Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 22 - Discharge by Agreement

Section 1. - In General

Generally

22-001

The discharge of a contract by agreement is a subject of considerable artificiality and refinement. The niceties of legal reasoning which appear in this branch of the law are not easy to justify, [1] but are attributable in the main to two causes. In the first place, the doctrine of consideration, which is an important component in the formation of a binding contract, has also been applied to its discharge. [2] Thus a distinction has to be drawn between those contracts which have been wholly executed on one side (i.e. where one party has performed all its obligations under the agreement) and those which are executory on both sides (i.e. where both parties still have some obligations to perform). In the former case, the party seeking to be discharged must prove either a release by deed or some consideration agreed by the other party ("accord and satisfaction") in place of its existing obligation or in addition to it. [3] In the latter case, consideration can usually be found in the mutual release by each party of its rights under the contract. [4] Secondly, the evidentiary requirements of the Statute of Frauds 1677 which required certain important classes of contract to be evidenced by writing, [5] were capable of producing even more serious instances of injustice than those which the statute was designed to prevent. Within the limits available to them, the judges endeavoured to circumvent the statute in order that it should not be made a cloak for fraud. Thus, although the variation of the term of a contract required to be evidenced by writing has to be proved by writing, [6] the discharge of the entire agreement [7] and the waiver of contractual terms [8] can be effected by parol. These distinctions have declined greatly in importance since the almost total repeal of the Statute of Frauds by the Law Reform (Enforcement of Contracts) Act 1954 [9] and a modern court may be unwilling to draw a distinction unless it is strictly necessary for it to do so. [10]

Discharge of right of action arising from breach

22-002

It will be convenient also to deal in this chapter with the discharge by agreement of a right of action arising from a breach of contract.

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1. *Samuel v Wadlow [2007] EWCA Civ 155, [2007] All E.R. (D) 370 (Feb)* at [35].

2. This was criticised by Frederick Pollock, *Principles of Contract*, 13th edn (1950), p.150, as an unwarrantable extension.

3. See below, paras 22-003, 22-012; see also "Waiver", below, paras 22-044 et seq.

4. See below, paras 22-025 et seq.

5. See above, para.5-010.

6. See below, para.22-033.

7. See below, para.22-030.

8. See below, para.22-041.

9. See above, para.5-010.

10. *Samuel v Wadlow [2007] EWCA Civ 155, [2007] All E.R. (D) 370 (Feb)* at [34]–[46].

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Section 2. - Release

Release by deed

22-003

Where a contract has been executed by one party only, that is to say, where only one party has fully performed its obligations under the contract and the other party has some obligations still outstanding, the contract may be discharged at any time before breach by release by deed. [11] Also, where one party has committed a breach of the contract, it will be a defence for it to show that the other party has by deed released the cause of action accruing from such breach. [12] The employment of a deed dispenses with the necessity for consideration. [13]

Parol release

22-004

A mere parol release, whether oral or in writing, without valuable consideration amounts to nudum pactum and is normally insufficient to effect a discharge either at law [14] or in equity. [15] A parol release given in return for valuable consideration amounts to accord and satisfaction. [16]

Construction of release

22-005

No particular form of words is necessary to constitute a valid release, and any words which show an evident intention to renounce a claim or discharge the obligation are sufficient. [17] The normal rules relating to the construction of a written contract also apply to a release, [18] and so a release in general terms is to be construed according to the particular purpose for which it was made. [19] In order to ascertain the intention of the parties, the court will have regard to the terms of the contract as a whole:

> "… giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties." [20]

The scope of a release drafted in general terms may be limited either by the existence of a dispute between the parties or by the parties' knowledge, at the time of entry into the release, of the existence of the claim. Where the parties have a particular dispute in mind when entering into the release, the scope of the dispute "provides a limiting background context to the document". [21] Even where the parties do not have a particular dispute in mind, the circumstances in which the release was given may suggest that the release should only apply to a particular subject matter. [22] The parties'

knowledge of the existence of the claim at the time of entry into the release is more equivocal. [23] The fact that the existence of the claim was unknown to both parties does not mean that such a claim falls outside the scope of the release. Parties who enter into a release frequently want to achieve finality and so the:

> "… wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims." [24]

It would appear that a person will not be allowed to rely upon a release in general terms if he knew that the other party had a claim and also knew that the other party was not aware that he had a claim. [25] But the construction of any individual release will necessarily depend upon its particular wording and phraseology. [26]

Covenants not to sue

22-006

A covenant not to sue without any limitation as to time is equivalent to a release. [27] The reason for this rule appears to be a desire to avoid the circuity of action which would otherwise arise if the covenantee recovered precisely the same damage that he suffered by reason of the covenantor suing on the original agreement. [28] But, at common law, a covenant, or agreement for valuable consideration, not to sue for a limited time was not equivalent to a release and did not bar the action on the contract. [29] The covenant was construed as giving the covenantee merely a right of action for its breach if the covenantor sued before the expiry of the time so limited. It did not operate as a bar to the original action but gave an action for damages. [30] A court of equity, however, would grant an injunction to restrain the covenantor from suing within that time, [31] and the equitable rule now prevails so as to provide the covenantee with a complete defence in that event. [32]

Joint contractors

22-007

The distinction between a release and a covenant not to sue can, however, be of importance in relation to the liability of joint contractors. This topic has been dealt with in the chapter on joint obligations earlier in this book. [33]

Conditional release

22-008

A release will be good although made subject to avoidance by the happening of a condition subsequent, as, for example, by the nonfulfilment of a compromise. [34]

Bills of exchange

22-009

The release of a bill of exchange or promissory note [35] need not be effected by deed nor is any consideration required for such discharge. [36] Section 62 of the Bills of Exchange Act 1882 provides that where the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor. [37]

Effect of misrepresentation

22-010

A release obtained by misrepresentation may be set aside. [38]

Pleading of release

22-011

A defence alleging a release must be specifically pleaded. [39]

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11. *Foster v Dawber (1851) 6 Exch. 839, 851*. The need for a seal for the valid execution of an instrument as a deed by an individual was abolished when s.1 of the Law of Property (Miscellaneous Provisions) Act 1989 came into force.

12. *Tetley v Wanless (1867) L.R. 2 Ex. 275*. See also *Barker v St Quintin (1844) 12 M. & W. 441* (debt of record).

13. *Preston v Christmas (1759) 2 Wils.K.B. 86*.

14. *Pinnel's Case (1602) 5 Co. Rep. 117a*; *Fitch v Sutton (1804) 5 East 230*; *Harris v Goodwyn (1841) 2 M. & G. 405*; *Foster v Dawber (1851) 6 Exch. 839, 851*; *De Bussche v Alt (1878) 8 Ch. D. 286*; *Foakes v Beer (1884) 9 App. Cas. 605* (see above, para.4-117). *Bank of Credit and Commerce International SA (In Liquidation) v Ali [1999] I.C.R. 1068, 1078*. If a receipt is given, expressing that money has been received in satisfaction of all demands, it is open to the parties to contradict such a receipt: *Foster v Dawber (1851) 6 Exch. 839, 848*. For exceptions to this rule, see above, paras 4-120—4-138; below, paras 22-016—22-018.

15. *Byrn v Godfrey (1798) 4 Ves. 6*; *Tufnell v Constable (1836) 8 Sim. 69*; *Cross v Sprigg (1849) 6 Hare 552* (reversed on other grounds: *(1850) 2 Mac. & G. 113*); *Jorden v Money (1854) 5 H.L.C. 185*; *Luxmore v Clifton (1867) 17 L.T. 460*. See also *Stackhouse v Barnston (1805) 10 Ves. 453, 466*. It is doubtful whether earlier cases in equity culminating in *Flower v Marten (1837) 2 My. & Cr. 459*, can now be considered good law. But see above, paras 4-086, 4-130 et seq.; below, paras 22-016—22-018, 22-044.

16. See below, para.22-012.

17. Co.Litt. 264; Com.Dig. *Release* (A.1); Bac.Abr. *Release* (A).

18. ❗See *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [8], [26]; *Point West London Ltd v Mivan Ltd [2012] EWHC 1223 (TCC), [2012] All E.R. (D) 91 (Jun)* at [32]; *Brazier v News Group Newspapers Ltd [2015] EWHC 125 (Ch.), [2015] All E.R. (D) 209 (Jan)*; *Novoship (UK) Ltd v Mikhaylyuk [2015] EWHC 992 (Comm)* at [14]; *Marsden v Barclays Bank Plc [2016] EWHC 1601 (QB)* at [46] (where one of the issues before the court was whether the settlement agreement applied to a claim in deceit and it was held that the "reference to 'all causes of action which arise directly or indirectly … ' was wide enough, and was clearly intended, to encompass an existing threat of misrepresentation claims, including those in deceit") and above, paras 13-041 et seq., para.13-098.

19. *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [8] and [26]. *L. & S.W. Ry v Blackmore (1870) L.R. 4 H.L. 610, 623*; *Solly v Forbes (1820) 2 B. & B. 38, 47*; *Morley v Frear (1830) 6 Bing. 547, 555*.

20. *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251*. In other words the courts will apply the general rules of interpretation as re-stated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 912–913* (on which see paras 13-043 et seq.), as qualified by Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [39] and as developed in subsequent case law.

21. *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [41]. See also *Directors of the London and South Western Railway Co v Blackburn (1870) L.R. 4 H.L. 610* and *Lyall v Edwards (1861) 6 H. & N. 337*.

22. *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [28]. On the facts of the case the release was held to be confined to matters relating to the termination of the employment relationship and so did not encompass a claim for stigma damages arising out of an alleged breach of an implied duty owed to the employees not to carry out a dishonest or corrupt business. A further factor influencing their Lordships was the fact that the existence of such a claim, as a matter of law, was unknown at the time of entry into the release (indeed, this factor was held to have been "crucial" by the Court of Appeal in *Mostcash Plc v Fluor Ltd [2002] EWCA Civ 975, [2002] B.L.R. 411* at [59]). See also *Cole v Gibson (1750) 1 Ves. Sen. 503*, *Lindo v Lindo (1839) 1 Beav 496* and *Grant v John Grant & Sons Pty Ltd (1954) 91 C.L.R. 112*.

23. ! *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251*; *Brazier v News Group Newspapers Ltd [2015] EWHC 125 (Ch.), [2015] All E.R. (D) 209 (Jan)* at [70] (affirmed by the Court of Appeal: *Leslie v News Group Newspapers Ltd [2016] EWCA Civ 79*).

24. *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [27]; *Mostcash Plc v Fluor Ltd [2002] EWCA Civ 975, [2002] B.L.R. 411*; *Priory Caring Services Ltd v Capita Property Services Ltd [2010] EWCA Civ 226, 129 Con. L.R. 81*. A party who wishes to ensure that a claim, the existence of which is unknown at the time of entry into the release, is covered by the release should use clear words to this effect because the courts may be reluctant to conclude that such was the intention of the parties in the absence of clear words to that effect (*Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [10]).

25. ! The point did not arise for decision in the House of Lords in *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* but Lord Nicholls (at [32]) and Lord Hoffmann (at [70]) were of the view that a person should not be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. Lord Bingham (at [20]) and Lord Clyde (at [87]) chose to express no view on the point. The majority of the Court of Appeal also concluded that courts have an equitable jurisdiction to grant relief to the releasor if it would be unconscionable for the releasee to rely on the words of a general release (*Bank of Credit and Commerce International SA v Ali [2000] I.C.R. 1410*). This principle applies most obviously to general releases and may not be applicable to a release that relates to a specific claim: *Brazier v News Group Newspapers Ltd [2015] EWHC 125 (Ch.), [2015] All E.R. (D) 209 (Jan)* at [98] (affirmed by the Court of Appeal: *Leslie v News Group Newspapers Ltd [2016] EWCA Civ 79*).

26. ! Co.Litt. 264B, 291b; *Tynan v Bridges (1612) Cro. Jac. 301*; *Cutler v Goodwin (1721) 11 Mod. R. 344*; *Tetley v Wanless (1867) L.R. 2 Ex. 275*; *Brazier v News Group Newspapers Ltd [2015] EWHC 125 (Ch.), [2015] All E.R. (D) 209 (Jan)* (affirmed by the Court of Appeal: *Leslie v News Group Newspapers Ltd [2016] EWCA Civ 79*).

27. *Hodges v Smith (1599) Cro. Eliz. 623*; *Clayton v Kynaston (1699) 12 Mod. R. 221, 222*; *Smith v Mapleback (1786) 1 T.R. 441, 446*; *Ford v Beech (1848) 11 Q.B. 852*; *Keyes v Elkins (1864) 5 B. & S. 240*; *Boosey v Wood (1865) 3 H. & C. 484*.

28. *Fowell v Forrest (1670) 2 Wms. Saund. 47 n.1*; *Ford v Beech (1848) 11 Q.B. 852, 871*.

29. It was a principle of law that a personal action, once suspended by the act of the parties, was for ever extinct. The courts would not therefore construe the covenant or agreement as a legal suspension of the claimant's right to sue since this would have the effect of precluding him from ever suing at all. See Williams, *Joint Obligations*, para.61; *Ford v Beech (1848) 11 Q.B. 852, 867*.

30. *Deux v Jefferies (1594) Cro. Eliz. 352*; *Thimbleby v Barron (1838) 3 M. & W. 210*; *Ford v Beech (1848) 1 Q.B. 852*; *Webb v Spicer (1849) 13 Q.B. 886, 898*; *Ray v Jones (1865) 19 C.B.(N.S.) 416*. Contrast *Foley v Fletcher (1858) 3 H. & N. 769*; *Bailey v Bowen (1868) L.R. 3 Q.B. 133*.

31. *Beech v Ford (1848) 7 Hare 208*.

32. Senior Courts Act 1981 s.49.

33. See above, paras 17-017—17-020.

34. *Newington v Levy (1870) L.R. 6 C.P. 180*; *Hall v Levy (1875) L.R. 10 C.P. 154*. See also *Slater v Jones (1873) L.R. 8 Ex. 186, 192*.

35. Bills of Exchange Act 1882 s.89.

36. See Chalmers and Guest on Bills of Exchange and Cheques, 17th edn (2009), para.8–061.

37. The rights of a holder in due course after such release are not affected if he takes without notice of the release: see s.62(2). See Vol.II, para.34-138.

38. *Wild v Williams (1840) 6 M. & W. 490*; *Hirschfeld v L.B. & S.C. Ry (1876) 2 Q.B.D. 1*.

39. Although the CPR no longer contain any express reference to a release, it is advisable to continue to plead the defence specifically. The rules relating to the contents of the defence are set out in CPR Pt 16 r.16.5.

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Section 3. - Accord and Satisfaction

Definition

22-012

> "Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative." [40]

Thus, although a release not in the form of a deed is normally ineffective to discharge a contract which is executory on one side only, [41] it will operate as a discharge if the other party agrees to accept some other or additional consideration in return for the right which he abandons. [42] Whether there is a release or a compromise depends upon the substance rather than the form of the transaction between the parties. [43]

Compromise

22-013

Where a claim is asserted by one party which is disputed by the other, they may agree to compromise their dispute on terms mutually agreed between them. [44] Once a valid compromise has been reached, it is not open to the party against whom the claim is made to avoid the compromise on the ground that the claim was in fact invalid, provided that the claim was made in good faith and was reasonably believed to be valid by the party asserting it. [45] Conversely, the claimant cannot avoid the compromise on the ground that there was in fact no defence to the claim, provided that the other party bona fide and reasonably believed that he had a good defence either as to liability or as to amount. In order to establish a valid compromise, it must be shown that there has been an agreement (accord) which is complete [46] and certain in its terms, [47] and that consideration (satisfaction) has been given or promised [48] in return for the promised or actual forbearance to pursue the claim. It is a good defence to an action for breach of contract to show that the cause of action has been validly compromised. [49]

Form of accord

22-014

At common law, accord and satisfaction was no answer to a claim on a specialty, but the rule was otherwise in equity and the latter now prevails. [50] The accord need not be in writing even if the contract which it is sought to discharge, or for the breach of which a claim is made, is required by law to be made or evidenced in writing. [51] An oral accord will suffice, unless the accord itself constitutes a

contract or transaction which is required to be made [52] or evidenced [53] in writing.

Executory satisfaction

22-015

At one time, a number of cases appeared to establish the rule that satisfaction was of no effect unless it was executed. While the satisfaction remained executory, that is to say, so long as the agreement to give satisfaction remained unperformed, the original claim was not discharged, nor would any action lie for breach of the accord. [54] Even a tender of performance of the satisfaction agreed upon was adjudged insufficient. [55] Only executed satisfaction would suffice. This rule, however, was never completely accepted [56] and it is now established that satisfaction may be executory. [57] The question is one of the construction of the accord: whether it was intended that the promise itself or the performance of the promise should discharge the original claim [58]:

> "The rational distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there will be no satisfaction without performance." [59]

In the modern law, therefore, a claimant may still insist upon the performance of some act by the other party in satisfaction of his claim. In that case, there is no satisfaction until performance, and the other party remains liable on the original claim until the satisfaction is executed. [60] More often, however, the claimant will agree to accept the other party's promise of performance in satisfaction of his claim. The original claim is then discharged from the date of the agreement [61] and cannot be revived. The claimant's sole remedy, in the event that the other party fails to perform, is by action for breach of the substituted agreement, and he has no right of resort to the original claim. [62] If he wishes to preserve his right to proceed with the original claim should the other party fail to perform, an express term should be incorporated in the agreement to that effect. [63]

Payment of part of a debt

22-016

Where there is a claim for a liquidated sum, the liability for which is not in dispute, [64] the acceptance of a smaller sum in satisfaction does not relieve the debtor for there is no consideration for the creditor's abandonment of the balance. [65] This rule, which is generally known as the rule in *Pinnel's Case*, [66] is nevertheless subject to a number of qualifications, the combined effect of which is substantially to undermine the rule.

Payment in different form, at earlier time, in different place

22-017

A debt may be discharged by the acceptance of something different in nature from part payment of the debt, for then there is accord and satisfaction. [67] Even if the satisfaction accepted is much less in value than the debt, it will constitute a good discharge, since the courts will not inquire into the adequacy of consideration. [68] Also payment by a debtor at an earlier time or in a different place from that required by the original contract, if made at the request and for the benefit of the creditor, [69] will effect a discharge. [70] More generally, a court is likely to find the existence of consideration where the creditor receives a practical benefit over and above that derived merely from accommodating the debtor. [71]

Exceptions

22-018

Other important qualifications relate to part-payment by a third party, [72] compositions with creditors [73] and the *High Trees* principle. [74]

Joint obligations

22-019

The effect of accord and satisfaction on joint obligations has been dealt with in the chapter on joint obligations earlier in this book. [75]

Bill of exchange

22-020

No satisfaction is required for the discharge of a bill of exchange or promissory note. [76] The holder may renounce his rights in writing, or by delivery up of the bill to the acceptor. [77]

Ineffective accord

22-021

An accord may be vitiated by any circumstance that would render a contract void or voidable, for example, by misrepresentation, [78] mistake, [79] or duress. [80]

Evidence of accord

22-022

The question whether there has been an accord and satisfaction is a question of fact. [81] Thus, retention and use by a creditor of a cheque sent by a debtor in full and final satisfaction of a larger claim does not, as a matter of law, constitute an accord and satisfaction. [82] The intention of the creditor in cashing the cheque must be objectively ascertained. Cashing a cheque or retention of a cheque without rejection is strong evidence of assent by the creditor [83] but it is not conclusive evidence so that a creditor who, at the moment of paying in the cheque or shortly thereafter makes clear that he is not assenting to the conditions imposed by the debtor will not be held to have entered into an accord and satisfaction. [84] The construction of any correspondence which, it is alleged, evidences the accord is, however, a question of law. [85]

Pleading

22-023

Both the accord and the satisfaction should be specifically pleaded. [86]

Judgment or order

22-024

A compromise may by consent be made the subject of a judgment or order of the court. A consent judgment will ordinarily extinguish by merger [87] the contract of compromise, but a consent order will

not have this effect. It does not itself constitute a contract, but it is sufficient evidence of the contract of compromise on which it is based, and such contract is no less a contract and subject to the incidents of a contract because there is superadded the command of a judge. [88] Where an action has been commenced and a compromise has been reached on agreed terms, the usual form of order sought by consent is a *Tomlin* order, [89] which provides that all further proceedings in the action be stayed, except for the purpose of carrying such terms into effect, with liberty to apply [90] as to carrying such terms into effect. The court will, if necessary, in appropriate cases enforce the terms of a compromise contained in a *Tomlin* order by specific performance. [91]

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40. *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 K.B. 616, 643*; *Bank of Credit and Commerce International SA v Ali [1999] I.C.R. 1068, 1078*.

41. See above, paras 4-079, 22-004.

42. *Wilkinson v Byers (1834) 1 A. & E. 106*; *Steeds v Steeds (1889) 22 Q.B.D. 537*.

43. *Bank of Credit and Commerce International SA v Ali [1999] I.C.R. 1068, 1078*, although it should be noted that, while Lightman J. regarded the agreement between the parties as a compromise, the Court of Appeal (*[2000] I.C.R. 1410, 1431*) held that its true purpose was "not to compromise identified claims but to release BCCI from unidentified claims". In the House of Lords it was accepted that the document was a release and not a compromise (*[2001] UKHL 8, [2002] 1 A.C. 251* at [40]).

44. See Foskett, *The Law and Practice of Compromise*, 7th edn (2010).

45. See above, para.4-053.

46. See above, para.2-119.

47. See above, para.2-147.

48. See below, para.22-015.

49. *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 K.B. 616* . See also *Knowles v Roberts (1888) 38 Ch. D. 263, 272*. Alternatively, the defendant may apply by summons for an order staying the proceedings and the court has jurisdiction to stay under the Senior Courts Act 1981 s.19.

50. Senior Courts Act 1981 s.49; *Steeds v Steeds (1889) 22 Q.B.D. 537*.

51. *Lavery v Turley (1860) 6 H. & N. 239*. See also below, para.22-030.

52. e.g. a legal assignment: see above, para.19-007. See also Law of Property (Miscellaneous Provisions) Act 1989 s.2(1), above, paras 5-013—5-054.

53. See above, para.5-011; Vol.II, Ch.45.

54. *Peytoe's Case (1612) 9 Co. Rep. 77b*; *James v David (1793) 5 T.R. 141*; *Reeves v Hearne (1836) 1 M. & W. 323*; *Bayley v Homan (1837) 3 Bing. N.C. 915*; *Griffith v Owen (1844) 13 M. & W. 58*; *Gifford v Whittaker (1844) 6 Q.B. 249*; *Woods v Pickersgill (1859) 1 F. & F. 710*; *Edwards v Hancher (1875) 1 C.P.D. 111*.

55. *Gabriel v Dresser (1855) 15 C.B. 622*.

56. *Goring v Goring (1602) Yelv. 11*; *Good v Cheesman (1831) 2 B. & Ad. 328*; *Cartwright v Cooke (1832) 3 B. & Ad. 701*; *Ford v Beech (1848) 11 Q.B. 852*; *Crowther v Farrer (1850) 15 Q.B. 677*; *Henderson v Stobart (1850) 5 Exch. 99*; *Elton Crop Dyeing Co Ltd v Broadbent & Son Ltd (1919) 89 L.J.K.B. 186*; *Morris v Baron & Co [1918] A.C. 1, 35*.

57. *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 K.B. 616, 643–645*; *Jameson v Central Electricity Generating Board [1998] Q.B. 323, 335*.

58. *[1933] 2 K.B. 616, 645, 655*; *Green v Rozen [1955] 1 W.L.R. 741*.

59. Smith, *Leading Cases*, 13th edn (1929), p.385.

60. *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 K.B. 616, 652*. But see the statements of Greer L.J., 655 (counterclaim).

61. *British Russian Gazette and Trade Outlook Ltd v Associcated Newspapers Ltd [1933] 2 K.B. 616, 644*; *Morris v Baron & Co [1918] A.C. 1, 35*.

62. *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 K.B. 616, 644, 654*. See also the cases cited in n.56, above, and *Green v Rozen [1955] 1 W.L.R. 741*.

63. For the effect of such a provision, see *Smith v Shirley and Baylis (1875) 32 L.T. 234*.

64. For the compromise of disputed claims, see above, para.4-047.

65. *Richard and Bartlet's Case (1584) 1 Leon. 19*; *Pinnel's Case (1602) 5 Co. Rep. 117a*; *Cumber v Wane (1721) 1 Str. 426*; *Flitch v Sutton (1804) 5 East 230*; *Down v Hatcher (1839) 10 A. & E. 121*; *McManus v Bark (1870) L.R. 5 Ex. 65*; *Foakes v Beer (1884) 9 App. Cas. 605*; *Underwood v Underwood [1894] P. 204*; *Hookham v Mayle (1906) 22 T.L.R. 241*; *D. & C. Builders v Rees [1966] 2 Q.B. 617*; *Re Selectmove [1995] 1 W.L.R. 474*; *Ferguson v Davies [1997] 1 All E.R. 315*, although Evans L.J. at (326) expressed no view on this issue; *Collier v P & MJ Wright (Holdings) Ltd [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643* at [3]. See above, para.4-117.

66. *(1602) 5 Co. Rep. 117a*.

67. See above, para.4-124.

68. See above, para.4-014.

69. cf. *Vanbergen v St Edmund's Properties Ltd [1933] 2 K.B. 223*.

70. *Pinnel's Case (1602) 5 Co. Rep. 117a*.

71. *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553* (where the practical benefit obtained by the creditor landlord as a result of the re-scheduling of the tenant's payment obligations under the licence was that the tenant would continue to occupy the property and it would not be left standing empty for some time at further loss to the tenant). On this case see further above, para.4-119A. See also *Stevensdrake Ltd v Hunt [2016] EWHC 1111 (Ch)*.

72. See above, para.4-128.

73. See above, para.4-127.

74. See above, para.4-130.

75. See above, para.17-017.

76. See above, para.22-009.

77. Bills of Exchange Act 1882 ss.62, 89; see Vol.II, para.34-138.

78. e.g. *Hirschfield v L.B. & S.C. Ry (1876) 2 Q.B.D. 1*; *Gilbert v Endean (1878) 9 Ch. D. 259*; *Re*

Roberts [1905] 1 Ch. 704; *Dietz v Lennig Chemicals Ltd [1969] 1 A.C. 170*; cf. *Wales v Wadham [1977] 1 W.L.R. 199*. See above, Ch.7.

79. An example of a compromise being set aside on the ground of mistake is provided by the decision of the Court of Appeal in *Magee v Pennine Insurance Co Ltd [1969] 2 Q.B. 507*. However, the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407, [2003] Q.B. 679* (on which see above, para.6-058), held that *Magee* was no longer good law (see *Great Peace* at [136]–[140], [153] and [160]). A party seeking to set aside an agreement on the ground of common mistake must therefore satisfy the more stringent requirements laid down by the House of Lords in *Bell v Lever Bros Ltd [1932] A.C. 161* (on which see para.6-026, above). This is likely to be an extremely difficult hurdle to overcome (see, for example, *Champion Investments Ltd v Ahmed [2004] All E.R. (D) 28 (Aug)*). In the exceptional case in which it is overcome, a compromise may be vitiated by a mistake of law as well as a mistake of fact: *Brennan v Bolt Burden (A Firm) [2004] EWCA Civ 1017, [2005] Q.B. 303* at [17]. See above, para.6-053.

80. e.g. *D. & C. Builders v Rees [1966] 2 Q.B. 617*. See above, Ch.8.

81. *Stour Valley Builders v Stuart, The Independent, February 9, 1993 CA*; cf. *Pereira v Inspirations East Ltd (1992) C.A.T. 1048*, discussed in more detail by Foskett, *The Law and Practice of Compromise*, 7th edn (2010), paras 3–34—3–44.

82. *Day v McLea (1889) 22 Q.B.D. 610*; *Auriena Ltd v Haigh and Ringrose Ltd (1988) Const. L.J. 200*; *Stour Valley Builders v Stuart, The Independent, February 9, 1993 CA*; *Ferguson v Davies [1997] 1 All E.R. 315*; *Inland Revenue Commissioners v Fry [2001] S.T.C. 1715*; cf. *Hirachand Punamchand v Temple [1911] 2 K.B. 330*. See generally S. Currie (2011) 27 J.C.L. 119.

83. *Stour Valley Builders v Stuart, The Independent, February 9, 1993 CA*; *Bracken v Billinghurst [2003] EWHC 1333 (TCC), [2003] All E.R. (D) 488 (Jul)*.

84. *Day v McLea (1889) 22 Q.B.D. 610*; *Stour Valley Builders v Stuart, The Independent, February 9, 1993 CA*; *Inland Revenue Commissioners v Fry [2001] S.T.C. 1715*; *Joinery Plus Ltd (In Administration) v Laing Ltd [2003] EWHC 3513 (TCC), (2003) 87 Con. L.R. 87* at [91]–[96].

85. *Bunge SA v Kruse [1977] 1 Lloyd's Rep. 492*; *Kitchen Design and Advice Ltd v Lea Valley Water Co [1989] 2 Lloyd's Rep. 221*; *Ferguson v Davies [1997] 1 All E.R. 315*.

86. *Flockton v Hall (1849) 14 Q.B. 380, 386*. Although the CPR do not expressly require the defence to be specifically pleaded, it is advisable to continue to plead it specifically. The rules relating to the contents of the defence are set out in CPR Pt 16 r.16.5.

87. See below, para.25-007.

88. *Wentworth v Bullen (1829) 9 B. & C. 840, 850*; *Lievesley v Gilmore (1866) L.R. 1 C.P. 570*.

89. *Practice Note [1927] W.N. 290*. See Chitty and Jacob's Queen's Bench Forms, 21st edn (1986, now with 8th Cumulative Supplement), paras 1339, 1350 and CPR Pt 40 r.6; cf. *McCallum v Country Residences Ltd [1965] 1 W.L.R. 657* (no consent).

90. *Cristel v Cristel [1951] 2 K.B. 725*.

91. *Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co A/B [1985] 2 All E.R. 669*.

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Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 22 - Discharge by Agreement

Section 4. - Rescission

Rescission by agreement

22-025

Where a contract is executory on both sides, that is to say, where neither party has performed the whole of its obligations under it, it may be rescinded by mutual agreement, express or implied. [92] A partially executed contract can be rescinded by agreement provided that there are obligations on both sides which remain unperformed. Similarly, a contract which has been fully performed by one party can be rescinded provided that the other party returns the performance which it has received and in turn is released from its own obligation to perform under the contract. The consideration for the discharge in each case is found in the abandonment by each party of its right to performance or its right to damages, as the case may be. [93] A rescission of this nature must be distinguished from a repudiation by one party, which the other party may elect to treat as a discharge of the obligation, [94] and from the right to rescind which is given to one party in cases of fraud, misrepresentation, duress and undue influence. [95] It must also be distinguished from a contractual right to rescind the contract under which the party exercising the right to rescind is entitled to forfeit and keep any deposit and accrued interest, resell the property and any chattels included in the contract and claim damages. [96]
It depends upon the consent of both parties, to be gathered from their words or conduct and not upon the intimation by one of them that it does not intend to be bound by the agreement. [97]

Effect of rescission

22-026

A contract which is rescinded by agreement is completely discharged and cannot be revived. [98] The parties will frequently make express provision for the restoration of money paid or for payment for services performed or goods supplied under the contract prior to rescission. In the absence of such provision (express or implied) it may be possible to bring a restitutionary claim provided that the contract has been set aside. [99] Money paid may be recoverable where the consideration for the payment has wholly failed. [100] It is more doubtful whether a claim can be brought in the case where goods have been supplied or services provided prior to the rescission of the contract because, in the case where performance has not been completed, the party in receipt of the performance may be able to contend that it was not enriched by receipt of partial performance. [101]

Abandonment

22-027

It is open to the court to infer that the parties have mutually agreed to abandon their contract where the contract has been followed by a long period of delay or inactivity on both sides. [102] The party seeking to establish abandonment of a contract must show that the other party so conducted himself as to entitle him to assume, and that he did assume, that the contract was agreed to be abandoned

sub silentio. [103] The issue to be decided is whether, "on an objective assessment of all the circumstances, including what was said or not said, written or not written, done or not done, an offer exists by one party to abandon the contract, which is accepted by the offeree, and which acceptance is communicated to the offeror". [104] Only in exceptional circumstances will silence and inactivity be sufficient to found a contract of abandonment. [105]

Substituted contract

22-028

A rescission of the contract will also be implied where the parties have effected such an alteration of its terms as to substitute a new contract in its place. [106] The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. [107] If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. [108] The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. [109] Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it. [110] The change must be fundamental [111] and:

> "… the question is whether the common intention of the parties was to 'abrogate', 'rescind,' 'supersede' or 'extinguish' the old contract by a 'substitution' of a 'completely new' or 'self-subsisting' agreement." [112]

It is not necessary to create a scintilla temporis between the old and the new agreement for there to be a rescission and replacement; it can be achieved concurrently in the same document. [113]

Morris v Baron & Co

22-029

In *Morris v Baron & Co* [114] a written contract was entered into for the sale of some cloth. A dispute arose and legal proceedings were begun. The parties orally agreed that the action and counterclaim should be withdrawn, that an extension should be given to the buyer for payment of a sum owed by him under the contract and that he should have an option to purchase the goods remaining due to him instead of being bound to take delivery. The House of Lords held that the original contract of sale was discharged by the substituted agreement. Lord Dunedin commented:

> "The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed." [115]

In order to extinguish the original contract, it is not necessary that the substituted agreement should have been performed; an executory contract is sufficient. [116] Nor is it necessary that it should amount to an enforceable agreement. [117]

Form of rescission

22-030

The old rule of the common law was that a contract under seal could only be rescinded by a contract under seal, [118] but in equity a rescission not under seal provided a good defence to an action on the deed. Since the Judicature Act 1873, the equitable rule prevails, so that now a deed can be rescinded by a written or oral agreement. [119] Even if the original contract is one which is required by law to be made in writing, as in the case of a contract for the sale or other disposition of an interest in land, [120] or to be evidenced by writing as in the case of those contracts within the Statute of Frauds 1677, [121] an oral agreement is sufficient to effect its discharge. [122] Nevertheless, the new agreement may itself be unenforceable unless so evidenced. Thus in *Morris v Baron & Co* [123] the original contract for the sale of cloth was one which was then required by s.4 of the Sale of Goods Act 1893 [124] to be evidenced in writing. The subsequent oral agreement was sufficient to discharge the original contract, but was itself unenforceable for want of writing. In the result, no action could be maintained on the original contract since this had been extinguished, nor on the subsequent agreement since this was unenforceable. [125]

Novation

22-031

Novation is a generic term which signifies:

> "… that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract." [126]

In particular, however, it denotes the rescission of one contract and the substitution of another in which the same acts are to be performed by different parties. [127] A novation cannot be forced on a new party without his agreement. So, for example, if there is a contract for the sale and purchase of a ship under which it is agreed that the actual purchaser of the ship will be a company to be nominated by and substituted for the buyer by novation, such substitution must be accepted by the company, either by authorising the nomination or by ratifying it after it has been made. [128]

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92. *Davis v Street (1823) 1 C. & P. 18*; *Foster v Dawber (1851) 6 Exch. 839, 851*; *Morris v Baron & Co [1918] A.C. 1*; *Rose & Frank Co v J.R. Crompton & Bros Ltd [1925] A.C. 445*.

93. *Scarf v Jardine (1882) 7 App. Cas. 345, 351*; *Raggow v Scougall & Co (1915) 31 T.L.R. 564*.

94. See below, para.24-049.

95. See above, Chs 7 and 8.

96. *Hardy v Griffiths [2014] EWHC 3947 (Ch), [2015] 2 W.L.R. 1239* at [115].

97. *Ogilvy and Mather Ltd v Silverado Blue Ltd [2007] EWHC 1285 (QB), [2007] All E.R. (D) 383 (May)* at [21]; *Intense Investments Ltd v Development Ventures Ltd [2006] EWHC 1628 (TCC), [2006] All E.R. (D) 346 (Jun)* at [117].

98. *R. v Inhabitants of Gresham (1786) 1 Term Rep. 101*. It is, of course, open to the parties to enter into a fresh agreement.

99. *West v Downes (1778) 1 Doug. K.B. 23*; *Gompertz v Denton (1832) 1 C. & M. 207*.

100. *Towers v Barratt (1786) 1 Term Rep. 133*; *Davis v Street (1823) 1 C. & P. 18*. See below, para.29-057.

101. *Lamburn v Cruden (1841) 2 Man. & G 253*.

102. *André & Cie SA v Marine Transocean Ltd (The Splendid Sun) [1981] Q.B. 64*; *Tracomin SA v Anton C. Nielsen A/S [1984] 2 Lloyd's Rep. 195*; *Excomm Ltd v Guan Guan Shipping (Pte) Ltd [1987] 1 Lloyd's Rep. 330* (above, paras 2-068, 2-074—2-075). See also *Tyers v Rosedale and Ferryhill Iron Co (1875) L.R. 10 Ex. 195*.

103. *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 A.C. 854, 924*; *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA (The Leonidas D.) [1985] 1 W.L.R. 925* (interpreting *Pearle Mill Co v Ivy Tannery Co Ltd [1919] 1 K.B. 78*); *Collin v Duke of Westminster [1985] Q.B. 581*; *MSC Mediterranean Shipping Co SA v B.R.E. Metro-Ltd [1985] 2 Lloyd's Rep. 239*; *Cie. Française d'Importation et Distribution v Deutsche Continental Handelsgesellschaft [1985] 2 Lloyd's Rep. 592*; *Gebr. van Weelde Scheepvaart Kantor BV v Compania Naviera Sea Orient SA [1987] 2 Lloyd's Rep. 223*; *Food Corp of India v Antclizo Shipping Corp [1988] 1 W.L.R. 603*; *Tankrederei Ahrenkeil GmbH v Frahuil SA [1988] 2 Lloyd's Rep. 486*; *Thai-Europe Tapioca Service Ltd v Seine Navigation Co Inc [1989] 2 Lloyd's Rep. 506*; *Idealview v Bello [2010] EWCA Civ 721* at [19]–[21].

104. *Blindley Heath Investments Ltd v Bass [2014] EWHC 1366 (Ch), [2014] All E.R. (D) 82 (Jun)* at [124].

105. *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA (The Leonidas D) [1985] 1 W.L.R. 925*; *Blindley Heath Investments Ltd v Bass [2014] EWHC 1366 (Ch), [2014] All E.R. (D) 82 (Jun)* at [124].

106. *Thornhill v Neats (1860) 8 C.B.(N.S.) 831*; *Hunt v S.E. Ry (1875) 45 L.J.Q.B. 87*; *Williams Bros v Agius Ltd [1914] A.C. 510, 527*; *Raggow v Scougall & Co (1915) 31 T.L.R. 564*; *Morris v Baron & Co [1918] A.C. 1*; *British & Beningtons Ltd v N.W. Cachar Tea Co Ltd [1923] A.C. 48, 69*; *Rose & Frank Co v J.R. Crompton & Bros Ltd [1925] A.C. 445*.

107. *British & Beningtons Ltd v N.W. Cachar Tea Co Ltd [1923] A.C. 48*; *Royal Exchange Assurance v Hope [1928] Ch. 179*; and see the cases cited in para.22-033 n.133, below.

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

109. *United Dominions Trust (Jamaica) Ltd v Shoucair [1969] 1 A.C. 340*; *Compagnie Noga D'Importation et D'Exportation SA v Abacha [2003] EWCA Civ 1100, [2003] 2 All E.R. (Comm) 915*; *Sookraj v Samaroo [2004] UKPC 50*; *Samuel v Wadlow [2007] EWCA Civ 155, [2007] All E.R. (D) 370 (Feb)*.

110. *British & Beningtons Ltd v N.W. Cachar Tea Co Ltd [1923] A.C. 48, 62*.

111. *[1923] A.C. 48*.

112. *[1923] A.C. 48, 67*.

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

114. *[1918] A.C. 1*.

115. *[1918] A.C. 1, 25–26*.

116. *Taylor v Hilary (1835) 1 Cr. M. & R. 741*.

117. *Morris v Baron & Co [1918] A.C. 1*; *Rose & Frank Co v J.R. Crompton & Bros Ltd [1925] A.C.*

445; cf. *Firth v Midland Ry (1875) L.R. 20 Eq. 100*. See below, para.22-030.

118. *Kaye v Waghorn (1809) 1 Taunt. 428*; *West v Blakeway (1841) 2 M. & G. 729*.

119. *Berry v Berry [1929] 2 K.B. 316*; Senior Courts Act 1981 s.49.

120. Law of Property (Miscellaneous Provisions) Act 1989 s.2(1). See above, para.5-013.

121. ss.4 and 17, as amended by the Law Reform (Enforcement of Contracts) Act 1954. See above, para.5-010.

122. Law of Property (Miscellaneous Provisions) Act 1989 s.2(1) requires that a contract falling within its scope be "*made* in writing" but does not regulate the discharge or unmaking of such a contract.

123. *[1918] A.C. 1*.

124. Re-enacting s.17 of the Statute of Frauds 1677; repealed by the Law Reform (Enforcement of Contracts) Act 1954. See above, para.5-010.

125. See also *Williams v Moss Empires [1915] 3 K.B. 242*; *United Dominions Trust (Jamaica) Ltd v Shoucair [1969] 1 A.C. 340*.

126. *Scarf v Jardine (1882) 7 App. Cas. 345, 351*; *The Tychy (No.2) [2001] 1 Lloyd's Rep. 10, 24*.

127. *Miller's Case (1877) 3 Ch. D. 391*; *Scarf v Jardine (1882) 7 App. Cas. 345*; *Re Head [1894] 2 Ch. 236*; *Re United Railways of Havana and Regla Warehouses Ltd [1960] Ch. 52, 84*; *Chatsworth Investments Ltd v Cussins (Contractors) Ltd [1969] 1 W.L.R. 1*; cf. *Liversidge v Broadbent (1859) 4 H. & N. 603*; *Conquest's Case (1875) 1 Ch. D. 334*. See above, paras 19-087—19-090.

128. *Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 W.L.R. 435*; cf. *Aktion Maritime Corp of Liberia v S. Kasmas & Bros Ltd [1987] 1 Lloyd's Rep. 283, 311*.

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Part 7 - Performance and Discharge

Chapter 22 - Discharge by Agreement

Section 5. - Variation [129]

Variation

22-032

The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement. [130] In *Berry v Berry* [131] a husband and wife entered into a separation deed whereby the husband covenanted to pay to the wife a certain sum each year for her support. His earnings proved insufficient to meet this obligation, so they agreed in writing to vary the financial provisions. It was held that this variation was valid and enforceable, and that it could be set up by the husband as a defence to an action against him on the original deed. A mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of a contract. [132]

Form of variation

22-033

As in the case of a rescission of a contract, the terms of a deed or written instrument may be varied by a subsequent agreement, whether oral or written. [133] This may be reconciled with the rule that extrinsic evidence is not admissible to vary or qualify the terms of a written instrument, for that rule only relates to the ascertainment of the original intention of the parties, and not to a subsequent variation. [134] A contract required by law to be made in or evidenced by writing can only be varied by writing, [135] although, as we have seen, it can be rescinded by parol. [136] In *Goss v Lord Nugent* [137] the plaintiff agreed in writing to sell to the defendant certain plots of land. In an action by the plaintiff against the defendant for the purchase-money, the defendant pleaded that the title to one of the plots was defective. To this plea the plaintiff replied that the defendant had orally agreed to waive the defect and to accept the existing title. The court held that, since the contract was one which was required by law to be evidenced by writing, [138] the oral variation was not admissible and the defendant was entitled to succeed on the ground that a good title had not been made.

Variation or rescission?

22-034

❗ Where the formal requirements apply to a variation but not to a rescission it is obviously important to determine whether there has been a mere variation of terms or a rescission, and this question may not be an easy one to answer. [139] The effect of a subsequent agreement—whether it constitutes a variation or a rescission—will depend in large part upon the extent to which it alters the terms of the original contract. The test suggested by Lord Dunedin in *Morris v Baron & Co* [140] has already been referred to, [141] and in the same case Lord Haldane [142] said that, for a rescission:

> "… there should have been made manifest the intention in any event of a complete

> extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting."

If the changes do not go "to the very root of the contract" [143] it is more likely to be a variation. However, at the end of the day, the question whether there has been a rescission or a variation depends upon the intention of the parties as evidenced by the terms of the subsequent agreement and its surrounding circumstances. [144] Thus, if it was their intention to replace the initial contract, the subsequent agreement may amount to a rescission even in the case where the subsequent agreement is not fundamentally inconsistent with the initial agreement. [145]

Consideration

22-035

The agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other. [146] For example, an alteration of the money of account in a contract proposed or made by one party and accepted by the other is binding on both parties, since either may benefit from the variation. [147] Alternatively, consideration may be found in the assumption of additional obligations or the incurring of liability to an increased detriment. [148] The position is more difficult in the case of an agreement whereby one party undertakes an additional obligation, but the other party is merely bound to perform his existing obligations, or an agreement whereby one party undertakes an additional obligation, but for the benefit of that party alone. There is a line of authority of respectable antiquity which supports the view that in such a case the agreement will not be effective to vary the contract because no consideration is present. [149] But a more liberal approach has been adopted in more recent cases and the courts have been prepared to find consideration and enforce the agreement where it has conferred a practical benefit upon the promisor. [150] A mere forbearance or concession afforded by one party to the other for the latter's convenience and at his request does not constitute a variation, although it may be effective as a waiver or in equity. [151] Such a forbearance or concession need not be supported by consideration, and can be made orally even when the contract is one which is required to be made or evidenced in writing. [152]

Variation and collateral agreement

22-036

A variation of an existing agreement should be distinguished from a collateral agreement (or collateral warranty) [153] concluded before the main agreement is entered into under which one party agrees not to enforce a term of the main agreement [154] or assumes obligations in addition to or at variance with those contained in the main agreement. [155] Such an agreement may not require to be evidenced by writing even though the main agreement requires to be made or evidenced in writing. [156] There seems to be no reason why such a collateral agreement should not be held to exist even if entered into after the conclusion of the main agreement, provided that there is present (and not merely past) consideration. [157]

Variation and elucidation

22-037

A variation should also be distinguished from the elucidation of a contract by the filling in of details which were agreed before the written contract was signed [158] or by the correction of mistakes which occurred when the contract was reduced to writing. [159]

Effect of extra works

22-038

Where, in a contract for the execution of specified works, it is provided that they shall be completed by a certain day, and that liquidated damages shall be payable by the contractor for non-completion to time, the general rule is that the employer will be unable to recover such liquidated damages if he orders extra work to be done which necessarily delays completion of the works. [160] However, the wording of the contract may be such that the original contract period continues to apply to the completion of the works even though additional work is ordered. [161] Alternatively, the contract may provide that the agreed date for completion shall be extended in the event that delay is caused by the additional work, in which case liquidated damages will be payable from that extended date if the works are not then completed.

Unilateral power of variation

22-039

At common law a contract may validly give to one contracting party the power unilaterally to vary the obligations of the parties to the contract. So, for example, in the case of a contract for the sale of goods, it is "a perfectly good contract to say that the price is to be settled by the buyer". [162] However, the power of one party unilaterally to vary the obligations of the parties may not be unlimited. The courts may imply into the contract a term the effect of which is to curtail that power. [163] In *Nash and Staunton v Paragon Finance Plc* [164] it was held that a lender's entitlement to vary interest rates was not completely unfettered. The court implied a term into the agreement to the effect that the rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily, or in a way in which no reasonable mortgagee, acting reasonably, would do. [165] The legislature has also intervened to control clauses such as those which purport to entitle a lender unilaterally and in its absolute discretion to vary the rate of interest subject to notice to the debtor. Where such a provision is contained in a contract concluded between a trader and a consumer, it may not be binding on the consumer. [166] Thus a contract term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract, [167] or which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the subject matter of the contract after the consumer has become bound by it, [168] or which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price was agreed when the consumer became bound, [169] or which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded, [170] may constitute an unfair term which will not be binding upon the consumer.

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129. See generally Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd edn (2012), Ch.2.

130. *Robinson v Page (1826) 3 Russ. 114*; *Goss v Lord Nugent (1833) 5 B. & Ad. 58, 65*; *Stead v Dawber (1839) 10 A. & E. 57, 65*; *Dodd v Churton [1897] 1 Q.B. 562*; *Fenner v Blake [1900] 1 Q.B. 426*; *Royal Exchange Assurance v Hope [1928] Ch. 179*. See Dugdale and Yates (1976) 39 M.L.R. 680.

131. *[1929] 2 K.B. 316*.

132. *Cowey v Liberian Operations Ltd [1966] 2 Lloyd's Rep. 45*; *T. Comedy (UK) Ltd v Easy Managed Transport Ltd [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep. 397* at [29].

133. *Berry v Berry [1929] 2 K.B. 316*. Statute may, of course, intervene to prescribe a particular form

of variation (see, for example, s.82 of the Consumer Credit Act 1974 concerning an agreement to vary or supplement a consumer credit or consumer hire agreement: below, Vol.II, para.39-145).

134. *Goss v Lord Nugent (1833) 5 B. & Ad. 58, 64*; see above, paras 13-098 et seq.

135. *Robinson v Page (1826) 3 Russ. 114*; *Stead v Dawber (1839) 10 A. & E. 57*; *Marshall v Lynn (1840) 6 M. & W. 109*; *Noble v Ward (1867) L.R. 2 Ex. 135*; *Sanderson v Graves (1875) L.R. 10 Ex. 234*; *Plevins v Downing (1876) 1 C.P.D. 220*; *British and Benington Ltd v N.W. Cachar Tea Co Ltd [1923] A.C. 48*; *United Dominions Trust (Jamaica) Ltd v Shoucair [1969] 1 A.C. 340*; *Richards v Creighton-Griffiths (Investments) Ltd (1972) 225 E.G. 2104*; *New Hart Builders Ltd v Brindley [1975] Ch. 342*; *McCausland v Duncan Lawrie Ltd [1997] 1 W.L.R. 38*.

136. See above, para.22-030.

137. *(1833) 5 B. & Ad. 58*.

138. Statute of Frauds 1677 s.4, re-enacted as s.40(1) of the Law of Property Act 1925, but subsequently repealed by s.2(8) of the Law of Property (Miscellaneous Provisions) Act 1989.

139. However, the distinction is no longer one of great significance in commercial practice. Thus in one modern case it was stated to be "sterile", "artificial" and one "of legal theory which might have little commercial meaning for the parties": *Samuel v Wadlow [2007] EWCA Civ 155, [2007] All E.R. (D) 370 (Feb)* at [39], [40] and [45]. For another case in which the distinction was considered but ultimately not held to be of any significance to the resolution of the case, see *Shell UK Ltd v Revenue & Customs Commissioners [2007] S.T.I. 2122, [2008] S.T.C. (S.C.D.) 91*. See further on the relevance of the distinction, Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd edn (2012), paras 2.27–2.40.

140. *[1918] A.C. 1, 5*.

141. See above, para.22-029.

142. *[1918] A.C. 1, 19*.

143. *British and Benington Ltd v N.W. Cachar Tea Co Ltd [1923] A.C. 48, 62, 68*.

144. *United Dominions Trust (Jamaica) Ltd v Shoucair [1969] 1 A.C. 340*; *Viscous Global Investment Ltd v Palladium Navigation Corporation [2014] EWHC 2654 (Comm), [2014] 2 Lloyd's Rep. 600*; *Plevin v Paragon Personal Finance Ltd (No.2) [2017] UKSC 23, [2017] 1 W.L.R. 1249* at [13].

145. *Viscous Global Investment Ltd v Palladium Navigation Corporation [2014] EWHC 2654 (Comm), [2014] 2 Lloyd's Rep. 600*.

146. *Re William Porter & Co Ltd [1937] 2 All E.R. 361*.

147. *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co [1972] A.C. 741, 757*; *W.J. Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 Q.B. 189*.

148. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd [1979] Q.B. 705*.

149. *Stilk v Myrick (1809) 2 Camp. 317*; *Vanbergen v St Edmund's Properties Ltd [1933] 2 K.B. 233*; *Syros Shipping Co SA v Elaghill Trading Co [1980] 2 Lloyd's Rep. 390*; see above, paras 4-067—4-072. See also above, paras 4-117, 22-016—22-018 (payment of part of debt).

150. *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 Q.B. 1*; *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No.2) [1990] 2 Lloyd's Rep. 526*; *Simon Container Machinery Ltd v Emba Machinery AB [1998] 2 Lloyd's Rep. 429, 434–435*.

151. See above, para.4-086; below, para.22-040.

152. See below, para.22-041.

153. See above, paras 13-004, 13-106.

154. *City and Westminster Properties (1934) Ltd v Mudd [1959] Ch. 129*.

155. *Erskine v Adeane (1873) 8 Ch. App. 756*; *De Lassalle v Guildford [1901] 2 K.B. 215*; *Brikom Investments Ltd v Carr [1979] Q.B. 467*; *Record v Bell [1991] 1 W.L.R. 853*; see above, paras 4-080, 13-106.

156. *Record v Bell [1991] 1 W.L.R. 853*.

157. See above, para.4-080.

158. *Hudson v Revett (1829) 5 Bing. 368*; *Rudd v Bowles [1912] 2 Ch. 60*.

159. *Bluck v Gompertz (1852) 7 Exch. 362*; see above, para.3-057.

160. *Holme v Guppy (1838) 3 M. & W. 387*; *Russell v Sada Bandeira (1862) 13 C.B.(N.S.) 149*; *Dodd v Churton [1897] 1 Q.B. 562*; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601, 607*; *Astilleros Canarios SA v Cape Hatteras Shipping Co Inc [1982] 1 Lloyd's Rep. 518*. See generally Keating on Construction Contracts, 9th edn (2015), para.10–015; M. Sergeant and M. Wieliczko, *Construction Contract Variations* (2014) para.12.57 and also *Perini Pacific Ltd v Greater Vancouver Sewerage and Drainage District (1966) 57 D.L.R. (2d) 307*.

161. *Macintosh v Midland Counties Ry (1845) 14 M. & W. 548*; *Legge v Horlock (1848) 12 Q.B. 1015* ; *Jones v St John's College, Oxford (1870) L.R. 6 Q.B. 115*; *Tew v Newbold-on-Avon United District School Board (1884) 1 Cab. & E. 260*.

162. *May and Butcher v R. [1934] 2 K.B. 17, 21*.

163. See, for example, *British Telecommunications Plc v Telefónica O2 UK Ltd [2014] UKSC 42, [2014] 4 All E.R. 907* at [37]; *West LB AG v Nomura Bank International Plc [2010] EWHC 2863 (Comm), [2010] All E.R. (D) 136 (Nov)*; *Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 538* at [60]–[69]; *Esso Petroleum v Addison [2003] EWHC 1730 (Comm)*; *Mallone v BPB Industries Plc [2002] EWCA Civ 126, [2002] I.C.R. 1045* and *Nash and Staunton v Paragon Finance Plc [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685*.

164. *[2001] EWCA Civ 1466, [2002] 1 W.L.R. 685*. The Court of Appeal declined to follow dicta of Staughton L.J. in *Lombard Tricity Finance Ltd v Paton [1989] 1 All E.R. 918, 923*.

165. On the facts of the case it was held that the borrowers had no real prospect of successfully establishing a breach of the implied term. The reason for the increase in interest rates was that the creditors were in financial difficulties and so had to increase their interest rates in order to protect their own financial position. It could not be said that they had acted dishonestly, capriciously, arbitrarily or wholly unreasonably in acting as they did. See also *Paragon Finance Plc v Pender [2005] EWCA Civ 760, [2005] 1 W.L.R. 3412*.

166. Consumer Rights Act 2015 Pt 2 and, in particular, see s.62(1). See further below, Vol.II, Ch.38, where the scope of the Pt 2 of the Act and the definition of terms such as "trader" and "consumer", etc. is discussed in more detail. These provisions replace the equivalent paragraphs in the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), which will continue to apply to contracts made before October 1, 2015: see below, Vol.II, para.38-192.

167. See Sch.2 Pt 1 of the Consumer Rights Act 2015 para.11, although note the restricted

applicability of this provision to the supply of financial services, contracts which last indefinitely and contracts for the sale of securities and foreign currency (paras 22-24).

168. See Sch.2 Pt 1 of the Consumer Rights Act 2015 para.12 and see also para.13 which contains a similar provision in relation to a term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

169. See Sch.2 Pt 1 of the Consumer Rights Act 2015 para.14, although note the restricted applicability of this provision to contracts which last indefinitely, contracts for the sale of securities and foreign currency and price index clauses "where otherwise lawful" and "the method by which prices vary is explicitly described" (paras 23-25).

170. See Sch.2 Part 1 of the Consumer Rights Act 2015, para.15, although note the restricted applicability of this provision to contracts which last indefinitely, contracts for the sale of securities and foreign currency and price index clauses "where otherwise lawful" and "the method by which prices vary is explicitly described" (paras 23-25).

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 22 - Discharge by Agreement

Section 6. - Waiver [171]

Waiver or forbearance

22-040

Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has *waived* his right to require that the contract be performed in this respect according to its original tenor. [172] Waiver (in the sense of "waiver by estoppel" rather than "waiver by election" [173]) may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation. [174]

Form of waiver

22-041

A waiver may be oral or written or inferred from conduct [175] even though the provision waived is found in a contract required to be made in or evidenced by writing. It has been noted that any variation of a contract required to be made in or evidenced by writing must itself be made in or evidenced by writing. [176] If it is merely oral, it is of no effect. An oral forbearance or concession made by one party to the other does not require to be so evidenced, even if made at the latter's request. [177] Thus, what is ineffective as a variation may possibly have effect as a waiver. The formal requirements, in relation to such a contract, of rescission, variation and waiver were thus described by Goddard J. in *Besseler Waechter Glover & Co v South Derwent Coal Co* [178]:

> "If the parties agree to rescind their original contract and to substitute for it a new one, the latter must be evidenced by writing; so, too, if as a matter of contract the parties agree that the terms of the original agreement shall be varied, the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected, and the obligation to deliver and accept the full contract quantity still continues … It does not appear to me to matter whether the request comes from one side or the other, or whether it is a matter which is convenient to one party or to both. What is of importance is whether it is a mere forbearance or a matter of contract."

The distinction between variation and waiver is, however, a difficult one to apply in practice, [179] particularly since a waiver may be consensual and be just as far reaching in its effect as a variation of the agreement. Fortunately, in respect of formal requirements, [180] it has become much less important since the almost total repeal of the Statute of Frauds by the Law Reform (Enforcement of Contracts) Act 1954. [181]

Effect on party forbearing

22-042

The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered. [182] However, in cases of postponement of performance, if the period of postponement is specified in the waiver, then, if time was originally of the essence, it will remain so in respect of the new date. [183] If the period of postponement is not specified in the waiver, the party forbearing is entitled, upon reasonable notice, to impose a new time-limit, which may then become of the essence of the contract. [184] Similarly, in other cases of forbearance, he may be entitled, upon reasonable notice, to require the other party to comply with the original mode of performance, [185] unless in the meantime circumstances have so changed as to render it impossible [186] or inequitable [187] so to do. He cannot treat the waiver as entirely without effect. If a seller of goods withholds delivery of the goods at the purchaser's request (i.e. if the seller waives the obligation of the purchaser to accept the goods within a certain time), he will still be under a duty to deliver within a reasonable time if so requested by the purchaser. [188]

Effect on party to whom forbearance is extended

22-043

Where one party has induced the other party to accede to his request, the party seeking the forbearance will not be permitted to repudiate the waiver and to rely on the letter of the agreement. [189] Thus in *Levey & Co v Goldberg* [190] the defendant agreed in writing to buy from the plaintiffs certain pieces of cloth over the value of £10 [191] to be delivered within a certain period. At the oral request of the defendant, the plaintiffs voluntarily withheld delivery during that period. The defendant subsequently refused to accept delivery, and, when sued, contended that the plaintiffs themselves were in breach, as the oral agreement was insufficient to vary the terms of a contract which was required by law to be evidenced by writing. It was held that the forbearance by the plaintiffs at the request of the defendant did not constitute a variation but a waiver, and the plaintiffs were entitled to maintain their action.

Consideration for waiver

22-044

A waiver is also distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the party to whom it is given. [192] It may therefore be more satisfactory to regard this form of waiver, that is "waiver by estoppel", as analogous to, or even identical with, equitable forbearance or "promissory" estoppel. [193] Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it. [194]

Contracting out of waiver

22-045

It is not uncommon for contracting parties to seek by a term of their contract to exclude or restrict the operation of the doctrine of waiver. Thus a contract term may provide that in no event shall any delay, neglect or forbearance in enforcing any term of the contract be or be deemed a waiver of that term. Another frequently encountered term is one which provides that the contract can only be altered if the parties go through a prescribed formality (such as a written amendment, signed by both parties). Contracting parties are free to stipulate that a particular act, such as payment of a rental instalment

under an equipment lease, should not be taken to waive a right to terminate for an earlier breach. [195] But the effect of such a term is not necessarily to deprive a waiver of effect. Nor does a contract term which requires that any amendment be made in writing and signed by both parties necessarily have the effect of depriving an oral variation of the contract of validity. Such terms do not deprive the parties of their freedom to vary, waive or otherwise depart from the terms of their original contract. [196] Freedom of contract, or party autonomy, does not only apply at the time of entry into the contract: it also applies to the variation and the unmaking or discharge of the contract. [197] The effect of a term which purports to restrict the ability of the parties to amend their contract or to deprive an apparent waiver of effect may be to cause the court to question whether the parties have in fact agreed to amend their contract or waive their rights when they have not gone through the prescribed formality, [198] but it does not formally alter the burden of proof, nor is it the case that the courts will require "strong evidence" before giving effect to an amendment or a variation which does not comply with the agreed formality. [199] If the court is satisfied on the balance of probabilities that the contracting parties have agreed an oral variation of their contract or that one party has orally agreed to waive its rights under the contract, then the court should give effect to the variation or the waiver notwithstanding the existence of a term in the original contract which purports to deprive the amendment or waiver of validity. [200]

Waiver of condition for benefit of one party

22-046

Where the terms of a contract include a provision which has been inserted solely for the benefit of one party, he may, without the assent of the other party, waive compliance with that provision and enforce the contract as if the provision had been omitted. [201] He will not be permitted to do so where the provision has been inserted for the benefit of both parties [202] or where there is in reality no concluded agreement. [203]

Waiver of breach

22-047

One party may waive his right to terminate a contract consequent upon a repudiation of the contract by the other party. [204] It is, however, important to distinguish between the case in which a party waives his right to treat the contract as repudiated but does not abandon his right to claim damages for the loss suffered as a result of the breach [205] and the case where the innocent party waives not only his right to terminate performance of the contract but also his claim for damages for the breach. [206] The former is an example of waiver by election, [207] whereas the latter is more properly classified as a species of waiver by estoppel. [208]

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171. See generally Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd edn (2012), Chs 3–5.

172. See above, para.4-082.

173. The distinction between these two types of waiver is discussed, below para.24-007. See also *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India [1990] 1 Lloyd's Rep. 391, 397–399*.

174. See above, paras 4-082, 4-086.

175. *Bruner v Moore [1904] 1 Ch. 305*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109*.

176. See above, para.22-033.

177. *Msas Global Logistics v Power Packaging Inc [2003] EWHC 1393 (Ch), [2003] All E.R. (D) 211 (Jun)*.

178. *[1938] 1 K.B. 408, 416, 417*; *Msas Global Logistics v Power Packaging Inc [2003] EWHC 1393 (Ch), [2003] All E.R. (D) 211 (Jun)*.

179. See *Besseler Waechter Glover & Co v South Derwent Coal Co [1938] 1 K.B. 408*; *Watson v Healy Lands [1965] N.Z.L.R. 511*; Dugdale and Yates (1976) 39 M.L.R. 680.

180. See Ch.5.

181. See above, para.5-010.

182. *Leather Cloth Co v Hieronimus (1875) L.R. 10 Q.B. 140*; *Bruner v Moore [1904] 1 Ch. 305*; *Panoutsos v Raymond Hadley Corp of New York [1917] 2 K.B. 473*; *Hartley v Hymans [1920] 2 K.B. 475*; *Besseler Waechter Glover & Co v South Derwent Coal Co [1938] 1 K.B. 408*; *Tankexpress A/S v Compagnie Financiére Belge des Petroles SA [1949] A.C. 76*; *Plasticmoda Societa per Azioni v Davidsons (Manchester) Ltd [1952] 1 Lloyd's Rep. 527*; *Enrico Furst & Co v W.E. Fischer [1960] 2 Lloyd's Rep. 340*; *W.J. Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 Q.B. 189, 213*; *Leofelis SA v Lonsdale Sports Ltd [2008] EWCA Civ 640, [2008] All E.R. (D) 87 (Jul)* at [60].

183. *Luck v White (1973) 26 P. & C.R. 89*; *Buckland v Farmar & Moody [1979] 1 W.L.R. 221*; *Nichimen Corp v Gatoil Overseas Inc [1987] 2 Lloyd's Rep. 46*.

184. *Hartley v Hymans [1920] 2 K.B. 475*; *Charles Rickards Ltd v Oppenhaim [1950] 1 K.B. 616*; *Jacobson van der Berg & Co (UK) Ltd v Biba Ltd (1977) 121 S.J. 333*; *State Trading Corp of India Ltd v Compagnie Française d'Importation et de Distribution [1983] 2 Lloyd's Rep. 679*. See also *Ficom SA v Sociedad Cadex Ltda [1980] 2 Lloyd's Rep. 118, 131*.

185. *Panoutsos v Raymond Hadley Corp of New York [1917] 2 K.B. 473*.

186. *Leather Cloth Co v Hieronimus (1875) L.R. 10 Q.B. 140*.

187. *Toepfer v Warinco A.G. [1978] 2 Lloyd's Rep. 569, 576*. See also above, para.4-084.

188. *Tyers v Rosedale Ferryhill Iron Co (1875) L.R. 10 Ex. 195*.

189. *Ogle v Earl Vane (1868) L.R. 3 Q.B. 272*; *Hickman v Haynes (1875) L.R. 10 C.P. 598*.

190. *[1922] 1 K.B. 688*.

191. Statute of Frauds 1677 s.17 (re-enacted as s.4 of the Sale of Goods Act 1893) required such a contract to be evidenced by writing. Both provisions have now been repealed by the Law Reform (Enforcement of Contracts) Act 1954.

192. *W.J. Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 Q.B. 189, 193*. See also above, para.4-082.

193. See above, para.4-086.

194. *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] A.C. 741, 755, 758, 761, 762, 767–768, 781*; *W.J. Alan & Co Ltd v El Nasr Export & Import Ltd [1972] 2 Q.B. 189, 212–214, 215, 217*; *Finagrain SA v P. Kruse [1976] 2 Lloyd's Rep. 508, 534–535, 540, 546*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's*

Rep. 109, 127; *Bunge SA v Schleswig-Holsteinische Landwirtschaftliche Hauptgenossenschaft Eingetr GmbH [1978] 1 Lloyd's Rep. 480, 490*; *Bremer Handelsgesellschaft mbH v C. Mackprang [1979] 1 Lloyd's Rep. 220, 225–226, 228, 230*; *Avimex SA v Dewulf & Cie [1979] 2 Lloyd's Rep. 57, 67–68*; *Bremer Handelsgesellschaft mbH v Westzucker [1981] 1 Lloyd's Rep. 207, 213*; *Cremer v Granaria BV [1981] 2 Lloyd's Rep. 583, 587*; *Cerealmangimi SpA v Toepfer [1981] 3 All E.R. 533*; *Cook Industries Inc v Meunerie Liegeois SA [1981] 1 Lloyd's Rep. 359, 368*; *Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn Bhd [1981] 2 Lloyd's Rep. 695, 700–702*; *Bremer Handelsgesellschaft mbH v Finagrain Compagnie Commerciale, etc. SA [1981] 2 Lloyd's Rep. 259, 263, 266*; *Bremer Handelsgesellschaft mbH v Raiffeisen Hauptgenossenschaft E/G [1982] 1 Lloyd's Rep. 599*; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH [1983] 2 Lloyd's Rep. 45*; *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA [1985] 1 W.L.R. 925*; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India [1990] 1 Lloyd's Rep. 391*. cf. *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana [1983] 2 Q.B. 529, [1983] 2 A.C. 694*. See above, para.4-082; below, paras 24-007—24-009.

195. ❗*State Securities Plc v Initial Industry Ltd [2004] EWHC 3482 (Ch), [2004] All E.R. (D) 317*.

196. ❗*Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396*; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553*. The consideration of the issue in *Globe Motors* is obiter because the case was decided on another ground, whereas in *MWB Business Exchange Centres* it was part of the *ratio* of the case. The point was previously the subject of apparently conflicting decisions of the Court of Appeal (contrast *United Bank Ltd v Asif Unreported, February 11, 2000*, in which it was held that the contract could only be altered by going through the prescribed formality, and *World Online Telecom Ltd v I-Way Ltd [2002] EWCA Civ 413* where the Court of Appeal refused summarily to give effect to a term which provided that "no addition, amendment or modification of this Agreement shall be effective unless it is in writing and signed by or on behalf of both parties"). The relationship between these apparently conflicting decisions and their precedent value is considered by Beatson L.J. in *Globe Motors* at [110]–[114] and was followed by Kitchin L.J. in *MWB Business Exchange Centres Ltd* at [26].

197. ❗*Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396* at [100] and [119] and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553* at [34].

198. ❗*Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396* at [120].

199. ❗*MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553* at [28] (Kitchin L.J.), following the judgment of Beatson L.J. in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396* at [120] and declining to follow *Spring Finance Ltd v HS Real Co LLC [2011] EWHC 57 (Comm)* at [57] and *World Online Telecom Ltd v I-Way Ltd [2002] EWCA Civ 413* at [33], which had adopted the "strong evidence" requirement.

200. ❗*MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553* at [28], following in this respect the judgment of Gloster L.J. in *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd [2013] EWHC 2118 (Comm)* at [273] and Beatson L.J. in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396* at [120].

201. *Bennett v Fowler (1840) 2 Beav. 302*; *Hawksley v Outram [1892] 3 Ch. 359*; *Morrell v Studd and Millington [1913] 2 Ch. 648*; *F.E. Napier v Dexters Ltd (1926) 26 Ll. L. R. 62, 63–64, 184, 187–188*; *Irwin v Wilson [2011] EWHC 326 (Ch), [2011] 2 P. & C.R. 8*. See also *North v Loomes [1919] 1 Ch. 378* and Sale of Goods Act 1979 s.11(2). Once he has waived the condition, either expressly or by conduct, he cannot then rely on it to deny his own liability: *Barrett Bros (Taxis) Ltd v Davies [1966] 1 W.L.R. 1334*.

202. *Lloyd v Novell [1895] 2 Ch. 744*; *Burgess v Cox [1951] Ch. 383*; *Heron Garage Properties Ltd v Moss [1974] 1 W.L.R. 148*; *Gregory v Wallace [1998] I.R.L.R. 387*; *Wessex Reserve Forces*

and Cadets Association v White [2005] EWHC 983 (QB), [2006] 1 P. & C.R. 22.

203. *Allsopp v Orchard [1923] 1 Ch. 323*.

204. See below, para.24-007.

205. *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India [1990] 1 Lloyd's Rep. 391, 397–398*.

206. This is sometimes known as "total waiver"; see Sale of Goods Act 1979 s.11(2); Benjamin's Sale of Goods, 9th edn (2014), paras 12–036—12–038; Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.18-082 and below, para.24-007.

207. See below, para.24-007.

208. See below, para.24-007. There are important differences between the two types of waiver; see below, para.24-008 and Treitel on The Law of Contract, paras 18-079—18-088.

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Part 7 - Performance and Discharge

Chapter 22 - Discharge by Agreement

Section 7. - Provision for Discharge in the Contract Itself

Express provision

22-048

The parties may expressly provide in their contract that either or one of them is to have an option to terminate the contract. [209] This right of termination may be exercisable upon a breach of contract by the other party (whether or not the breach would amount to a repudiation of the contract), [210] or upon the occurrence or non-occurrence of a specified event other than breach, [211] or simply at the will of the party upon whom the right is conferred. In principle, since the parties are free to incorporate whatever terms they wish for the termination of their agreement, no question arises at common law whether the provision is reasonable or whether it is reasonable for a party to enforce it, [212] unless the situation is one in which equity would grant relief against forfeiture. [213] However, certain statutes restrict the efficacy of such provisions, [214] and in certain circumstances a term of this nature would have to be shown to be reasonable by virtue of the provisions of the Unfair Contract Terms Act 1977. [215] Where such a provision is contained in a contract concluded between a trader, seller or supplier and a consumer and that contract term has not been individually negotiated, it may also fall within the scope of the Unfair Terms in Consumer Contracts Regulations 1999, [216] or (for contracts made between a trader and a consumer on or after October 1, 2015, and whether or not the term was individually negotiated), Pt 2 of the Consumer Rights Act 2015. [217] Thus, a contract term which has the object or effect of authorising a trader to dissolve a contract on a discretionary basis where the same facility is not granted to the consumer may constitute an unfair term which will not be binding upon the consumer. [218]

Relationship with right to terminate at common law

22-049

The fact that one party is contractually entitled to terminate the agreement in the event of a breach by the other party does not preclude that party from treating the agreement as discharged by reason of the other's repudiation or breach of condition, [219] unless the agreement itself expressly or impliedly provides that it can only be terminated by exercise of the contractual right. [220] Whether the procedure laid down for termination in the contract excludes, expressly or impliedly, the common law right to terminate further performance of the contract in respect of a breach which falls within the scope of the clause is a question of construction of the contract. [221] When interpreting a clause in a contract which lays down a procedure for termination of the contract, the court will have regard to the commercial purpose which is served by the termination clause and interpret it in the light of that purpose. [222] Strict or precise compliance with the termination clause may no longer be a necessary pre-requisite to a valid termination. [223] It can be a matter of some practical importance whether termination has taken place pursuant to a term of the contract or under the general law. [224] A contractual right to terminate can be exercised even if the breach is not repudiatory at common law. [225] On the other hand, a contractual right to terminate, of itself, says nothing about the remedial consequences of termination; that is to say, not every termination pursuant to an express term of the contract will entitle the party terminating the contract to loss of bargain damages. Thus, where a

contracting party terminates further performance of the contract pursuant to a term of the contract, and the breach which has caused it to exercise that power is not a repudiatory breach, the party exercising the right to terminate may only be entitled to recover damages in respect of the loss which it has suffered at the date of termination and not for loss of bargain damages. [226] Where, however, the breach is also repudiatory [227] and that repudiatory breach has been accepted, [228] loss of bargain damages can be recovered [229] by relying on the contractual right to do so or by accepting the other party's repudiation of the contract. An example of a case in which the line between the two became distinctly blurred is provided by *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* [230] where Judge Lloyd Q.C. concluded that reliance on a contractual right to terminate did not amount to an acceptance of a repudiatory breach and that therefore the contract remained alive for the benefit of both parties. The finding that the contract remained alive, notwithstanding the reliance on the express power to terminate, is a difficult one. A simpler analysis would have been to conclude that reliance on the express term in the contract did operate to discharge both parties from their obligation to perform under the contract but that the exercise of the right to terminate did not, of itself, entitle the plaintiff to recover loss of bargain damages. [231]

Burden of proof

22-050

It is for the party seeking to terminate the contract to prove the existence of the facts which justify the exercise of his contractual right to terminate. [232]

Requirements as to notice

22-051

Where the terms of the contract expressly or impliedly [233] provide that the right of termination is to be exercised only upon notice given to the other party, it is clear that notice must be given for the contract to be terminated pursuant to that provision. [234] Any notice must be sufficiently clear and unambiguous in its terms to constitute a valid notice [235]; but it is a question of construction in each case whether the notice must actually be communicated to the other party and whether it takes effect at the time of dispatch or of receipt. [236] The terms of the contract may further provide that notice can be given only after the occurrence of a specified event [237]; or that a specified period of notice be given; or that the notice is to be in a certain form (e.g. in writing); or that it should contain certain specified information; or that it should be given within a certain period of time. Prima facie the validity of the notice depends upon the precise observance of the specified conditions. [238] However, a consideration of the relationship of the notice requirements to the contract as a whole and regard to general considerations of law, may show that a stipulated requirement, for example, that notice be given "without delay", [239] was intended by the parties to be an intermediate term, [240] the non-observance of which would not invalidate the notice (unless the other party was seriously prejudiced thereby), but would give rise to a claim for damages only. [241]

Waiver of defects in notice

22-052

Where the requirements of notice have not been complied with, the party giving the notice may still be entitled to rely on it if the other party has expressly or by conduct waived the defect in the notice. [242]

Waiver of right to terminate

22-053

Conversely, if one party is contractually entitled to terminate the agreement on breach by the other, he may be held to have waived his right to terminate. [243]

Implied provision

22-054

A contract which appears on its face to be perpetual and rrevocable may nevertheless be construed in the sense that it can be determined upon reasonable notice. [244] This topic has been dealt with in the chapter on Implied Terms earlier in this book. [245] An unlawful repudiation of the contract by one party cannot be relied on by him as a lawful determination upon reasonable notice under an implied term in the contract. [246]

Determination of contract

22-055

The parties may expressly provide that the con tract shall ipso facto determine upon the happening of a certain event. [247] Whether the contract provides for automatic termination or requires the innocent party to take a positive step to bring the contract to an end depends upon the construction of the contract. [248] But a clause which makes provision for automatic determination is to be construed subject to the principle that no man can take advantage of his own wrong, so that one party may not be allowed to rely on such a provision where the occurrence of the event is attributable to his own act or default. [249]

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209. In *Aktieselskabet Dampskibsselskabet Svendborg v Mobil North Sea Ltd [2001] 2 Lloyd's Rep. 127, 130* David Steel J. said that he saw no reason to accord the word "terminated" in a termination clause anything other than "its ordinary meaning of coming, or being brought, to an end, however that result may have occurred". Thus he held that a repudiatory breach by either party accepted by the other constituted a "termination" within the meaning of the clause. See generally Randall [2014] C.L.J. 113 and J. Stannard and D. Capper, *Termination for Breach of Contract* (2014), Ch.8. On the relationship between the right to terminate under the general law and the right to terminate under an express contractual provision, see further Peel [2013] L.M.C.L.Q. 519.

210. See below, para.24-001. A court may, however, interpret a clause entitling a party to terminate on the occurrence of "any breach" of contract as applying only to a breach of contract which is repudiatory in nature: see *Rice (t/a Garden Guardian) v Great Yarmouth BC, The Times, July 26, 2000*. In Rice the local authority purported to terminate the contract under a term of the contract which stated that: "[I]f the contractor commits a breach of any of its obligations under the contract, the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect". The Court of Appeal concluded that the notion that this term entitled the council to terminate the contract at any time for any breach of any term flew in the face of commercial common sense (the contract was one which was designed to run for four years). The clause only gave the Council the right to terminate the contract on the occurrence of a repudiatory breach of contract and the Court of Appeal held that the trial judge had been entitled to conclude on the facts that there had not been a repudiatory breach of contract so that the Council was not entitled to terminate the contract. Rice was followed by Kitchin J. in *Dominion Corporate Trustees Ltd v Debenham Properties Ltd [2010] EWHC 1193 (Ch), [2010] 23 E.G. 106*. Given the "multitude" of obligations in the contract, "many of which" were of "minor importance" and which could be broken "in many different ways", Kitchin J. concluded (at [32]) that it flouted business commonsense to conclude that any breach entitled the other party to terminate the contract. *Dominion Corporate Trustees* was, however, distinguished by Newey J. in *Looney v Trafigura Beheer BV [2011] EWHC 125 (Ch), [2011] All E.R. (D) 17 (Feb)*, where it was held that the defendant's right to terminate the contract was not qualified by a requirement that the termination must be on "proper and reasonable grounds" or in "proper and reasonable commercial circumstances". It was held that the contract gave to the defendant an unfettered right to terminate the contract provided it paid to the claimant the applicable early termination

fee. Each case ultimately depends upon its own facts and the terms of the individual contract (see *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC), [2014] B.L.R. 484, [323]*) but, as a general rule, there is a need for clearer drafting if one wishes to ensure a right to terminate in the event of a breach of a long-term contract (for an example, albeit in the context of an ISDA Master Agreement, see *BNP Paribas v Wockhardt EU Operations (Swiss) AG [2009] EWHC 3116 (Comm), 132 Con. L.R. 177* at [42]). It may be possible to use the words "material breach" (see *National Power Plc v United Gas Co Ltd Unreported July 3, 1998*, Coleman J.; *Fortman Holdings Ltd v Modem Holdings Ltd [2001] EWCA Civ 1235*; *Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599* at [90]–[102]) or "substantial breach" (see *Crane Co v Wittenborg A/S Unreported, December 21, 1999 CA*) but that simply opens the problem of establishing the meaning of "material" or "substantial".

211. See above, para.13-030 (conditions subsequent) and para.13-039 (force majeure clauses).

212. *Financings Ltd v Baldock [1963] 2 Q.B. 104, 115*; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA [1979] 1 W.L.R. 1018*.

213. See, e.g. *Stockloser v Johnson [1954] 1 Q.B. 476*; *Barton Thompson & Co Ltd v Stapling Machines Co [1966] Ch. 499*; *Shiloh Spinners Ltd v Harding [1973] A.C. 691*; *Starside Properties Ltd v Mustapha [1974] 1 W.L.R. 816*; *B.I.C.C. Plc v Burndy Corp [1985] Ch. 232*; *Transag Haulage Ltd v Leyland DAF Finance Plc [1994] B.C.C. 356*; *On Demand Information Plc v Michael Gerson (Finance) Plc [2001] 1 W.L.R. 155*; *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd [2013] UKPC 2, [2015] 2 W.L.R. 875*. Contrast *Galbraith v Mitchenall Estates Ltd [1965] 2 Q.B. 473*; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia [1977] A.C. 850*; *Afovos Shipping Co SA v R. Pagnan and Filli [1983] 1 W.L.R. 195*; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana [1983] 2 A.C. 694*; *Sport Internationaal Bussum BV v Inter-Footwear Ltd [1984] 1 W.L.R. 776*; *Union Eagle Ltd v Golden Achievement Ltd [1997] A.C. 514*; *Etzin v Reece [2002] All E.R. (D) 405 (Jul)*; *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship "Jotunheim" [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep. 181*; *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd [2010] EWHC 185 (Comm), [2010] 1 C.L.C. 165*.

214. e.g. Law of Property Act 1925 s.146; Consumer Credit Act 1974 ss.76, 86, 87, 98; Housing Act 1996 s.81.

215. s.3(2)(b)(ii); see above, para.15-085.

216. See further below, Ch.37, where the scope of the Regulations and the definition of terms such as "seller or supplier" and "consumer", etc., is discussed in more detail.

217. See further below, Vol.II, paras 38-447—38-448, where the scope of Pt 2 and the definition of terms such as "trader" and "consumer", etc., is discussed in detail.

218. See Sch.2 Pt 1 of the Consumer Rights Act 2015, para.7.

219. *Leslie Shipping Co v Welstead [1921] 3 K.B. 420*; *The Mihalis Angelos [1971] 1 Q.B. 164*; *Lombard North Central Plc v Butterworth [1987] Q.B. 587*.

220. *Npower Direct Ltd v South of Scotland Power Ltd [2005] EWHC 2123 (Comm)* at [177]. A court is unlikely to be satisfied that a contracting party has given up a valuable right arising by operation of law (such as the right to recover damages under the general law or a right to terminate the contract at law), "unless the terms of the contract make it sufficiently clear that that was intended": *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461* at [23], relying on an observation of Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] A.C. 689, 717*.

221. See, for example, *Lockland Builders Ltd v Rickwood (1996) 77 Build. L.R. 38* where the contractually agreed procedure for dealing with the consequences of a particular breach was held impliedly to have excluded the common law right to terminate performance of the contract

in respect of a breach which fell within the scope of the clause. However, the position would have been otherwise if the party in breach had evinced a clear intention not to be bound by the terms of the contract; in such a case the common law right to terminate and the right contained in the contract would have existed side by side (see Russell L.J. at 46 and Hirst L.J. at 50). A provision to the effect that the contractual right to terminate is "without prejudice to other rights and remedies" will generally suffice to persuade a court that the common law right to terminate has not been excluded. The Court of Appeal in *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461* distinguished Lockland Builders and held that the parties to the contract in *Stocznia Gdynia* had not intended to exclude the common law right to terminate performance of the contract. The courts are likely to be slow to conclude that the parties did intend to give up their common law rights unless there is evidence that such was the intention of the parties. See also *Ram Media Ltd v Ministry of Culture of the Hellenic Republic (Secretariat General of Sport) [2008] EWHC 1835 (QB), [2008] All E.R. (D) 06 (Aug)*, where it was not disputed (at [199]) that the passage in the text correctly summarised the law. The relationship between a contractual right to terminate and the right to terminate at common law in respect of a repudiatory breach was further considered by Ramsay J. in *BSkyB Ltd v HP Enterprise Services UK Ltd [2010] EWHC 86 (TCC), [2010] B.L.R. 267* at [1366] by Leggatt J. in *Newland Shipping and Forwarding Ltd v Toba Trading FZC [2014] EWHC 661 (Comm)* at [49]–[54]; *Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC [2016] EWHC 525 (Comm)*; *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC)*, [186]–[191]. See, more generally, Peel [2013] L.M.C.L.Q. 519.

222. *Ellis Tylin Ltd v Co-operative Retail Services Ltd [1999] B.L.R. 205*, relying upon *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749* and *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 898*.

223. As was previously thought to be the case in cases such as *The Mihalis Angelos [1971] 1 Q.B. 164*; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia [1977] A.C. 850, 870*; and *Afovos Shipping Co v Pagnan [1983] 1 W.L.R. 195, 201* and continues to be the view of some commentators (see, for example, Randall [2014] C.L.J. 113, 117).

224. Although it can occasionally be difficult to tell on which ground a party has purported to terminate.

225. See, for example, *Financings Ltd v Baldock [1963] 2 Q.B. 104*.

226. See, for example, *Financings Ltd v Baldock [1963] 2 Q.B. 104*; *Brady v St Margaret's Trust [1963] 2 Q.B. 494*; *Anglo-Auto Finance Ltd v James [1963] 1 W.L.R. 1042*; *United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 Q.B. 54*. The decision of the Court of Appeal in *United Dominion Trust (Commercial) Ltd v Ennis* was analysed closely by the Court of Appeal in *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461* at [26]–[35] and it was concluded that the case was "difficult … to explain". The Court of Appeal in *Stocznia Gdynia* stated (at [20]) that it was, "wrong to treat the right to terminate in accordance with the terms of the contract as different in substance from the right to treat the contract as discharged by reason of repudiation at common law". But it is important to see this statement in its proper context (see E Peel (2009) 125 L.Q.R. 378, 380–381). On the facts of the case the Court of Appeal concluded that the parties intended to equate the contractual right to terminate with the right to treat the contract as repudiated and gave effect to that intention. But, where such was not the intention of the parties, a court is not obliged to equate the two rights; on the contrary, a court should give effect to the parties' intention and conclude that the contractual right to terminate does differ in substance from the right to treat the contract as repudiated under the general law (see, for example, *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 [97]–[104]* in this respect declining to follow the analysis of Flaux J. in *Kuwait Rocks Co v AMN Bulkcarriers Inc (The "Astra") [2013] EWHC 865 (Comm), [2013] 2 Lloyd's Rep. 69)*. This separation of the right to terminate and the right to claim loss of bargain damages has been rejected by the Supreme Court of Canada in *Keneric Tractor Sales Ltd v Langille (1987) 43 D.L.R. (4th) 171* and subjected to academic criticism, see Opeskin (1990) 106 L.Q.R. 293. An attempt to stipulate for a wider right of recovery in the contract in such a case may be invalid as a penalty clause: *Lombard North Central Plc v Butterworth [1987] Q.B. 527*.

227. This is so whether it is repudiatory under the general law or by virtue of the decision of the parties to treat the term which has been broken as a condition of the contract: *Lombard North Central Plc v Butterworth [1987] Q.B. 527*; cf. Treitel [1987] L.M.C.L.Q. 143.

228. A court may conclude that, having regard to the conduct of the parties, any repudiatory breach committed was not, in fact, accepted so that the contract must be regarded as continuing: see *United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 Q.B. 54* and *Laing Management Ltd v Aegon Insurance Co (UK) Ltd (1998) 86 Build. L.R. 70*.

229. *Yeoman Credit Ltd v Waragowski [1961] 1 W.L.R. 1124*; *Overstone Ltd v Shipway [1962] 1 W.L.R. 117*; *Lombard North Central Plc v Butterworth [1987] Q.B. 527*.

230. *(1998) 86 Build. L.R. 70*. For further discussion of the case, see *Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599* at [139]–[142].

231. See above, n.222.

232. See *Chandris v Isbrandtsen Moller Co Inc [1951] 1 K.B. 240, 245–246*; *P.J. Van der Zijden Wildhandel NV v Tucker & Cross Ltd [1975] 2 Lloyd's Rep. 240* (force majeure clauses). See also above, para.15-152.

233. See *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia [1977] A.C. 850* (withdrawal of ship). See also *Abingdon Finance Co Ltd v Champion, Guardian, November 6, 1961* (seizure of goods let on hire purchase). Whether the terms of the contract do require that notice be given depends upon the interpretation of the contract (see, for example, *Geys v Société Générale, London Branch [2012] UKSC 63, [2013] 1 A.C. 513* at [57]–[58] where it was held to be "an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate" so that it was necessary not only that the employee receive his payment in lieu of notice but that he receive notification from the employer in clear and unambiguous terms that such payment has been made and that it is made in the exercise of the contractual right to terminate the employment with immediate effect).

234. *Reliance Car Facilities Ltd v Roding Motors [1952] 2 Q.B. 844*. Contrast *Union Transport Finance Ltd v British Car Auctions [1978] 2 All E.R. 385*.

235. *Allam & Co Ltd v Europa Poster Services Ltd [1968] 1 W.L.R. 638*. See also *May v Borup [1915] 1 K.B. 830*; *Addis v Burrows [1948] 1 K.B. 444*; *Aegnoussiotis Shipping Corp of Monrovia v A/S Kristian Jebsens Rederi [1977] 1 Lloyd's Rep. 268*. cf. *P. Phipps & Co (Northampton and Towcester) Breweries Ltd v Rogers [1925] 1 K.B. 14*.

236. *Scarf v Jardine (1882) 7 App. Cas. 345, 348*; *Re London and Northern Bank [1900] 1 Ch. 220*; *Tenax S.S. Co Ltd v The Brimnes [1973] 1 W.L.R. 386; affirmed [1975] Q.B. 929*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109*.

237. *Afovos Shipping Co SA v Pagnan & Filli [1983] 1 W.L.R. 195*; *Telfair Shipping Corp v Athos Shipping Co SA [1983] 1 Lloyd's Rep. 127*.

238. See *Afovos Shipping Co SA v Pagnan & Filli [1983] 1 W.L.R. 195*; *Tradax Exports SA v Dorada Compania Naviera SA [1982] 2 Lloyd's Rep. 140*; and the cases cited in n.238, below. However, the prima facie rule may have to give way on the facts of the case when regard is had to the underlying commercial purpose of the termination clause and the modern approach would appear to place less emphasis on the need for precise compliance: *Ellis Tylin Ltd v Co-operative Retail Services Ltd [1999] B.L.R. 205*.

239. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109*.

240. See above, para.13-034.

241. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109,*

113. See also *Bunge SA v Kruse [1979] 1 Lloyd's Rep. 279; affirmed [1980] 2 Lloyd's Rep. 142*.

242. *Alfred C. Toepfer v P. Cremer [1975] 2 Lloyd's Rep. 118*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109*; *Bremer Handelsgesellschaft mbH v C. Mackprang [1979] 1 Lloyd's Rep. 220*; *Bunge GmbH v Alfred C. Toepfer [1979] 1 Lloyd's Rep. 554*. Contrast (no waiver) *V. Berg & Son Ltd v Vanden Avenne-Izegem PVBA [1977] 1 Lloyd's Rep. 499*; *Avimex SA v Dewulf Cie. [1979] 2 Lloyd's Rep. 56*; *Toepfer v Schwarze [1980] 1 Lloyd's Rep. 385*; *Bremer Handelsgesellschaft mbH v C. Mackprang [1981] 1 Lloyd's Rep. 292*; *Tradax Export SA v Cook Industries Inc [1982] 1 Lloyd's Rep. 385*; *Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co Ltd [1981] 1 Lloyd's Rep. 345*; *Bremer Handelsgesellschaft mbH v Westzucker [1981] 1 Lloyd's Rep. 207*; *Cook Industries Inc v Meunerie Liegeois SA [1981] 1 Lloyd's Rep. 359*; *Bremer Handelsgesellschaft mbH v Finagrain Compagnie Commerciale, etc., SA [1981] 2 Lloyd's Rep. 259*; *Bremer Handelsgesellschaft mbH v Westzucker (No.2) [1981] 2 Lloyd's Rep. 130*; *Bunge SA v Compagnie Européenne des Cereales [1982] 1 Lloyd's Rep. 306*; *Bremer Handelsgesellschaft mbH v Bunge Corp [1983] 1 Lloyd's Rep. 476*; *Bremer Handelsgesellschaft mbH v Deutsche-Conti Handelsgesellschaft mbH [1983] 2 Lloyd's Rep. 45*.

243. *Keith Prowse & Co v National Telephone Co [1894] 2 Ch. 147*; *Reynolds v General & Finance Facilities (1963) 107 S.J. 889*. Contrast (no waiver) *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia [1977] A.C. 850*; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama [1979] 1 W.L.R. 1018*; *Bremer Handelsgesellschaft v Deutsche-Conti Handelsgesellschaft [1983] 2 Lloyd's Rep. 45*; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana [1983] 2 Q.B. 529; affirmed [1983] 2 A.C. 694*; *Eximenco Handels A.G. v Partredereit Oro Chief [1983] 2 Lloyd's Rep. 509*.

244. *Crediton Gas Co v Crediton U.D.C. [1928] Ch. 174, 178*; *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd [1948] A.C. 173*; *Martin Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd [1955] 2 Q.B. 556*; *Re Spenborough U.D.C.'s Agreement [1968] Ch. 139*; *Beverley Corp v Richard Hodgson & Sons Ltd (1972) 225 E.G. 799*; *Staffordshire AHA v South Staffordshire Waterworks Co [1978] 1 W.L.R. 1387*. Contrast *Kirklees Metropolitan BC v Yorkshire Woollen District Transport Co (1978) 77 L.G.R. 448*. See also Carnegie (1969) 85 L.Q.R. 392.

245. See above, para.14-032.

246. *Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 1 W.L.R. 361*. See also *Bridge v Campbell Discount Co Ltd [1962] A.C. 600*.

247. *Jay's Furnishing Co v Brand & Co [1915] 1 K.B. 458*; *Continental Grain Export Corp v S.T.M. Grain Ltd [1979] 2 Lloyd's Rep. 460*; *Bremer Handelsgesellschaft mbH v Finagrain SA [1981] 2 Lloyd's Rep. 259*.

248. *Artpower Ltd v Bespoke Couture Ltd [2006] EWCA Civ 1696, [2006] All E.R. (D) 35 (Nov)*.

249. *Rede v Farr (1817) 6 M. & S. 121, 124*; *Doe d. Bryan v Bancks (1821) 4 B. & Ald. 401, 406*; *New Zealand Shipping Co v Société des Ateliers et Chantiers de France [1919] A.C. 1, 6, 8, 9*; *Quesnel Forks Gold Mining Co Ltd v Ward [1920] A.C. 222*; *Alghussein Establishment v Eton College [1988] 1 W.L.R. 587*. cf. *Cheall v Association of Professional Executive and Computer Staff [1988] 2 A.C. 180*; *Thompson v Asda M.F.I. Group Plc [1988] Ch. 241*; *Micklefield v S.A.C. Technology Ltd [1990] 1 W.L.R. 1002*; *Richco International Ltd v Alfred C. Toepfer International GmbH [1991] 1 Lloyd's Rep. 136*; *BDW Trading Ltd v JM Rowe (Investments) Ltd [2011] EWCA Civ 548, [2011] All E.R. (D) 174 (May)*; see above, para.14-015.