [1260.](#) *R. v Att.-Gen. for England and Wales* [2003] UKPC 22, [2003] E.M.L.R. 24 at [31]; and see para.4-187 at nn.1198 and 1199.
- [1261.](#) e.g. *Wyatt v Kreglinger & Fernau* [1933] 1 K.B. 793.
- [1262.](#) See *Laythoarp v Bryant* (1836) 2 Bing.N.C. 735.
- [1263.](#) Below, para.16-053. For more elaborate provisions of this kind, see Financial Services and Markets Act 2000, ss.20, 26–30.
- [1264.](#) *Re Kumar* [1993] 1 W.L.R. 224, where the void promise was held not to constitute consideration for the purpose of Insolvency Act 1986, s.339. The common law rule that, because a wife's promise not to seek a court order for maintenance was of no effect in law, it could not constitute consideration for her husband's promise for maintenance was described as "unfortunate" by Lord Phillips P. in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534 at [39]. The rule has been reversed by statute: see above at n.1208.
- [1265.](#) *Clayton v Jennings* (1760) 2 W.Bl. 706.
- [1266.](#) *Rajbenback v Mamon* [1955] 1 Q.B. 283 as explained in (1961) 77 L.Q.R. 83, 95; cf. Unger (1956) 19 M.L.R. 99.
- [1267.](#) 2005 Act, ss.334(1), 356(3), 356(1) and Sch.16. The 2005 Act is discussed in Vol.II, paras 41-003 et seq.
- [1268.](#) 2005 Act, s.335(2), below, Vol.II, para.41-017.
- [1269.](#) See below, Vol.II, paras 41-018, 41-019.
- [1270.](#) See below, paras 16-011 et seq.
- [1271.](#) See the discussion in *Ritz Hotel Casino Ltd v Al Daher* [2014] EWHC 2847 (QB) (below, Vol.II, para.41-019 n.102) of the effects of "unlawfulness" on the enforceability of a contract relating to gambling under s. 335(2) of the Gambling Act 2005; and cf. below para.16-158 and Vol.II, para.41-043 n.263. The actual decision on the *Ritz Hotel* case (above) was that there had been no "unlawfulness": see below, Vol.II, para.41-019 n.110.
- [1272.](#) See above, n.1216.
- [1273.](#) ss.336(2) and (3), below, Vol.II, para.41-022.
- [1274.](#) In spite of its title, the Act applies (where appropriate) to contracts of insurance generally: see *Locker & Woolf Ltd v W. Australian Insurance Co Ltd* [1936] 1 K.B. 408 at 416.
- [1275.](#) [1991] 2 A.C. 548.
- [1276.](#) Above, para.4-016.
- [1277.](#) Above, paras 2-082 et seq.
- [1278.](#) See *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch. 231, 238.
- [1279.](#) Above, para.2-082.



- [1280.](#) *Wigan v English & Scottish Law Life Assurance Association* [1909] 1 Ch. 291, 298; above, para.4-060.
- [1281.](#) See above, para.4-058.
- [1282.](#) For the contrary view see Wormser in *Selected Readings on the Law of Contracts*, p.307—but he recanted in (1956) 3 *Journal of Legal Education* 146.
- [1283.](#) Unless, perhaps, such a promise is divisible: e.g. where the promise is to pay the walker a specified sum per mile. It would be a question of construction whether such a promise imposed an “entire” or a “divisible” obligation: see below, paras 21-028 et seq. In the example given in the text above, the promisor’s obligation would probably be regarded as “entire”.
- [1284.](#) The above passage (para.3-168 in the 29th edition of this book) is cited with apparent approval in *Schweppe v Harper* [2008] EWCA Civ 444 at [42] by Waller L.J. who there dissented on the different issue, whether the agreement was sufficiently certain to have contractual force: see above, para.2-150 n.795.
- [1285.](#) *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd* [1986] 1 A.C. 207, 224 (“when the invitation was received”).
- [1286.](#) By submitting the requested bid: cf. above para.2-039.
- [1287.](#) Below, para.4-203.
- [1288.](#) *Cooke v Oxley* (1790) 3 T.R. 653; *Routledge v Grant* (1828) 4 Bing. 653; *Head v Diggon* (1828) 3 M. & Ry 97; *Dickinson v Dodds* (1876) 2 Ch.D. 463; above, para.2-093.
- [1289.](#) The legal characteristics of such an option have been variously described: (1) as a contract: *Greene v Church Commissioners for England* [1947] Ch. 467, 476, 478 (disapproving a dictum in *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, 555, actual decision affirmed [1961] Ch. 549 but dicta at first instance are disapproved on a point not here under discussion in *Bolton MBC v Torrington* [2003] EWCA Civ 1634, [2004] Ch. 66); though not one of sale: *Chippenham Golf Club v North Wilts. RDC* (1992) 64 P. & C.R. 527; (2) as a transaction which, even though it is not a contract, gives rise to an interest in property: *Re Button’s Lease* [1964] Ch. 263, 270–271; *Armstrong & Holmes Ltd v Holmes* [1994] 1 All E.R. 826; (3) as a unilateral contract: *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 945; *Little v Courage* (1995) 70 P. & C.R. 469, 474; (4) as a conditional contract: *Bircham & Co Nominees (No.2) Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 773; (2001) 82 P. & C.R. 427 at [45]; *Coaten v PBS Corporation* [2006] EWHC 1781, [2007] 1 P. & C.R. DG 11 at [33]; (5) as an irrevocable offer: *Re Gray* [2004] EWHC 1538, [2005] 1 W.L.R. 815 at [25]; contrast the *Coaten* case, above; and (6) as being sui generis: *Spiro v Glencrown Properties* [1991] Ch. 537. And see Mowbray, 74 L.Q.R. 242; Lücke, 3 *Adelaide L.Rev.* 200.
- [1290.](#) Above, para.2-128.
- [1291.](#) *Pitt v P.H.H. Asset Management Ltd* [1994] 1 W.L.R. 327, 332; for other consideration in this case, see above. para.4-053; *Tye v House* [1997] 2 E.G.L.R. 171.
- [1292.](#) At n.1236.
- [1293.](#) cf. *Ee v Kakar* (1979) 40 P. & C.R. 223 (a case not concerned with a “firm” offer).
- [1294.](#) See *Habibsons Bank Ltd v Standard Chartered Bank* [2010] EWCA Civ 1335, [2011] Q.B. 943 at [23] (lenders held to have provided consideration for a “standing offer” by entering into a “Facility Agreement” with the borrower).
- [1295.](#) (1877) 2 App. Cas. 439; above, para.4-086.
- [1296.](#) [1947] K.B. 130; above, para.4-130.

- [1297.](#) Above, para.4-099.
- [1298.](#) cf. *Holman Construction Ltd v Delta Timber Co Ltd* [1972] N.Z.L.R. 1081; and see *Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 W.L.R. 1195, 1202.
- [1299.](#) [1964] A.C. 465; below, para.7-089.
- [1300.](#) Law Revision Committee, 6th Interim Report, Cmd. 5449 (1937), para.38; Law Commission Working Paper No.60 (1975).
- [1301.](#) *Jaglom v Excess Insurance Ltd* [1972] 2 Q.B. 250, 258; cf. *County Ltd v Girozentrale Securities* [1996] 3 All E.R. 834 where an “offer to subscribe” for shares was described at 837 as “not legally binding but regarded by City convention as binding in honour unless some unforeseen exceptional circumstances supervened.” It seems that the “commitment” (below, before n.1248) was given not to the company but to the underwriter, or by prospective investors to each other, so that the principles discussed in para.2-024 above did not apply. For the view that the statement in question in the *Jaglom* case was not an offer at all, but an acceptance (and binding as such) see *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856, 863–864.
- [1302.](#) Above, para.2-061; Art.16(2).
- [1303.](#) *Citadel Insurance Co v Atlantic Union Insurance Co* [1982] 2 Lloyd’s Rep. 543, 546; contrast the nature of “preliminary” slips: these were said in *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [173] as “nothing more than quotation slips”: i.e., presumably offers without any indication that they would be kept open for a specified or ascertainable time, or perhaps mere invitations to treat (see above, para.2-010).
- [1304.](#) e.g. where a builder enters into a contract in reliance of offers from sub-contractors to supply services or materials and expressed to be “firm” for a fixed period. For conflicting American authorities, see *James Baird Co v Gimbel Bros.*, 64 F. 2d. 344 (1933); *Drennan v Star Paving Co* 51 Cal. 2d. 409, 333 P. 2d. 757 (1958); for a review of Canadian authorities, see *Northern Construction Co v Gloge Heating & Plumbing* (1984) 6 D.L.R. (4th) 450 (holding the sub-contractor bound by his offer).
- [1305.](#) See Law Com. Working Paper 60 (1975).
- [1306.](#) *Warlow v Harrison* (1859) 1 E. & E. 309; *Harris v Nickerson* (1873) L.R. 8 Q.B. 286, 288; *Johnson v Boyes* [1899] 2 Ch. 73, 77.
- [1307.](#) See *Slade* (1952) 68 L.Q.R. 238; *Gower*, *ibid.* at 457; *Slade* (1953) 69 L.Q.R. 21.
- [1308.](#) *Barry v Davies* [2000] 1 W.L.R. 1962 at 1967.
- [1309.](#) *Harris v Nickerson* (1873) L.R. 8 Q.B. 286; above para.2-020.
- [1310.](#) *ibid.*
- [1311.](#) Below, para.19-087; Partnership Act 1890, s.17(3). Problems of the kind here discussed do not arise in the same form in the case of limited liability partnership incorporated under the Limited Liability Partnerships Act 2000 since the liabilities of the partnership are those of the body corporate incorporated under ss.1–3 of that Act; these are not affected by a change in the membership of the body. Section 6(3) of the Act deals with the different question of the extent to which acts of a person who has ceased to be a member can still impose liability on the partnership.
- [1312.](#) Cf. the reasoning of *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd’s Rep. 59 at [46] and [41].

- [1313.](#) *Lyth v Ault* (1852) 7 Ex. 669; *Thompson v Percival* (1834) 5 B. & Ad. 925 is based on reasoning which is obsolete after *D. & C. Builders Ltd v Rees* [1967] 2 Q.B. 617; above, para.4-124, n.731.
- [1314.](#) Above, para.4-009.
- [1315.](#) [2004] EWHC 593 (Ch), [2004] 3 All E.R. 222.
- [1316.](#) (1838) 8 A. & E. 743.
- [1317.](#) At 744.
- [1318.](#) cf. *Verral v Farnes* [1966] 1 W.L.R. 1254, a case relating to land; followed in *Milton v Farrow* (1980) 255 E.G. 449.
- [1319.](#) For this duty, see *Coggs v Bernard* (1703) 2 Ld. Raym. 909; *Mitchell v Ealing LBC* [1979] Q.B. 1; *Port Swettenham Authority v T.W. Wu & Co* [1979] A.C. 580, 590.
- [1320.](#) For the view that a bailment can come into existence “without consideration passing from the bailor [A] to the bailee [B]” see also *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] Q.B. 1 at [48]. B’s liability was there said to be based on “an assumption of responsibility” but not necessarily to “lie in tort”, the Court being “strongly attracted to the view that B’s liability was sui generis” (citing Palmer on Bailment, 2nd ed. (1991) at pp.44 et seq.). For this case, see also below after n.1269.
- [1321.](#) *Morris v C.W. Martin Ltd* [1966] 1 Q.B. 716, 731; *Compania Continental del Peru v Evelpis Shipping Corp. (The Agia Skepi)* [1992] 2 Lloyd’s Rep. 467, 472.
- [1322.](#) cf. *Charnock v Liverpool Corporation* [1968] 1 W.L.R. 1498; below, para.18-010.
- [1323.](#) *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16, 27.
- [1324.](#) Above, para.4-014.
- [1325.](#) [2009] EWCA Civ 37, [2009] 2 All E.R. 986.
- [1326.](#) At [49].
- [1327.](#) At [58].
- [1328.](#) At n.1267.
- [1329.](#) Above, at n.1267.
- [1330.](#) At n.1272.
- [1331.](#) [2009] EWCA Civ 37 at [48].
- [1332.](#) At n.1267.
- [1333.](#) See the phrase quoted at n.1276 above.
- [1334.](#) At [58].
- [1335.](#) At [48], quoted at n.1276 above.
- [1336.](#) At [48].
- [1337.](#) At [58].

1338. At [58].
1339. *Argy Trading & Development Co Ltd v Lapid Developments Ltd* [1977] 1 W.L.R. 444; cf. the New York case of *Thorn v Deas*, 4 Johns. 84 (1809); later American authorities are divided: Corbin, *Contracts*, para.205, n.54.
1340. *Ashia Centur Ltd v Barker Gillette LLP* [2011] EWHC 148 (QB); the client argued that it had provided consideration by forbearing immediately to instruct new solicitors but this argument was rejected as there was no evidence of any conduct on the client's part to support a finding of such forbearance (at [19], [20]).
1341.  For other reasons why there was no contract between A and B, see above, paras 1-172 and 2-170.
1342.  *Burgess v Lejonvarn* [2017] EWCA Civ 254, [2017] B.L.R. 277 at [71], referring to the reasoning of the Court below ([2016] EWHC 40 (TCC) at [152]) and affirming the decision of that Court.
1343. cf. *De la Bere v Pearson* [1908] 1 K.B. 280, 287.
1344. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465; cf. below, para.7-089.
1345. *Wilkinson v Coverdale* (1793) 1 Esp. 75.
1346.  *Burgess v Lejonvarn* [2017] EWCA Civ 254, [2017] B.L.R. 277 at [88], [128].
1347. *Chaudhry v Prabhakar* [1989] 1 W.L.R. 29; the defendant conceded that he owed a duty of care to the claimant and two members of the Court of Appeal seem to have regarded this concession as correct; Brown [1989] L.M.C.L.Q. 148. Contrast *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 181, suggesting that there may be no liability in respect of services rendered on "an informal occasion."
1348. Or of privity of contract: see *Hamble Fisheries Ltd v L. Gardner & Son Ltd (The Rebecca Elaine)* [1999] 2 Lloyd's Rep. 1 at 5.
1349. *G.A.F.L.A.C. v Tanter (The Zephyr)* [1985] 2 Lloyd's Rep. 529, 538, disapproving the contrary view expressed at first instance [1984] 1 Lloyd's Rep. 58, 85 and there based on authorities which were all cases of misfeasance. *The Zephyr* itself was also such a case: [1984] 1 Lloyd's Rep. at 79, 86 ("he was making the position steadily worse"). A fortiori, there is no liability in tort for pure omission where no promise has been made: see *Reid v Rush & Tompkins Group plc* [1990] 1 W.L.R. 212 and *Van Oppen v Clerk to the Bedford Charity Trustees* [1990] 1 W.L.R. 235 though in the latter case it was said at 260 that a voluntary assumption of responsibility by one party followed by reliance on it by the other might in exceptional cases give rise to such liability. The scope of the exception is not clear; in the last two cases it was held that there was no duty on respectively an employer and a school to advise an employee or the parents of a pupil to insure against foreseeable risks of injury cf. *Outram v Academy Plastics Ltd* [2001] I.C.R. 367 at 372: generally no liability in tort "for pure omission", the omission taking the form of an employer's failure, without breach of contract, to advise an employee as to his membership of the employer's pension scheme. Liability in tort for pure omission may exceptionally arise where there is a "duty to act": see *White v Jones* [1995] 2 A.C. at 261, 268, 295 below, para.18-039); but it is submitted that no such duty would arise merely from the making of a gratuitous promise. For a further possible exception, see below, after n.1293.
1350. Because he will then be able to recover damages for loss of bargain.
1351. [2004] EWCA Civ 130, [2004] 1 W.L.R. 2594 at [34].
1352. *ibid.*, at [34].

- [1353.](#) *ibid.*, at [20].
- [1354.](#) [1967] 2 Q.B. 31; Harris (1967) 30 M.L.R. 584; Odgers (1970) 86 L.Q.R. 69; and see above, para.2-188 on the issue of contractual intention.
- [1355.](#) This contract was void, so far as it purported to exclude liability for personal injury, by virtue of s.151 of the Road Traffic Act 1960 (now Public Passenger Vehicles Act 1981, s.29); below, para.15-133.
- [1356.](#) [1967] 2 Q.B. 31, 42.
- [1357.](#) Below, Vol.II, para.34-505.
- [1358.](#) For explicit recognition of such an exception in the United States, see UCC, s.5–105; cf. *United City Merchants Ltd v Royal Bank of Canada (The American Accord)* [1982] Q.B. 208, 225, reversed on other grounds [1983] 1 A.C. 168. Under the Contracts (Rights of Third Parties) Act 1999 (below, paras 18-090 et seq.) the beneficiary might have a claim against the bank as a third party identified in the contract between the bank and its customer; there is no requirement, in such cases, of consideration moving from the third party: above, para.4-046. But his rights under the Act would be less secure than his common law rights in two respects. First, they would be subject under subs.3(2) to any defences which the bank might have against its customer. And, secondly they could be defeated or diminished by rescission or variation of the contract by subsequent agreement between the bank and its customer before the seller had *either* communicated his assent to the bank *or* relied on the credit, and the bank either was aware of, or reasonably should have foreseen such reliance: see subs.2(1) and paras 18-105 and 18-106 below.