

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 3 - Capacity of Parties

Chapter 9 - Personal Incapacity

Section 1. - In General

Contractual incapacity

9-001

The incapacity of one or more of the contracting parties may defeat an otherwise valid contract. Prima facie, however, the law presumes that everyone has a capacity to contract; so that, where exemption from liability to fulfil an obligation is claimed by reason of want of capacity, this fact must be strictly established on the part of the person who claims the exemption. In English law, three classes of individuals are subject to some degree of personal contractual incapacity.¹ These are minors,² persons lacking the requisite mental capacity³ and drunken persons.⁴ Abnormal weakness of mind short of such mental incapacity as prevents a person understanding the nature of the transaction, or immaturity of reason in one who has attained full age, or the mere absence of skill upon the subject of the particular contract, affords in itself no ground for relief at law or in equity,⁵ although in certain cases, undue influence⁶ or unconscionable dealing by the other party⁷ or (perhaps) inequality of bargaining power may permit the transaction to be set aside as inequitable.⁸ Moreover, illiteracy and unfamiliarity with the English language are not to be equated with disabilities like mental incapacity or drunkenness. According to Millett L.J. in *Barclays Bank Plc v Schwartz*,⁹ although all four conditions are disabilities which may prevent the sufferer from possessing a full understanding of a transaction into which he enters:

“... mental incapacity and drunkenness [may] not only deprive the sufferer of understanding the transaction, but also deprive him of the awareness that he [does] not understand it”,

which is not the case as regards an illiterate or a person unfamiliar with English. Again, however, such a person may in an appropriate case claim that the transaction be set aside as a harsh and unconscionable bargain.¹⁰

Consumer protection and vulnerable consumers

9-002

Modern consumer protection legislation sometimes requires a court to take into account the limited understanding of consumers of the contracts which they enter with traders in determining whether a consumer is to be protected.

Unfair commercial practices: “mental infirmity” or impairment of judgment of consumer

9-003

So, under the Consumer Protection from Unfair Trading Regulations 2008, unfair commercial

practices by a trader towards a consumer are prohibited if they fall under a general test of unfairness, if they constitute a “misleading action”, “misleading omission” or are “aggressive”, or if they are contained in a legislative list. ¹¹ Under the general test, a court must consider, inter alia, whether a business’s commercial practice “materially distorts or is likely to materially distort the economic behaviour of the average consumer”. ¹² While in general the average consumer is understood to be “reasonably well informed, reasonably observant and circumspect”, ¹³ it is also provided that:

“In determining the effect of a commercial practice on the average consumer—x

(a)

where a clearly identifiable group of consumers is particularly vulnerable to the practice or underlying product¹⁴ because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b)

where the practice is likely to materially distort the economic behaviour only of that group,

a reference to the average consumer shall be read as referring to the average member of that group.” ¹⁵

This definition is also relevant to the commission of a misleading statement or omission. ¹⁶ Moreover, in relation to “aggressive commercial practices”, it is provided that a court must take into account in determining whether the trader uses “harassment, coercion or undue influence” whether the trader exploited:

“any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment, of which the trader [was] aware, to influence the consumer’s decision with regard to the product.” ¹⁷

Under the Consumer Protection from Unfair Trading Regulations 2008 as originally made, the commission of an unfair commercial by a trader had no effect on the validity of any contract concluded by the trader with the consumer, ¹⁸ but in 2014 the 2008 Regulations were amended so as to create new rights of redress for consumers in respect of misleading statements and aggressive commercial practices, ¹⁹ a right “to unwind” the contract, or to a “discount”, and a right to damages. ²⁰ These rights are discussed in Ch.38 of Vol.II of the present work. ²¹

Unfair contract terms: consumer’s degree of understanding relevant to fairness of term

9-004

If a person acting in the course of a business takes advantage of the lack of full understanding of the terms of a contract which he concludes with a consumer, this circumstance would be relevant to the issue of the fairness of these terms under the Unfair Terms in Consumer Contracts Regulations 1999 ²² or (for contracts made on or after October 1, 2015) the Consumer Rights Act 2015 Pt 2. ²³

1. At common law, a married woman could not in general enter into a contract on her own account

either with her husband or with a third party, but successive statutes from 1857 to 1949 progressively removed this incapacity (although an agreement between spouses may be held not to be a contract on the ground of a lack of intention to create legal relations: above, paras 2-178—2-179). However, some uncertainty remains as to the liability of a wife in respect of a contract concluded with her husband before marriage, this turning on whether or not the Law Reform (Married Women and Tortfeasors) Act 1935 s.1(c) reversed the effect of the decision in *Butler v Butler* (1885) 14 Q.B.D. 831 (affirmed on a different point (1885) 16 Q.B.D. 374). It is submitted that the broader reading of the 1935 Act so as to remove from the law this last vestige of the peculiar treatment of married women's contracting is the more likely given "society's recognition of the equality of the sexes": *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 188, per Lord Browne-Wilkinson (though this observation was made in another context).

2. See below, paras 9-005 et seq.
3. See below, paras 9-075 et seq.
4. See below, paras 9-105—9-106.
5. *Osmond v Fitzroy* (1731) 3 P.Wms. 129; *Lewis v Pead* (1789) 1 Ves. Jun. 19 and see Barton (1987) 103 L.Q.R. 118.
6. See above, paras 8-057 et seq.
7. See above, paras 8-130 et seq.
8. See above, para.8-143.
9. *The Times*, August 2, 1995; *Hambros Bank Ltd v British Historic Buildings Trust* [1995] N.P.C. 179.
10. Above, para.8-130.
11. The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) ("2008 Regulations (SI 2008/1277)") regs 3, 5–7, and Sch.1 as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). On these regulations generally, see Vol.II, paras 38-145 et seq.
12. 2008 Regulations (SI 2008/1277) reg.3(3)(b).
13. 2008 Regulations (SI 2008/1277) reg.2(2).
14. "Product" is defined by the 2008 Regulations: see reg.2(1) and Vol.II, para.38-156.
15. 2008 Regulations (SI 2008/1277) reg.2(5).
16. 2008 Regulations (SI 2008/1277) regs 5 and 6.
17. 2008 Regulations (SI 2008/1277) reg.7(2)(c).
18. 2008 Regulations (SI 2008/1277) reg.29 (as originally enacted) provided that "an agreement shall not be void or unenforceable by reason only of a breach of these regulations".
19. The Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.3 inserting new Pt 4A into the 2008 Regulations. These changes were brought into force as from October 1, 2014.
20. 2008 Regulations (SI 2008/1277) regs 27E et seq. (as inserted by SI 2014/870).
21. Vol.II, paras 38-160 et seq.
22. SI 1999/2083 (as amended) and see Vol.II, paras 38-201 et seq.

[23.](#) See Vol.II, para.38-201 et seq. especially at 38-268.

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Section 2. - Minors ²⁴

(a) - Generally

Definition of minors

9-005

The age of capacity for the purposes of the law of contract (as for most other legal purposes) which was 21 at common law, was reduced to 18 by s.1 of the Family Law Reform Act 1969. Section 9 of the same Act also abolished the common law rule under which a person attained his majority on the day preceding the relevant anniversary of the birth. ²⁵ Under this section a person is deemed to attain the age of 18 at the commencement of the 18th anniversary of his birthday. The Act also declares that a person who is not of full age may be described as a “minor” instead of an “infant”.

Very young children

9-006

The cases at common law concerning the capacity of a minor to make contracts generally concern older children. ²⁶ However, it has been doubted whether a very young child has the mental capacity to enter a contract, even where the contract is of a type which would normally be held valid, though voidable at common law. In *R. v Oldham Metropolitan BC Ex p. Garlick*, ²⁷ Scott L.J. observed that:

“If a minor is to enter into a contract with the limited efficacy that the law allows, the minor must at least be old enough to understand the nature of the transaction and, if the transaction involves obligations on the minor of a continuing nature, the nature of those obligations.” ²⁸

Thus, while he considered that a child well under the age of 10 years could purchase sweets, a four-year-old could not contract for the occupation of residential premises. ²⁹ This approach to the position of very young children can be related to that taken by the common law and by the Mental Capacity Act 2005 ³⁰ to mental incapacity in adults, where the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. ³¹

General rule: contracts voidable at minor’s option

9-007

Apart from contracts for necessities and contracts of apprenticeship, education and service, the general rule at common law is that a minor’s contracts are voidable at his option, i.e. not binding on the minor but binding on the other party. ³² Of these voidable contracts there are two classes:

(a)

contracts which are binding on the minor unless he repudiates them during minority, or within a reasonable time of attaining his majority³³;

(b)

contracts which are not binding on him unless and until he ratifies them after attaining his majority.³⁴

Prior to the passing of the Minors' Contracts Act 1987, the second of these classes was partially governed by the Infants Relief Act 1874, which also introduced a fourth category of minors' contracts, namely those declared by s.1 to be "absolutely void". By s.1 of the 1987 Act, however, both these changes were abolished and the position returned to the common law.³⁵

Contracts binding on a minor

9-008

The main qualification on the general rule that contracts are voidable at the minor's option is found in relation to contracts for necessities, which bind the minor, though this does not mean that the minor is bound by the price of goods or services as stipulated.³⁶ There is, however, in the cases, a diversity of meanings given to the word "necessaries". In one sense, the term is confined to necessary goods and services supplied to the minor.³⁷ In another, it extends to contracts for the minor's benefit and in particular to contracts of apprenticeship, education and service.³⁸ It has long been customary for a distinction to be drawn between these two classes of contract and it remains convenient for the purposes of exposition, but it is doubtful whether any practical importance still attaches to it. To these common law examples must be added the special treatment of settlement or compromise agreements made by a child and approved by the court under CPR r.21.10.³⁹

Deeds

9-009

In general a minor is bound by a deed to the same extent that he would be bound if the promise contained in the deed were oral. He is, therefore, liable on a deed which contains a promise to pay for necessities.⁴⁰

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

^{25.} *Re Shurey, Savory v Shurey* [1918] 1 Ch. 263.

^{26.} At common law the age of majority was 21 years: see above, para.9-005.

^{27.} [1993] 1 F.L.R. 645. The decision of the Court of Appeal was affirmed by the House of Lords: [1993] A.C. 509.

^{28.} [1993] 1 F.L.R. 645, 662.

- [29.](#) [1993] 1 F.L.R. 645. The context of these observations was the challenge by two four-year-old boys of a local authority's refusal to accept their application for accommodation under the Housing Act 1985 s.62.
- [30.](#) ss.2 and 7.
- [31.](#) See below, paras 9-089—9-092.
- [32.](#) This passage was relied on as an accurate statement of the law in *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93 at [34]. In many old cases certain types of minors' contracts were often said to be "void" but normally where the word "void" was used, "voidable" was intended: *Williams v Moor* (1843) 11 M. & W. 256, 263–264. As will be seen, the treatment of settlement and compromise agreements is specially treated by CPR r.21(10), on which see below, para.9-035.
- [33.](#) See below, paras 9-036 et seq.
- [34.](#) See below, paras 9-049 et seq.
- [35.](#) See below, para.9-051. For the position obtaining under the Infants Relief Act 1874 governing contracts made before June 9, 1987 see the 25th edition of the present work, Vol.I, paras 569–574.
- [36.](#) See below, para.9-010.
- [37.](#) *Wharton v Mackenzie* (1844) 5 Q.B. 606; *Peters v Fleming* (1840) 6 M. & W. 42, 46; *Cowern v Nield* [1912] 2 K.B. 419, 422.
- [38.](#) *Walter v Everard* [1891] 2 Q.B. 369; *Roberts v Gray* [1913] 1 K.B. 520, 525, 528, 529; *Shears v Mendeloff* (1914) 30 T.L.R. 342.
- [39.](#) Below, para.9-035.
- [40.](#) *Walter v Everard* [1891] 2 Q.B. 369. As to the effect of a disposition of property by deed, see below, paras 9-072—9-074.

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(b) - Contracts Binding on a Minor

(i) - Liability for Necessaries

Liability for necessaries

9-010

Executed contracts for “necessary” goods and services were binding on a minor at common law, ⁴¹ though this does not mean that the minor will be liable for the price of the goods or services as stipulated. ⁴² The common law was partially codified in relation to the sale and delivery of necessary goods by the Sale of Goods Act 1893. ⁴³ Less clear is the position of executory contracts for necessaries. ⁴⁴ The meaning of “necessaries” is an extended one for this purpose, by no means being confined to “necessities” in the ordinary sense.

Meaning of necessaries

9-011


Such things as relate immediately to the person of the minor, as his necessary food, drink, clothing, lodging and medicine, are clearly necessaries for which he is liable. But the term is not confined to such matters only as are positively essential to the minor’s personal subsistence or support; it is also employed to denote articles purchased for real use, so long as they are not merely ornamental, or are used as matters of comfort or convenience only, and it is a relative term to be construed with reference to the minor’s age and station in life. ⁴⁵ The burden of showing that the goods supplied are necessaries is always on the supplier:



“Having shewn that the goods were suitable to the condition in life of the infant, he [the tradesman] must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery.” ⁴⁶

Thus the fact that the minor was already sufficiently supplied with the goods in question will defeat any claim against him ⁴⁷ even though this fact was unknown to the supplier. ⁴⁸

Contracts for necessaries must be beneficial

9-012

 It has been held that even a contract for necessaries will not be binding on the minor if it contains harsh and oppressive terms so that the contract, taken as a whole, cannot be said to be for the

minor's benefit.⁴⁹ So, for instance, in *Flower v London & North Western Ry Co*⁵⁰ it was held that a contract of carriage (though clearly a necessary in the circumstances) was void as against the minor because it contained a clause exempting the defendants from liability for injury to the minor even if caused by negligence. However, it is submitted that any judgment of the overall beneficial (or conversely prejudicial) effect of a minor's contract for necessities should be viewed after the application of any relevant legislation governing the fairness of terms. So, for example, since 1977 a contract term purporting to exclude a business liability for personal injuries and death caused by negligence is ineffective in law⁵¹ ; and many types of terms in consumer contracts may be held "not binding" on a minor/consumer as unfair.⁵² 




Liability for goods "sold and delivered"

9-013

Section 3 of the Sale of Goods Act 1979 (replacing s.2 of the 1893 Act) provides that where necessities are sold and delivered to a minor he must pay a reasonable price for them. "Necessaries" are defined by s.3(3) as goods suitable to the condition in life of the minor and to his actual requirements at the time of the sale and delivery. There are two difficult points arising out of the impact of this section on the common law which have not yet been resolved. First, it is uncertain whether a minor can be held liable on an executory contract for the purchase of necessities; and, secondly, where such a contract is executed by the delivery of the goods to the minor, it is uncertain whether the goods must be necessary for the minor at the time of sale as well as at the time of delivery.


Executory contracts for necessary goods


9-014

 Section 3 of the Sale of Goods Act 1979 deals only with the case of necessary goods *sold and delivered*; it does not in terms deal with the case of necessities sold but not delivered to a minor, and such a case may, therefore, still be governed by the common law. But even at common law it is uncertain whether a minor could be liable on an executory contract for the purchase of necessary goods.⁵³ Whether a minor is so liable may depend on the view taken of the basis of the minor's liability, though this seems to restate the problem rather than to solve it.⁵⁴  On the one hand it is argued that the minor is liable on such a contract quite apart from the Act, for a contract for necessities is one which, despite his lack of age, a minor may make.⁵⁵ This may be supported by more recent authority which has recognised that a minor may give a valid consent, notably, to medical treatment,⁵⁶ and by analogy with decisions which have held a minor liable on an executory contract for education and training⁵⁷: the reason why an older minor's contracts are not binding on him is a matter of legal policy rather than because he cannot consent.⁵⁸  On the other hand it is said that a minor's obligation to pay for goods supplied to him is not contractual at all but is restitutionary, based on unjust enrichment.⁵⁹ Delivery would, therefore, be necessary, for without it the minor could not be said to be unjustly enriched at the seller's expense. The supporters of this view buttress their argument by pointing to the fact that the minor is bound to pay only a reasonable price for the goods, rather than the contractual price.⁶⁰ This, they say, does not suggest a consensual liability.⁶¹ Moreover, if s.3 of the Sale of Goods Act 1979 were treated as superseding the common law, this would suggest that a minor would not be liable except where the goods were "sold and delivered".⁶²

Goods necessary when delivered, but not when sold, and vice versa

9-015

 The second problem is, to some extent, tied up with the first. At common law there seems to be no doubt that the crucial question was always whether the goods were necessary when delivered⁶³ and

it was immaterial whether or not they were necessary when the contract was made. This again would seem to support the theory that the minor's liability is based on unjust enrichment rather than being contractual, for if it were contractual it would be hard to see why a change of circumstances between the time of sale and the time of delivery should affect the liability of the minor. But whatever the position may have been at common law it is possible that s.3 of the Sale of Goods Act resolved both questions. In *Nash v Inman*⁶⁴ the Court of Appeal appears to have treated this section as completely superseding the common law on the liability of a minor for necessary goods, and the wording of the section appears to support the view that the goods must be necessary both when sold and when delivered. If this is indeed the effect of the section it can hardly be supposed that a minor could today be held liable on a purely executory contract.⁶⁵ 

Necessary services

9-016

Services as well as goods may be necessities. So, for example, a contract for legal⁶⁶ or medical services⁶⁷ may be a contract for necessities.⁶⁸ It has also been held that a contract by a widow (who was a minor) to pay for her husband's funeral was binding as for a necessary.⁶⁹ Unlike the uncertain position in respect of contracts to supply necessary goods, it is clear that executory contracts for necessary services may be enforced against a minor, at least in the context of apprenticeship or contracts for education. Thus, a minor's promise to pay part of the premium for his apprenticeship on gaining his majority has been enforced⁷⁰ and his (reasonable) restrictive covenant against competing with his master after service is concluded has been enforced by injunction after gaining his majority.⁷¹ In *Roberts v Gray*, the Court of Appeal held a minor who had entered a contract to go on a tour with a professional billiard player liable in damages for failing to proceed with the tour.⁷² The court considered that once it had been decided that a contract is one for necessities not qualified by unreasonable terms, then it was binding on the minor, so as to allow the other contracting party all such remedies as were appropriate on breach.⁷³ The reasoning of these decisions runs counter to that which argues for a noncontractual basis of an infant's liability for necessities.⁷⁴ The question whether the services must be necessary only when rendered or whether they must also be necessary when ordered seems never to have been considered.

Fact and law

9-017

Whether the particular goods or services are necessities has for many years been treated as a question of fact in each case, subject to there being some evidence on which they might properly be so found.⁷⁵ Today, however, it would seem that, while it is still a pure question of fact whether the minor is already well supplied with the goods or services in question, it is a question of mixed fact and law or a matter of evaluating the facts whether the goods or services can be treated as necessities in themselves.⁷⁶

Contracts for both necessities and non-necessaries

9-018

If a minor buys a quantity of goods, some of which may be necessities, but a substantial number of which cannot be necessities, it has been said that the minor will not be liable at all if the contract is one entire contract.⁷⁷ On the other hand the courts have sometimes allowed a claimant to recover for necessities while disallowing a claim for non-necessaries without advertting to the question whether the contract was an entire contract.⁷⁸ Since the minor is not bound to pay the contract price but only a reasonable price, there seems no reason why this course should not always be followed.⁷⁹

Examples

9-019

The following have been held to be necessities (although it must be remembered that the usages of society change and articles which once were necessities may no longer be held to be so and vice versa): engagement and wedding rings, ⁸⁰ regimental uniform (for an enlisted soldier), ⁸¹ presents for a fiancée, ⁸² a racing bicycle for a youth earning (in 1898) 21s. a week, ⁸³ the hire of horses ⁸⁴ and for work done for them, ⁸⁵ and the hire of a car to fetch luggage from a station six miles away. ⁸⁶ On the other hand, the following have been held not to be necessities: 11 fancy waistcoats for a Cambridge undergraduate already sufficiently supplied with clothing, ⁸⁷ expensive dinners with fruit and confectionery for another undergraduate, ⁸⁸ jewelled solitaire sleeve-links for the son of a deceased baronet, ⁸⁹ a large quantity of tobacco for an army officer, ⁹⁰ lessons in flying for a law student, ⁹¹ a vanity-bag worth (in 1936) £20, 10s bought by the son of an ex-cabinet minister for his fiancée, ⁹² a hunter for an impecunious cavalry officer, ⁹³ a collection of snuff-boxes and curios ⁹⁴ and a second-hand sports car. ⁹⁵

Trading contracts

9-020

A minor's trading contracts are not contracts for necessities. ⁹⁶ While there is no precise definition of a trading contract for this purpose, it has been held that a minor will not be liable in contract upon an agreement for services performed for him to enable him to carry on his trade, ⁹⁷ or for goods supplied to him for the purposes of his trade, ⁹⁸ or where he fails to deliver goods to a purchaser who has paid for them. ⁹⁹ However, if the contract can be considered to be one by which the minor gains proficiency in a certain trade (as in a contract of service or apprenticeship) it will be binding on him if, viewed as a whole, it is for his benefit. ¹⁰⁰

9-021

⚠ Where a minor's contract is a "trading contract" the minor cannot be adjudicated bankrupt on this basis for he is not a debtor at law, ¹⁰¹ though he may be liable for (and be made bankrupt on account of) a tax debt. ¹⁰² It has even been held that a minor is not liable in unjust enrichment for the recovery of the price of goods sold by him but not delivered. ¹⁰³ ⚠ Moreover, the court now possesses a discretion to order the minor to transfer money, or property representing it, to the other contracting party under s.3(1) of the Minors' Contracts Act 1987. ¹⁰⁴

Necessaries for wife or children

9-022




There have been some extensions of the doctrine of minors' necessities. Necessaries for a minor's wife are necessities for him, ¹⁰⁵ though he is not liable on contracts made by his wife unless he has authorised them. ¹⁰⁶ Either spouse is bound by a contract to pay for the funeral of the other where he or she dies leaving no sufficient estate. ¹⁰⁷



Loans for necessities


9-023

A minor cannot be made liable on a loan advanced to enable him to purchase necessities. ¹⁰⁸ If, however, the loan is actually expended on necessities, the lender can recover the amount spent on them under the equitable principle of subrogation laid down in *Marlow v Pitfield*. ¹⁰⁹ A person who purchased necessities for a minor at his request was held at common law to be entitled to sue the minor for money paid to his use. ¹¹⁰ It would seem that today such an action could be maintained either by treating the purchaser as a lender and entitled to invoke the principle of subrogation, or by

treating the purchaser as the minor's agent.¹¹¹ Any security given in respect of a loan is unenforceable even though the money was required for necessities¹¹² and an account stated is voidable despite the fact that some of the items in the account consist of necessities.¹¹³ A bill of exchange or promissory note is void both as against the minor and any third person although given in payment of necessities.¹¹⁴ But the person who supplied the necessities can, of course, disregard the account stated or the security and sue for a reasonable price.¹¹⁵

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- ^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.
- ^{41.} *Peter v Fleming* (1840) 6 M. & W. 42; *Ryder v Wombwell* (1868) L.R. 4 Ex. 32. See below, para.9-014 as to the position of executory contracts for necessities.
- ^{42.} Below, para.9-013.
- ^{43.} s.2 (now Sale of Goods Act 1979 s.3). cf. Mental Capacity Act 2005 s.7, below, paras 9-095—9-096.
- ^{44.} See below, para.9-014.
- ^{45.} *Peters v Flemming* (1840) 6 M. & W. 42; *Ryder v Wombwell* (1869) L.R. 4 Ex. 32; *Nash v Inman* [1908] 2 K.B. 1.
- ^{46.} *Nash v Inman* [1908] 2 K.B. 1, 5, per Cozens-Hardy M.R., *Maddox v Miller* (1813) 1 M. & s.738; *Harrison v Fane* (1840) 1 M. & G. 550; *Brooker v Scott* (1843) 11 M. & W. 67; *Ryder v Wombwell* (1869) L.R. 4 Ex. 32.
- ^{47.} *Barnes & Co v Toye* (1884) 13 Q.B.D. 410; *Johnstone v Marks* (1887) 19 Q.B.D. 509; *Nash v Inman* [1908] 2 K.B. 1.
- ^{48.} *Barnes & Co v Toye* (1884) 13 Q.B.D. 410; *Johnstone v Marks* (1887) 19 Q.B.D. 509. See also *Bainbridge v Pickering* (1780) 2 W.Bl. 1325; *Brayshaw v Eaton* (1839) 7 Scott 183; *Foster v Redgrave* (1867) L.R. 4 Ex. 35n.
- ^{49.} *Fawcett v Smethurst* (1914) 84 L.J.K.B. 473.
- ^{50.} [1894] 2 Q.B. 65. See also *Buckpitt v Oates* [1968] 1 All E.R. 1145, 1147–1148.
- ^{51.}  Unfair Contract Terms Act 1977 s.2(1) or (as regards contracts made on or after October 1, 2015) the Consumer Rights Act 2015 s.65.
- ^{52.}  Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) or (as regards contracts made on or after October 1, 2015) the Consumer Rights Act 2015 Pt 2: see Vol.II, paras 38-201 et seq.
- ^{53.} *Miles* (1927) 43 L.Q.R. 389.
- ^{54.}  Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 24-14–24-27.
- ^{55.} *Nash v Inman* [1908] 2 K.B. 1, 12.

- [56.](#) *Gillick v West Norfolk Area Health Authority* [1986] A.C. 112, 169 (minors under 16); the Family Law Reform Act 1969 s.8 provides that a minor over the age of 16 can consent to medical treatment and see Clerk & Lindsell on Torts, 20th edn (2010), paras 10-55–10-57. cf. *R. v D.* [1984] A.C. 778, 806 (consent to kidnapping).
- [57.](#) *Roberts v Gray* [1913] 1 K.B. 520; *Hamilton v Bennett* (1930) 94 J.P.N. 136; *Doyle v White City Stadium Ltd* [1935] 1 K.B. 110. See below, para.9-032.
- [58.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.12–008.
- [59.](#) *Nash v Inman* [1908] 2 K.B. 1, 8; *Elkington & Co Ltd v Amery* [1936] 2 All E.R. 86, 88; Birks, *An Introduction to the Law of Restitution* (1985), p.436. cf. *Re Rhodes* (1890) 44 Ch. D. 94, 105 and *Re J.* [1909] 1 Ch. 574, 577, and below, para.9-095 (mental incapacity).
- [60.](#) Sale of Goods Act 1979 s.3(2) and see Birks at p.436.
- [61.](#) *Pontypridd Union v Drew* [1927] 1 K.B. 214, 220.
- [62.](#) See below, para.9-015.
- [63.](#) Winfield (1942) 58 L.Q.R. 82.
- [64.](#) [1908] 2 K.B. 1, 7, 9.
- [65.](#)  It is, however, arguable that the words of s.3 of the Sale of Goods Act “at the time of the sale and delivery” appear to contemplate one time only. See also Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.12–008. If a minor is liable on an executory contract it would have to be decided whether the goods must be necessary when sold, or at the time when they ought to have been delivered, or perhaps even when the minor refuses to take delivery.
- [66.](#) *Helps v Clayton* (1864) 17 C.B.(N.S.) 553; *De Stacpoole v De Stacpoole* (1887) 37 Ch. D. 139; *Re Jones (An Infant)* (1883) 48 L.T. 188.
- [67.](#) *Huggins v Wiseman* (1690) Carth. 110. But quare whether this is still so having regard to the National Health Service.
- [68.](#) cf. the position as regards a person lacking mental capacity for necessary goods and services under the Mental Capacity Act 2005 s.7, below, para.9-096.
- [69.](#) *Chapple v Cooper* (1844) 13 M. & W. 252.
- [70.](#) *Walter v Everard* [1891] 2 Q.B. 369.
- [71.](#) *Gadd v Thompson* [1911] 1 K.B. 304.
- [72.](#) [1913] 1 K.B. 520. cf. Mathews (1982) 33 N.Ir.L.Q. 150, 154–155.
- [73.](#) [1913] 1 K.B. 520, 530.
- [74.](#) cf. above, para.9-014.
- [75.](#) *Ryder v Wombwell* (1868) L.R. 3 Ex. 90.
- [76.](#) cf. *Benmax v Austin Motor Co Ltd* [1955] A.C. 370.
- [77.](#) *Stocks v Wilson* [1913] 2 K.B. 235, 241–242. As to entire contracts, see below, para.24-043.
- [78.](#) See, e.g. *Ryder v Wombwell* (1868) L.R. 3 Ex. 90.

- [79.](#) Certainly this would be the right course if the minor's liability is based on unjust enrichment; see above, para.9-014.
- [80.](#) *Elkington & Co Ltd v Amery* [1936] 2 All E.R. 86.
- [81.](#) *Coates v Wilson* (1804) 5 Esp. 152.
- [82.](#) *Jenner v Walker* (1868) 19 L.T. 398; cf. *Hewlings v Graham* (1901) 70 L.J. Ch. 568; *Elkington & Co Ltd v Amery* [1936] 2 All E.R. 86.
- [83.](#) *Clyde Cycle Co v Hargreaves* (1898) 78 L.T. 296.
- [84.](#) *Hart v Prater* (1837) 1 Jur. 623; cf. *Harrison v Fane* (1840) 1 M. & G. 550.
- [85.](#) *Clowes v Brook* (1739) 2 Str. 1101.
- [86.](#) *Fawcett v Smethurst* (1914) 84 L.J.K.B. 473.
- [87.](#) *Nash v Inman* [1908] 2 K.B. 1.
- [88.](#) *Wharton v Mackenzie* (1844) 5 Q.B. 606.
- [89.](#) *Ryder v Wombwell* (1869) L.R. 4 Ex. 32.
- [90.](#) *Bryant v Richardson* (1866) L.R. 3 Ex. 93.
- [91.](#) *Hamilton v Bennett* (1930) 94 J.P.N. 136.
- [92.](#) *Elkington & Co Ltd v Amery* [1936] 2 All E.R. 86.
- [93.](#) *Re Mead* [1916] 2 I.R. 285.
- [94.](#) *Stocks v Wilson* [1913] 2 K.B. 235.
- [95.](#) *Coull v Kolbuc* (1969) 68 W.W.R. 76 (Alberta District Ct).
- [96.](#) *Lowe v Griffith* (1835) 1 Scott 458.
- [97.](#) *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109.
- [98.](#) *Mercantile Union Guarantee Corp Ltd v Ball* [1937] 2 K.B. 498. But where a minor used goods (supplied to him in his trade) for household purposes he was held liable: *Turberville v Whitehouse* (1823) 1 C. & P. 94.
- [99.](#) *Cowern v Nield* [1912] 2 K.B. 419.
- [100.](#) *Roberts v Gray* [1913] 1 K.B. 520; *Doyle v White City Stadium Ltd* [1935] 1 K.B. 110. cf. *Shears v Mendeloff* (1914) 30 T.L.R. 342; below, paras 9-024—9-034.
- [101.](#) *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109, 120; *Re Davenport* [1963] 1 W.L.R. 817.
- [102.](#) *Re A Debtor (No.564 of 1949)* [1950] Ch. 282.
- [103.](#)  *Cowern v Nield* [1912] 2 K.B. 419. This decision is supported by Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 19-09—19-13 on the basis that as a matter of policy minors should only have to repay the value of benefits which they still have at the time of the claim.
- [104.](#) See below, paras 9-061—9-064.

- [105.](#) *Rainsford v Fenwick* (1671) *Carter* 215; *Turner v Trisby* (1719) 1 *Stra.* 168.
- [106.](#) The wife's "agency of necessity" was abolished by s.41 of the Matrimonial Proceedings and Property Act 1970: see Vol.II, para.31-050.
- [107.](#) *Chapple v Cooper* (1844) 13 *M. & W.* 252. It was doubted whether a minor would be bound by a contract to pay for the funeral of a parent or other relative: 260. The common law rule that a husband is always bound to pay for his wife's funeral no longer obtains: *Rees v Hughes* [1946] *K.B.* 517.
- [108.](#) *Darby v Boucher* (1694) 1 *Salk.* 279.
- [109.](#) (1719) 1 *P.Wms.* 558; *Re National Permanent Benefit Building Society* (1869) *L.R.* 5 *Ch. App.* 309, 313; *Martin v Gale* (1876) 4 *Ch. D.* 428; *Lewis v Alleyne* (1888) 4 *T.L.R.* 560; *Orakpo v Manson Investments Ltd* [1978] *A.C.* 95; Birks, *An Introduction to the Law of Restitution* (1985), p.398. For a similar principle in a different context, see *The Mogileff* (1921) 6 *L.I.L. Rep.* 528; *The Fairport* (No.5) [1967] 2 *Lloyd's Rep.* 162.
- [110.](#) *Ellis v Ellis* (1689) *Comb.* 482; *Earle v Peale* (1712) 10 *Mod.* 67.
- [111.](#) See below, para.9-065.
- [112.](#) *Martin v Gale* (1876) 4 *Ch. D.* 428.
- [113.](#) *Williams v Moor* (1843) 11 *M. & W.* 256. At common law, an account stated may be ratified by the minor on reaching majority: (1843) 11 *M. & W.* 256 at 266. The Infants Relief Act 1874 s.1, which made void all accounts stated with infants, was repealed by the Minors' Contracts Act 1987 s.1.
- [114.](#) *Re Soltykoff Ex p. Margrett* [1891] 1 *Q.B.* 413; cf. Bills of Exchange Act 1882 s.22(2).
- [115.](#) [1891] 1 *Q.B.* 413; *Walter v Everard* [1891] 2 *Q.B.* 369.

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Beneficial contracts

9-024

Since it is of obvious advantage to a minor that he should be able to fit himself for his future trade or profession and to obtain a livelihood, he may enter into contracts of apprenticeship, employment, education and instruction, provided that these are beneficial to him. As was said by Kay L.J. in *Clements v London & North Western Ry Co* ¹¹⁶:

“It has been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the court before which the question comes will not allow the infant to repudiate it.”

Contracts of apprenticeship at common law

9-025

At common law, a minor may bind himself apprentice to an employer, and after the employer's death to his executors provided that they carry on the same trade in the same place. ¹¹⁷ The validity of such a contract depends on whether the contract is as a whole, beneficial to the minor at the time when it is entered into. ¹¹⁸ If the contract of apprenticeship imposes onerous terms ¹¹⁹ such as a penalty clause, ¹²⁰ or a provision that his wages are to depend on the will of his employer, ¹²¹ or if it places the minor virtually in a position of entire subservience to his employer, ¹²² it will be unenforceable. The question of fairness will depend upon whether the clause was common to employment contracts at the time, or accorded with the current conditions of trade, so that the employer was reasonably justified in imposing it in protection to himself. ¹²³

Formal requirements

9-026

Before the Apprentices Act 1814 a deed was necessary to create a valid contract of apprenticeship; and under such a deed the apprentice promised faithfully to serve his employer, and the employer promised to provide proper instruction for the apprentice and to pay him wages. However, the 1814

Act reduced the formality to a requirement that the apprenticeship contract must be in writing ¹²⁴ and in 2004 even this requirement was abolished. ¹²⁵

Minor's apprenticeship covenants

9-027

Although a minor may by contract bind himself apprentice, during the period of apprenticeship no action is maintainable against him on his covenant to serve in such a contract, ¹²⁶ nor can an injunction be obtained to enforce a negative covenant in the contract. ¹²⁷ Accordingly, at one time it was customary for the minor's father or mother to execute the contract so as to covenant for his due performance of the agreement. ¹²⁸ After his apprenticeship has ceased, however, a restrictive covenant in such a contract may be enforced provided that the contract as a whole is for the minor's benefit. ¹²⁹

Rescission of contracts of apprenticeship

9-028

It has been held that a minor cannot validly agree to rescind a binding contract of apprenticeship unless its rescission would be beneficial and this will not normally be so, since if the contract is beneficial to him its dissolution cannot normally be beneficial. ¹³⁰ In a later case this rule was held to mean that a master cannot terminate a contract of apprenticeship made with a minor on the ground of the latter's breach of his covenants to serve, etc. since the minor cannot by breaking his covenants do indirectly what he may not do directly. ¹³¹ However, in the same case it was noted that earlier authorities on the relationship of master and apprentice dated from a time when the master possessed real and considerable powers of domestic chastisement, ¹³² and that (in 1922) these powers no longer existed and that this social change justified an exception to be made to the master's inability to terminate for breach where:

“there is habitual and systematic conduct, arising out of the character of the apprentice, which renders it impossible that the work of service and of teaching should continue.” ¹³³

Statutory “apprenticeship agreements”

9-029

⚠ The Apprenticeships, Skills, Children and Learning Act 2009 recognised a new form of apprenticeship founded on an “apprenticeship agreement”, and set out rules governing, inter alia, its form and certification. ¹³⁴ ⚠ In 2015, the 2009 Act was amended so as to distinguish between

“approved English apprenticeships” ¹³⁵ ⚠ and “Welsh apprenticeships”. ¹³⁶ ⚠ Under the 2009 Act as so amended, both “approved English apprenticeships” and “Welsh apprenticeships” are to be treated as “contracts of service” and are not to be treated as “contracts of apprenticeship” for “the purposes of any enactment or rule of law”. ¹³⁷ ⚠ It is submitted, therefore, that an “apprenticeship agreement” concluded by a minor would be subject to the rules explained below governing contracts of employment rather than those governing contracts of apprenticeship, though the two sets of rules are closely related.

Contracts of employment

9-030

A contract of employment entered into by a minor is dealt with by the law in the same manner as a contract of apprenticeship. A contract of employment may be binding even if the minor gives up certain rights available under the general law, at least if he gets something equally advantageous in return,¹³⁸ and an agreement to submit disputes to arbitration may also be binding if it forms part of a binding contract of employment.¹³⁹ But a contract containing a term by which his work and wages depend on the will of his employer¹⁴⁰ or by which, in consideration of special terms, he contracts to waive all claims for compensation for accident¹⁴¹ is not binding on him. There are many statutory restrictions on the employment of minors under which it is in general unlawful to employ a person under the age of 14, and the employment of persons between 13 and compulsory school age is subject to many restrictions.¹⁴² An agreement in breach of these provisions would presumably be unenforceable against the minor.

Covenants in restraint of trade

9-031

If a minor enters into a contract of employment or apprenticeship containing a covenant restraining his freedom to compete after the termination of the contract, it must first be decided whether this provision would have been valid against an adult.¹⁴³ But a covenant of this kind may not bind a minor even where it would have bound an adult.¹⁴⁴ Whether, if the covenant is void, it invalidates the whole contract of employment or apprenticeship may be a difficult question. It seems that in deciding this question regard must be had to the covenant only in so far as it would have been valid against an adult. If, therefore, the covenant is severable according to the ordinary principles governing severance,¹⁴⁵ the question is whether the enforceable part of the covenant (and not the whole covenant) is so unfair or oppressive as to render the whole contract not beneficial.¹⁴⁶ It seems to follow that if the whole covenant is void quite apart from the defence of minority it should be disregarded altogether in deciding whether the remainder of the contract is beneficial to the minor. Where, on the other hand, the covenant is itself valid and does not render the whole contract void, it may be enforced against the minor by injunction in the usual way.¹⁴⁷

Education

9-032

At common law a minor could bind himself by a contract for instruction and education, on the same ground as other contracts for necessities. Having regard to modern statutory provisions for compulsory and free schooling it is doubtful if it could still be regarded as necessary for a minor to contract for ordinary schooling below the school-leaving age except perhaps in very special circumstances.¹⁴⁸ But a minor can doubtless still bind himself with regard to other forms of education or instruction, and a minor has been held liable under a contract for singing lessons to be paid for by commission on his earnings as a singer.¹⁴⁹ That the contract is executory appears to be immaterial.¹⁵⁰ On the other hand, not every form of instruction or education is appropriate to the status and position of a particular minor, and a contract for unnecessary education is no more binding than a contract for unnecessary goods.¹⁵¹

Other beneficial contracts

9-033

The principle that contracts beneficial to a minor are binding on him is not confined to contracts for necessities and contracts of employment, apprenticeship or education in a strict sense.¹⁵² It extends also to other contracts which in a broad sense may be treated as analogous to contracts of service, apprenticeship or education.¹⁵³ So, for instance, a contract by a minor (who was a professional boxer) with the British Boxing Board of Control whereby he agreed to adhere to the rules of the Board was held binding on him because he could not have earned his living as a boxer without entering into

the agreement.¹⁵⁴ Similarly, it has been held that an agreement between a minor and a publisher for the publication of the minor's biography which was to be written by a "ghost writer" was binding on the minor.¹⁵⁵ So also, a contract between a group of underage musicians (known as "The Kinks") whereby they appointed a company as their manager and agent was held binding as analogous to a contract of employment.¹⁵⁶ On the other hand, it has been held that a contract by which a footballer aged 15 engaged a person to act as his executive agent and representative in all matters relating to his work as a professional footballer was not analogous to contracts of employment, apprenticeship or education as the agent did not provide any training (which was provided by the professional club where he played) nor did it undertake any matters essential to his livelihood.¹⁵⁷ And there is no general principle to the effect that any contract beneficial to a minor is binding on him.¹⁵⁸ So a minor's trading contracts are not binding on him, even if beneficial.¹⁵⁹

Benefit

9-034

Where the contract contains terms, some of which are beneficial to the minor and others not, the question is whether, taken as a whole, it is to his advantage. If it is, he is bound.¹⁶⁰ One stipulation may be so unfair to the minor that it affects the validity of the whole contract¹⁶¹; but if the agreement as a whole is for his benefit, in principle he cannot pick and choose and adopt those terms while rejecting those terms which are not beneficial or not clearly beneficial.¹⁶² However, as in the case of contracts for necessities, the question of the beneficial (or prejudicial) effect of a contract of employment should be judged after the application of any legal control on the effectiveness on any apparently prejudicial terms.¹⁶³

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

^{116.} [1894] 2 Q.B. 482, 491.

^{117.} *Cooper v Simmons* (1862) 7 H. & N. 707.

^{118.} *De Francesco v Barnum* (1890) 45 Ch. D. 430; *Dillingham v Harrison* [1917] W.N. 305; *Mackinlay v Bathurst* (1919) 36 T.L.R. 31; *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch. 71; *Aylesbury Football Club (1997) Ltd v Watford Association Football Club Ltd Unreported 2000 HC*.

^{119.} *Meakin v Morris* (1884) 12 Q.B.D. 352; *De Francesco v Barnum* (1890) 45 Ch. D. 430.





^{120.} *De Francesco v Barnum* (1890) 45 Ch. D. 430, 439. See below paras 26-178 et seq. for the general invalidity of penalty clauses properly so-called and their distinction from liquidated damages clauses.

^{121.} *R. v Lord* (1850) 12 Q.B. 757; *Corn v Matthews* [1893] 1 Q.B. 310; *Meakin v Morris* (1884) 12 Q.B.D. 352; cf. *Green v Thompson* [1899] 2 Q.B. 1.

^{122.} *De Francesco v Barnum* (1890) 45 Ch. D. 430.

^{123.} *Leslie v Fitzpatrick* (1877) 3 Q.B.D. 229, 232.

^{124.} Apprentices Act 1814 s.2; *McDonald v John Twiname Ltd* [1953] 2 Q.B. 304 at 313.

- [125.](#) Statute Law (Repeals) Act 2004 s.1, Sch.1 Pt 8.
- [126.](#) *De Francesco v Barnum* (1889) 43 Ch. D. 165, 171, where it was noted that the master might correct him in service or complain to a justice of the peace to have the apprentice punished under the statute 5 Eliz. c.4. This power was abolished by the Family Law Reform Act 1969 s.11.
- [127.](#) (1889) 43 Ch. D. 165.
- [128.](#) Where a child is being “looked after” by a local authority within the meaning of the Children Act 1989 s.22, or is a person qualifying for advice and assistance within the meaning of s.24(2), the authority may undertake any obligation by way of guarantee under any deed of apprenticeship or articles of clerkship which he enters into: s.23(9), Sch.2 para.18(1).
- [129.](#) *Cornwall v Hawkins* (1872) 41 L.J.Ch. 435; *Fellows v Wood* (1888) 59 L.T. 513; *Evans v Ware* [1892] 3 Ch. 502; *Gadd v Thompson* [1911] 1 K.B. 304; cf. *Brown v Harper* (1893) 68 L.T. 488.
- [130.](#) *R. v Great Wigston (Inhabitants)* (1824) 3 B. & C. 484.
- [131.](#) *Waterman v Fryer* [1922] 1 K.B. 499.
- [132.](#) [1922] 1 K.B. 499, 506.
- [133.](#) [1922] 1 K.B. 499, 507, per Shearman J. citing *Learoyd v Brook* [1891] 1 Q.B. 431 as an example. cf. *Mcdonald v John Twiname Ltd* [1953] 2 Q.B. 304, 311 (conduct of apprentice falling short of these “extreme examples”).
- [134.](#)  Apprenticeships, Skills, Children and Learning Act 2009 Pt 1 (as enacted). The provisions on the “prescribed form” were contained in s.32(2)(b) and this form was later designated as being either “a written statement of particulars of employment” given to the employee/apprentice or “a document in writing in the form of a letter of engagement” as foreseen by the Employment Rights Act 1996: the Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012 (SI 2012/844) reg.2, referring to the Employment Rights Act 1996 ss.2 and 7A respectively (with the exceptions specified by the Regulations). In 2015, s.32 was amended so as to apply only to “Welsh apprenticeships”, as explained in the following text and notes.
- [135.](#)  Apprenticeships, Skills, Children and Learning Act 2009, esp. Ch.A1 as inserted by the Deregulation Act 2015 Sch.1 para.1 (in force May 26, 2015).
- [136.](#)  Apprenticeships, Skills, Children and Learning Act 2009 ss.2, 7–12, 18–22, 28–36 (as amended).
- [137.](#)  Apprenticeships, Skills, Children and Learning Act 2009 s.A5 (approved English apprenticeships) and s.35 (Welsh apprenticeships).
- [138.](#) *Clements v L. & N.W. Ry* [1894] 2 Q.B. 482.
- [139.](#) *Slade v Metrodent Ltd* [1953] 2 Q.B. 112.
- [140.](#) *R. v Lord* (1848) 12 Q.B. 757.
- [141.](#) *Flower v London & N.W. Ry Co* [1894] 2 Q.B. 65; *Butterfield v Sibbitt* [1950] 4 D.L.R. 302; *Buckpitt v Oates* [1968] 1 All E.R. 1145. Such a term would since 1977 not be effective: Unfair Contract Terms Act 1977 s.2(1).
- [142.](#) See Children and Young Persons Act 1933 s.18 (as amended); s.30(1)(a) (“child” to be defined as someone who is not over “compulsory school age” under Education Act 1996 s.8). For the purposes of the 1933 Act, the “employment” of children is not restricted to children who are

employed under a contract of service and extends to those working under contracts for services: *Bebbington v Palmer T/A Sturry News* (EAT, February 23, 2010 at [42]–[43]).

- [143.](#) See below, paras 16-085 et seq.
- [144.](#) *Sir W.C. Leng & Co Ltd v Andrews* [1909] 1 Ch. 763; *Gadd v Thompson* [1911] 1 K.B. 304; *Express Dairy Co v Jackson* (1930) 99 L.J.K.B. 181, 183.
- [145.](#) See below, paras 16-211 et seq.
- [146.](#) *Bromley v Smith* [1909] 2 K.B. 235.
- [147.](#) See cases cited above at n.142.
- [148.](#) cf. *Practice Direction (Minor: School Fees)* [1980] 1 W.L.R. 1441; *Practice Direction (Minor: Payment of School Fees)* [1983] 1 W.L.R. 800; *Sherdley v Sherdley* [1988] A.C. 213, 225.
- [149.](#) *Mackinlay v Bathurst* (1919) 36 T.L.R. 31.
- [150.](#) cf. above, para.9-016.
- [151.](#) *Hamilton v Bennett* (1930) 94 J.P.N. 136.
- [152.](#) This paragraph in the 28th edition of the present work was quoted as an accurate statement of the law in *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93 at [35].
- [153.](#) *Roberts v Gray* [1913] 1 K.B. 525.
- [154.](#) *Doyle v White City Stadium Ltd* [1935] 1 K.B. 110.
- [155.](#) *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch. 71.
- [156.](#) *Denmark Productions Ltd v Boscobel Productions Ltd* (1967) 111 S.J. 715 reversed on other grounds [1969] 1 Q.B. 699; cf. *Shears v Mendeloff* (1914) 30 T.L.R. 342 where the contract contained oppressive terms and was void.
- [157.](#) *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93 at [35]–[41].
- [158.](#) *Martin v Gale* (1876) 4 Ch. D. 428, 431; *Mercantile Union Guarantee Corp Ltd v Ball* [1937] 2 K.B. 498; *Bojczuk v Gregorczewicz* [1961] S.A.S.R. 128; *Sellin v Scott* (1901) 1 S.R.(N.S.W.) Eq. 64; but cf. *Slade v Metrodent Ltd* [1953] 2 Q.B. 112, 115.
- [159.](#) *Cowern v Nield* [1912] 2 K.B. 419, above, para.9-020.
- [160.](#) *De Francesco v Barnum* (1890) 45 Ch. D. 430, 439; *Clements v London & N.W. Ry* [1894] 2 Q.B. 482; *Roberts v Gray* [1913] 1 K.B. 520; *Doyle v White City Stadium Ltd* [1935] 1 K.B. 110; *IRC v Mills* [1975] A.C. 38, 53.
- [161.](#) *R. v Lord* (1848) 12 Q.B. 757; *Meakin v Morris* (1884) 12 Q.B.D. 352; *Corn v Matthews* [1893] 1 Q.B. 310; *Flower v London & N.W. Ry Co* [1894] 2 Q.B. 65; *Stephens v Dudbridge Ironworks Co* [1904] 2 K.B. 225; *Express Dairy Co v Jackson* (1930) 99 L.J.K.B. 181.
- [162.](#) *Slade v Metrodent Ltd* [1935] 2 Q.B. 112.
- [163.](#) Above, para.9-012.

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CPR r.21.10

9-035

Rule 21.10(1) of the Civil Procedure Rules (CPR) provides that:

“Where a claim is made—

- (a)
by or on behalf of a child or protected party; or
- (b)
against a child or protected party,

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.”

This requirement of approval has been held to apply to the settlement of a claim made on behalf of a child even before any proceedings were begun. ¹⁶⁴ It is clearly the main purpose of r.21.10 to protect the interests of children and other “protected parties” (i.e. persons under a mental incapacity ¹⁶⁵), but it also provides “a means by which a defendant may obtain a valid discharge from a child or protected party’s claim”. ¹⁶⁶ As a result, it has been held that r.21.10 carves out a special exception to the general rules governing the validity of contracts made by children and “protected parties” so as to require court approval even where the agreement would otherwise be binding on them. ¹⁶⁷ Conversely, any settlement or compromise approved by the court under r.21.10 is binding on the child even where it would not otherwise bind him under the general law governing minors’ contracts. The court’s discretion under r.21.10 extends to the approval of a settlement or compromise retrospectively, that is, in circumstances where the parties did not obtain the court’s approval for a settlement made in the course of earlier proceedings. ¹⁶⁸ The court’s discretion as to approval has been described as “unfettered”, ¹⁶⁹ but the court will take into account that the purpose of the requirement of approval is to ensure the protection of the minor and to ensure that his best interests are served, while taking into account the interests of the other party to the settlement or compromise (for example, as regards any prejudice caused by delay) and the interests of good administration of

justice more generally, notably, the “certainty of outcome and finality of judgments”.¹⁷⁰ While it was said (under the former procedural rules which made similar provision¹⁷¹) that the court has no power to compel a compromise against the opinion of the minor’s advisers,¹⁷² it has been held that this does not apply where the compromise was made by the incapable person himself in circumstances where the only objection to the enforceability of the compromise is that the approval of the court is required.¹⁷³

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- ^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors’ contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors’ Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission’s Report on Minors’ Contracts (1984) Law Com. No.134 led to the Minors’ Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.
- ^{164.} *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170; *Drinkall v Whitwood* [2003] EWCA Civ 1547, [2004] 1 W.L.R. 462; *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [23].
- ^{165.} See below, paras 9-091 and 9-097.
- ^{166.} Civil Procedure 2015 (2015), Section A, r.21.10.1, Introduction.
- ^{167.} *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170 (rejecting counsel’s argument that a settlement was binding without the court’s approval as being for the benefit of the child); *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [30] in the context of mental incapacity on which see below para.9-097.
- ^{168.} *Masterman-Lister v Brutton & Co (Nos 1 & 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [31] (Kennedy L.J.); *Bailey v Warren* [2006] EWCA Civ 51, [2006] C.P.Rep. 26 at [180].
- ^{169.} *Bailey v Warren* [2006] EWCA Civ 51, [2006] C.P.Rep. 26 at [180] per Ward L.J. (in the context of a possible retroactive approval of a settlement by a mentally incapable person), referring to *Masterman-Lister v Brutton & Co (Nos 1 & 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [31] (Kennedy L.J.).
- ^{170.} *Bailey v Warren* [2006] EWCA Civ 51, [2006] C.P.Rep. 26 at [182]–[184] per Ward L.J. and cf. at [95]–[96] (Hallett L.J.) and [140]–[144] (Arden L.J.). cf. *Rhodes v Swithenbank* (1889) 22 Q.B.D. 577; *Mattei v Vautro* (1898) 78 L.T. 682 where it was said (under earlier rules) that a compromise will not be sanctioned, although made in good faith, if not for the minor’s benefit.
- ^{171.} RSC Ord.80 rr.10, 11; CCR Ord.10 r.10.
- ^{172.} *Re Birchall* (1880) 16 Ch. D. 41; *Norman v Strains* (1880) 6 P.D. 219. See also *Re Taylor’s Application* [1972] 2 Q.B. 369.
- ^{173.} *Bailey v Warren* [2006] EWCA Civ 51, [2006] C.P.Rep. 26 at [94], [139] and [168].

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 3 - Capacity of Parties

Chapter 9 - Personal Incapacity

Section 2. - Minors ²⁴

(c) - Contracts Binding on a Minor Unless Repudiated

Contracts for an interest of a permanent nature

9-036

Where a minor enters into a contract which involves the acquisition of an interest in property of a permanent nature, with continuing obligations attached to it, he may avoid it at his option either before, or within a reasonable time after, attaining his majority. ¹⁷⁴ But until he does so avoid it, he is bound to carry out the obligations as they become due; and if he waits until attaining his majority before avoiding the contract, he must then act promptly and clearly, or he will be bound by the contract for its full term. The reason for this was explained by Parke B. in *North Western Ry Co v M'Michael*, ¹⁷⁵ a case where a minor was sued for a call on railway shares. The learned Baron, after referring to various cases ¹⁷⁶ in which it had been held that minor shareholders in railway companies were liable for calls on their shares whilst they were minors, continued:

“They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature ... and with certain obligations attached to it, which they were bound to discharge, and having been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate, or instance, to pay rent in the case of a lease rendering rent ... unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so.” ¹⁷⁷

9-037

⚠ Despite this explanation there does not seem to be any general principle to the effect that *any* contract conferring an interest in a subject matter of a permanent nature is valid until repudiated. There appear to be four types of case which fall within this category though it is not clear whether these are exhaustive. These are contracts to lease or purchase land, marriage settlements, contracts to subscribe for or to purchase shares, and partnerships. On the other hand, a contract of hire or of hire-purchase entered into by a minor as hirer is either valid (if for necessities) or unenforceable against the minor without a need for repudiation. ¹⁷⁸ ⚠

Benefit

9-038

There is old authority for the view that the underlying principle is one of benefit to the minor—that is, if the contract were beneficial to the minor, he could not avoid it at all, ¹⁷⁹ whereas if it were not beneficial, he was not bound at all. ¹⁸⁰ But since the mid-nineteenth century it has been established that even if the contract is not beneficial, the minor is bound if he takes possession of the property, but only until he disclaims within the time stated. ¹⁸¹

Contracts to lease or purchase land

9-039

At common law a lease to a minor was voidable only, ¹⁸² but even during his minority he was liable for accrued rent, if he had gone into occupation. ¹⁸³ If he continued in occupation after attaining his majority he was liable for rent which had accrued prior to that date. ¹⁸⁴ He was entitled to repudiate the lease either during his minority or within a reasonable time of attaining full age. ¹⁸⁵ It seems that a contract by a minor to purchase freehold land is also in this category, i.e. the contract is binding unless and until repudiated by the minor, ¹⁸⁶ at all events where there are outstanding obligations on the minor after completion. If there are no such obligations outstanding the question is really academic for even if the minor can repudiate the contract after completion he cannot recover the purchase price. ¹⁸⁷

Conveyances to minors

9-040

Since 1926, a minor has not been able to acquire or hold any legal estate, ¹⁸⁸ nor has a minor been able to be a tenant for life or exercise the powers of a tenant for life. ¹⁸⁹ A conveyance or lease to a minor has taken effect only as an agreement for valuable consideration to execute a settlement in his favour, and in the meantime to hold the land in trust for him. ¹⁹⁰ The 1925 property legislation did not, however, affect a minor's beneficial interest, or prevent his holding an equitable interest in settled land. ¹⁹¹ However, this position was altered by the Trusts of Land and Appointment of Trustees Act 1996 as the latter repealed the provisions of the earlier legislation regarding the effect of conveyance or lease to a minor, ¹⁹² and instead provided that after its commencement a conveyance of a legal estate to a minor takes effect as a declaration of trust and that, where immediately before its commencement a conveyance is operating as an agreement to execute a settlement in favour of a minor, the agreement ceases to have effect and subsequently operates instead as a declaration that the land is held in trust for the minor. ¹⁹³ In effect, therefore, the common law rule with regard to leases to minors is preserved. Equity will not allow a minor who has had the benefit of the statutory trusts to affirm them upon his majority and afterwards to say that he is not liable upon their obligations. ¹⁹⁴

Minor housed as “homeless person”

9-041

Where a local authority, in exercise of its statutory duty to house a homeless person aged between 16 and 17 under the Housing Act 1996, granted a tenancy to such a minor on its standard form for legal tenancies made with adult tenants, the Court of Appeal held that this grant took effect as an equitable tenancy under the Trusts of Land and Appointment of Trustees Act 1996, thereby constituting the local authority trustee of the legal estate of the lease for the benefit of the tenant. ¹⁹⁵ The tenant had argued that the local authority could not terminate the tenancy by notice under one of its clauses as “it could not lawfully destroy the subject matter of the trust by serving notice to quit” and the Court of Appeal agreed, ¹⁹⁶ holding that the effect of the 1996 Act meant that, in the absence of any other trustee, the local authority:

“... was in the uncomfortable position of being both lessor and trustee, and in the former

capacity of being not merely a party to the breach of trust, but the instigator of the breach of trust. In these particular circumstances ... service of notice to quit only on the minor beneficiary of the trust was not sufficient to terminate the tenancy that was being held by the [local authority] on her behalf.” ¹⁹⁷

In recognising the practical difficulties to which this decision may be thought to give rise, Waller L.J. suggested that local authorities could fulfil their duties under the Housing Act 1996 and their social services functions by agreeing with minors aged 16 to 17 years licences to occupy their dwellings rather than tenancies or by granting leases until the end of minority. ¹⁹⁸

Minors as successors to secured or statutory tenants

9-042

In *Kingston upon Thames BC v Prince* ¹⁹⁹ the question arose whether a minor who was otherwise qualified to succeed to a secure periodic tenancy under the provisions of the Housing Act 1985 could do so despite her minority. The Court of Appeal held that such a minor could so succeed. ²⁰⁰ According to Hale J.:

“... a minor is quite capable of becoming a tenant, albeit in equity ... If there is nothing to stop a local authority granting a tenancy effective in equity to a minor in appropriate circumstances there can be no insuperable technical objection to Parliament rendering that equitable tenancy secure. If Parliament had wanted to limit these provisions to adults it could easily have done so: but it did not.” ²⁰¹

The Court of Appeal therefore ordered that the minor be declared to be the secure tenant of the property in question until she reached the age of majority and the legal estate in relation to the said equitable tenancy be held on trust by the minor’s mother until that time. Hale J. further observed that where a tenancy was for a term certain, an otherwise qualified minor could succeed the deceased tenant as a secured tenant under the 1985 Act here:

“... the deceased’s estate will continue to hold the legal estate on trust for the minor until she reaches the age of 18 when she can call for a conveyance of the legal estate.” ²⁰²

Hale J. also noted with approval that “it has been established for some time, apparently uncontroversially, that a minor can succeed to a statutory tenancy under the Rent Acts”. ²⁰³

Marriage settlements

9-043

Further instances of contracts which are binding on a minor unless repudiated are to be found in marriage settlements and agreements for marriage settlements. They can be avoided by the minor within a reasonable time of coming of age. ²⁰⁴ But he must accept or reject them in their entirety. He cannot take the benefit and refuse to accept a burden. ²⁰⁵ If he elects to avoid the settlement, any interest taken by the minor in property brought into the settlement by the other party may be taken away to make up to the beneficiaries the loss which they have sustained because of the avoidance. ²⁰⁶

Shareholder underage

9-044

A minor may be a shareholder in a company regulated by the Companies Clauses Consolidation Act 1845,²⁰⁷ or by the Companies Act 1985, or in any corporation formed under a statute which authorises, either expressly or by implication, the membership of minors, or which by its nature does not prohibit their membership.²⁰⁸ A contract by a minor to subscribe for shares in the company may be repudiated either while he is underage or within a reasonable time of attaining full age,²⁰⁹ but until he does so he is liable for calls made even while he is underage.²¹⁰ If he wishes to avoid the contract after coming of age he must do so promptly or he will be bound by acquiescence.²¹¹

Purchase of shares

9-045

If a minor purchases shares in the market and thereafter becomes registered as a shareholder there are two contracts whose validity may come into question, viz that between the minor and the company, and that between the minor and the vendor. In the nineteenth century there were a number of decisions concerning the validity of a transfer of partly paid-up shares to a minor, and the liability of the transferor to pay calls or to contribute in a winding up.²¹² In these cases it was held that the transferor generally remained liable for calls notwithstanding that the minor had been registered as a shareholder. But although it was said in these cases that a transfer of shares to a minor was voidable none of them actually raised any question as to the validity of the contracts made between the minor on the one hand and the vendor or the company on the other. So far as the contract with the company is concerned the question is largely academic for the only liability likely to be enforceable against the shareholders is the obligation to pay calls, and partly paid-up shares are rarely met with today. But if the question were raised it would seem that the position must be the same as in the case of shares applied for by the minor and allotted to him by the company itself, i.e. the contract would be binding unless and until repudiated.²¹³ As to the contract between the minor and the vendor of the shares it is uncertain whether the contract is unenforceable against the minor, or whether it is voidable in the sense that it is binding until repudiated. It is submitted that such a contract would be unenforceable against the minor, but any price paid by him would be irrecoverable unless there was a total failure of consideration.²¹⁴

Partnerships

9-046

⚠ A minor who becomes a member of a partnership is, as between himself and his partners, bound by the contract unless and until he repudiates it.²¹⁵ ⚠ He does not become liable to partnership creditors for debts or liabilities incurred while he is a minor,²¹⁶ but if he repudiates the partnership agreement while still a minor or within a reasonable time of coming of age, his co-partners may insist on all partnership debts being paid and liabilities being met before the minor can draw any profits or capital from the firm.²¹⁷ It seems that the creditors may also avail themselves of this right of the minor's partners in appropriate proceedings.²¹⁸ Furthermore, even if the minor repudiates before attaining his majority he may still become liable for partnership debts subsequently incurred on the holding-out principle, by which a person who holds himself out as being a partner is bound to those who deal with the firm upon the faith of that supposed partnership.²¹⁹

Effect of avoidance

9-047

⚠ In all contracts of this class, namely, contracts involving the acquisition of an interest in property of a permanent nature with continuing obligations attached to it, the effect of avoidance by the minor is that he escapes from liability to perform obligations which have not accrued at the time of avoidance.

He has, however, to meet obligations which have already accrued ²²⁰; moreover, he can recover nothing which he has paid under the contract unless there has been a total failure of consideration. ²²¹ So, where a minor paid a premium to the defendant on taking a lease from him, and entered upon and used and enjoyed the premises for a short period before he came of age, he could not recover the premium. ²²² And where a minor applied for and was allotted shares in a company and paid the amounts due on allotment and on the first call, it was held that upon subsequently repudiating while still underage she could not recover back what she had paid, for although she had received no dividends she had received “the very consideration for which she bargained”. ²²³ The requirement of total failure of consideration has been criticised on the basis that:

“[t]he policy justification for allowing minors out of contracts—that the minor’s consent should not count because one needs to protect the young against foolishness and poor judgment—should surely be fully carried over to restitution of an unjust enrichment.” ²²⁴



Instead, it is argued, the minor’s ability to avoid the contract should be subject to restitutio in integrum being possible, with the result that:

“A minor who cannot restore the status quo ante should be unable to avoid the contract; but if he has restored the status quo, then he should be able to avoid the contract and recover benefits conferred thereunder.” ²²⁵



Time of avoidance

9-048

As earlier explained, in this category of contract a minor may avoid a contract within a reasonable time after attaining his majority, as well as during his minority. What is a reasonable time after attaining majority will depend upon the circumstances of each particular case. ²²⁶ A minor cannot plead ignorance of his right to repudiate as an excuse for his failure to exercise that right within a reasonable time ²²⁷ nor even that the property had not yet come into possession, so that there was nothing certain on which the repudiation could operate. ²²⁸

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors’ contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors’ Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission’s Report on Minors’ Contracts (1984) Law Com. No.134 led to the Minors’ Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

^{174.} Presumably the minor could not affirm and then repudiate the transaction, even if he acted within a reasonable time. cf. the principle stated in para.9-039, below.


^{175.} (1850) 5 Exch. 114, 123, 124, 127, 128.

^{176.} *Cork and Bandon Ry v Cazenove* (1847) 10 Q.B. 935; *Leeds & Thirsk Ry Co v Fearnley* (1849) 4 Exch. 26.

^{177.} (1850) 5 Exch. 114, 123–124.

- [178.](#)  See *Mercantile Union Guarantee Corp v Ball* [1937] 2 K.B. 498. For criticism see Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 12–025–12–026.
- [179.](#) *Maddon v White* (1787) 2 Term R. 159.
- [180.](#) *Ketsey's Case* (1614) Cro. Jac. 320; *Brownlow* 120 (*Kirton v Elliott*, 2 Bulst. 69).
- [181.](#) *North Western Ry Co v M'Michael* (1850) 5 Exch. 114, 128.
- [182.](#) *Davies v Beynon-Harris* (1931) 47 T.L.R. 424.
- [183.](#) *Blake v Concannon* (1870) 4 Ir. Rep. C.L. 323; *Kelly v Coote* (1856) 5 Ir. C.L.R. 469.
- [184.](#) *Blake v Concannon* (1870) 4 Ir. Rep. C.L.
- [185.](#) *Holmes v Blogg* (1818) 8 Taunt. 508.
- [186.](#) *Thurston v Nottingham Permanent Benefit Building Society* [1902] 1 Ch. 1, 9, affirmed [1903] A.C. 6; *Whittingham v Murdy* (1889) 60 L.T. 956.
- [187.](#) *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452, a case dealing with the purchase of shares.
- [188.](#) Law of Property Act 1925 s.1(6).
- [189.](#) Settled Land Act 1925 ss.19, 20.
- [190.](#) Law of Property Act 1925 s.19; Settled Land Act 1925 s.27(1); *Kingston upon Thames BC v Prince* [1999] 1 F.L.R. 593.
- [191.](#) Law of Property Act 1925 s.19; Settled Land Act 1925 ss.26, 27.
- [192.](#) Trusts of Land and Appointment of Trustees Act 1996 s.25(2), Sch.4 repealing Law of Property Act 1925 s.19; Settled Land Act 1925 s.27.
- [193.](#) Trusts of Land and Appointment of Trustees Act 1996 s.2, Sch.1 para.1(1), (3). The Act came into force on January 1, 1997: Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996 (SI 1996/2974).
- [194.](#) *Davies v Beynon-Harris* (1931) 47 T.R.R. 424.
- [195.](#) *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259, [2010] 2 Ch. 272.
- [196.](#) *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259 at [31].
- [197.](#) *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259 at [35], per Waller L.J. (with whom Scott Baker and Sullivan L.J.J. agreed).
- [198.](#) [2009] EWCA Civ 259 at [37] and [38].
- [199.](#) [1999] 1 F.L.R. 593.
- [200.](#) [1999] 1 F.L.R. 593, 600 so interpreting Housing Act 1995 s.89.
- [201.](#) [1999] 1 F.L.R. 593, 601.
- [202.](#) [1999] 1 F.L.R. 593, 600, so interpreting Housing Act 1995 s.90. See also *Alexander-David v Hammersmith and Fulham LBC* [2009] EWCA Civ 259 at [22].
- [203.](#) [1999] 1 F.L.R. 593, 596, citing *Portman Registrars v Mohammed Latif* [1987] 6 C.L. 217


(Willesden County Court).

- [204.](#) *Burnaby v Equitable Revisionary Interest Society* (1885) 28 Ch. D. 416; *Cooper v Cooper* (1888) 13 App. Cas. 88; *Duncan v Dixon* (1890) 44 Ch. D. 211; *Edwards v Carter* [1893] A.C. 360. *Kingsman v Kingsman* (1880) 6 Q.B.D. 122, which appears to suggest that such a contract is void rather than voidable, can no longer be relied on.
- [205.](#) *Codrington v Codrington* (1875) L.R. 7 H.L. 854; *Hamilton v Hamilton* [1892] 1 Ch. 396. cf. *Re Vardon's Trusts* (1885) 31 Ch. D. 275 as to which see *Re Hargrove* [1915] 1 Ch. 398.
- [206.](#) *Hamilton v Hamilton* [1892] 1 Ch. 396; *Carter v Silber* [1891] 3 Ch. 553.
- [207.](#) s.79.
- [208.](#) *Seymour v Royal Naval School* [1910] 1 Ch. 806.
- [209.](#) *Newry and Enniskillen Ry Co v Coombe* (1849) 3 Exch. 565; *North Western Ry Co v M'Michael* (1850) 5 Exch. 114; *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch. 589; *Re Alexandra Park Co* (1868) L.R. 6 Eq. 512.
- [210.](#) *Leeds & Thirsk Ry v Fearnley* (1849) 4 Exch. 26; *Birkenhead, etc., Ry v Pilcher* (1850) 5 Exch. 121; *North Western Ry Co v M'Michael* (1850) 5 Exch. 114; *Dublin and Wicklow Ry v Black* (1852) 8 Exch. 181. Unless perhaps he has derived no advantage from the shares and is still a minor: *Newry and Enniskillen Ry v Coombe* (1849) 3 Exch. 565.
- [211.](#) *Cork and Bandon Ry Co v Cazenove* (1847) 10 Q.B. 935; *Dublin and Wicklow Ry Co v Black* (1852) 8 Exch. 181.
- [212.](#) *Gooch's Case* (1872) L.R. 8 Ch. App. 266; *Capper's Case* (1868) L.R. 3 Ch. App. 458; *Merry v Nickalls* (1872) L.R. 7 Ch. App. 733; *Lumsden's Case* (1868) L.R. 4 Ch. App. 31; *Curtis's Case* (1868) L.R. 6 Eq. 455; *Re Crenver and Wheal Abraham United Mining Co* (1872) L.R. 8 Ch. App. 45.
- [213.](#) *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452, a case of allotment and not purchase in the market; and see *Capper's Case* (1868) L.R. 3 Ch. App. 458, 461.
- [214.](#) *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452, 458. cf. *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch. 589. For criticisms of this position, see below, para.9-047 and cf. below, paras 29-044 et seq. on recovery of money paid under a mistake of law.
- [215.](#)  *Goode v Harrison* (1821) 5 B. Ald. 147. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.12–020 n.89 suggests that the same rules appear to apply to the relations between persons who become members of a limited liability partnership if one or more of them is a minor, noting that ss.4 and 5 of the Limited Liability Partnerships Act 2000 make no mention of minority. Such a minor's liability to contribute to the assets of the partnership would seem to be governed by the rules governing a minor who subscribes for shares in a company: above, para.9-045.
- [216.](#) *Lovell & Christmas v Beauchamp* [1894] A.C. 607.
- [217.](#) [1894] A.C. 607.
- [218.](#) [1894] A.C. 607, 611.
- [219.](#) *Goode v Harrison* (1821) 5 B. Ald. 147, 157; see Vol.II, paras 31-055 et seq.
- [220.](#) *Cork & Bandon Ry Co v Cazenove* (1847) 10 Q.B. 935. cf. *North Western Ry Co v M'Michael* (1850) 5 Exch. 114, 125; *Newry and Enniskillen Ry Co v Coombe* (1849) 3 Exch. 565.
- [221.](#) See Burrows, *The Law of Restitution*, 3rd edn (2012), pp.312–314 (who describes this position

as the “unsatisfactory but predominant view in the authorities”): for criticisms, see below.

[222.](#) *Holmes v Blogg* (1818) 8 Taunt. 508; cf. *Re Burrows* (1856) 8 De G.M. & G. 254.

[223.](#) *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452. Insofar as *Hamilton v Vaughan-Sherrin Engineering Co* [1894] 3 Ch. 589 decides to the contrary, it must be taken to have been overruled. cf. below, paras 29-044 et seq. on recovery of payments made under a mistake of law.

[224.](#)  Burrows, *The Law of Restitution* 3rd edn (2012) pp.312–314; Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 24-21 et seq.

[225.](#)  Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.24-21; Burrows, *The Law of Restitution*, 3rd edn (2012) p.313.

[226.](#) See *Carter v Silber* [1892] 2 Ch. 278, affirmed sub nom. *Edwards v Carter* [1893] A.C. 360; *Carnell v Harrison* [1916] 1 Ch. 328 (disapproving *Re Jones* [1893] 2 Ch. 461).

[227.](#) *Carnell v Harrison* [1916] 1 Ch. 328.

[228.](#) *Edwards v Carter* [1893] A.C. 360.

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Section 2. - Minors ²⁴

(d) - Contracts Unenforceable against a Minor unless Ratified

Contracts not binding until ratified

9-049

The largest class of minor's contracts are enforceable by the minor, ²²⁹ but are not binding upon him unless he expressly ratifies them upon coming of age. For this purpose:

“... in order to be a ratification there must be a recognition, by the debtor after he attained his majority, of the debt as a debt binding upon him.” ²³⁰

It is in this sense that general propositions as to minors' incapacity should be understood. Indeed, were it otherwise, the minor's incapacity, instead of being an advantage to him might in many cases turn greatly to his disadvantage. ²³¹ The class includes all contracts other than those for necessities, beneficial contracts of employment and contracts for the acquisition of a permanent interest in property which are valid unless expressly avoided. ²³² Thus, a minor may sue but may not be sued upon an account stated ²³³ or upon a contract for the sale of goods (other than necessities) or any other simple contract. It was also held, for example (before the abolition of actions for breach of promise of marriage), that a minor could sue an adult for breach of promise of marriage, ²³⁴ although the adult could not sue the minor on such a promise. ²³⁵ And a minor can maintain an action for money had and received against an attorney for damages recovered by his next friend in an action brought on his behalf. ²³⁶ A minor cannot, however, obtain specific performance of a contract because the remedy would not be mutual, ²³⁷ at any rate not unless he has himself performed his side of the agreement. ²³⁸

Examples

9-050

The general rule that a minor's contracts are not binding on him unless ratified on attaining his majority has the consequence that a minor is not, at common law, liable on a warranty of goods or chattels sold by him ²³⁹ even where the warranty is fraudulent. ²⁴⁰ Nor is he liable on the custom of the realm as an innkeeper. ²⁴¹ He is not bound by an agreement to refer a dispute to arbitration ²⁴²; nor by the recitals in a deed made during infancy ²⁴³; nor by a release of a legal claim ²⁴⁴; nor by a contract of guarantee. ²⁴⁵

Ratification after full age

9-051

At common law, the general rule in this class of contract is that if, on attaining his majority, a minor ratifies a contract made by him during his minority, it will bind him although there may be no consideration for the new promise.²⁴⁶ Formerly, this rule was replaced by s.2 of the Infants Relief Act 1874 which provided that debts contracted during infancy were made incapable of becoming binding by ratification by the minor on majority, unless new consideration for such ratification was provided.²⁴⁷ This provision itself has been repealed,²⁴⁸ returning the law relating to ratification to the position at common law. Ratification after reaching majority may be express or implied from the former minor's conduct.²⁴⁹

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

^{229.} See below, para.9-052.

^{230.} *Rowe v Hopwood* (1868–1869) L.R. 4 Q.B. 1, 3, per Cockburn C.J. (decided under the Statute of Frauds (Amendment) Act 1828 s.5).

^{231.} *Warwick v Bruce* (1813) 2 M. & s.205; *Shannon v Bradstreet* (1803) 1 Sch. & Lcf. 52, 58; *Re Smith's Trusts* (1890) 25 L.R. Ir. 439, 443.

^{232.} See above, paras 9-010, 9-036. See also above, para.9-035 as regards settlement or compromises approved by the court.

^{233.} *Williams v Moor* (1843) 11 M. & W. 256.

^{234.} *Holt v Ward* (1732) 2 Str. 937, 939.

^{235.} *Hale v Ruthven* (1869) 20 L.T. 404.

^{236.} *Collins v Brook* (1860) 5 H. & N. 700.

^{237.} *Flight v Bolland* (1828) 4 Russ. 298. By the same token, specific performance cannot be obtained against an adult who is co-defendant with a minor: *Lumley v Ravenscroft* [1895] 1 Q.B. 683, commented on in *Basma v Weekes* [1950] A.C. 441, 456.

^{238.} See below, para.27-051

^{239.} *Howlett v Haswell* (1814) 4 Camp. 118.

^{240.} *Green v Greenbank* (1816) 2 Marsh. 485.

^{241.} *Williams v Harrison* (1691) Carth. 160; 1 Roll.Abr. Action sur Case, D (3).

^{242.} Unless it forms one term of an otherwise beneficial contract of service, etc.: *Slade v Metrodent Ltd* [1953] 2 Q.B. 112.

^{243.} *Milner v Lord Harewood* (1810) 18 Ves. 259, 274; *Field v Moore* (1854) 7 De G.M. & G. 691.

^{244.} *Overton v Bannister* (1844) 3 Ha. 503; *Mattei v Vautro* (1898) 78 L.T. 682. But see CPR r.21.10(2), above, para.9-035, which enables the court to sanction a compromise by a minor even where no proceedings are otherwise contemplated, on which see *Drinkall v Whitwoord* [2003] EWCA Civ 1547, [2004] 1 W.L.R. 462 applying *Dietz v Lennig Chemicals Ltd* [1969] 1

A.C. 170.

[245.](#) *Re Davenport* [1963] 1 W.L.R. 817.

[246.](#) *Southerton v Whitlock* (1726) 2 Str. 690; *Williams v Moor* (1843) 11 M. & W. 256, 298.

[247.](#) See for its effect the 25th edition of the present work, paras 569-570.

[248.](#) Minors' Contracts Act 1987 s.1.

[249.](#) cf. *Brown v Harper* (1893) 68 L.T. 488.

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Section 2. - Minors ²⁴

(e) - Third Parties and Incapacity

Third parties

9-052

In general, lack of capacity of a minor is a personal privilege and does not prevent the other party being bound. However, there are circumstances where a third party has taken advantage of the invalidity of a minor's contract. Thus, for example, in one case an impresario employed an infant who had entered an unreasonable deed of apprenticeship with the plaintiff. The latter's action against the impresario for enticement was rejected by the court as the contract of apprenticeship was invalid as between its parties. ²⁵⁰ Similarly, where a minor has entered a contract which is not binding on him then a third party who induces him to enter another contract in circumstances which (putting aside the issue of minority) would constitute breach of contract is not liable in the tort of inducing breach of contract. ²⁵¹ Another example used to be found in the liability of the guarantor of an infant's debts. By s.1 of the Infants Relief Act 1874, a loan to an infant was made absolutely void and there was authority that this meant that any guarantors of the loan were not bound by their guarantee. ²⁵² However, s.2 of the Minors' Contracts Act 1987 expressly ²⁵³ provides that where a guarantee is given in respect of an obligation of a party to a contract made after its commencement and that obligation is unenforceable against him (or he repudiates the contract) on the grounds of minority, then the guarantee is not unenforceable for that reason alone. ²⁵⁴ The extent to which a minor may give title to property, which may have consequences for third parties, is discussed below. ²⁵⁵

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

^{250.} *De Francesco v Barnum* (1890) 45 Ch. D. 430, 438 and 443.

^{251.} *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93 at [33].

^{252.} *Coutts & Co v Browne-Lecky* [1947] K.B. 104.

^{253.} As s.1 of the Minors' Contracts Act 1987 repeals s.1 of the 1874 Act, it would otherwise have been arguable that a guarantor of an unenforceable (as opposed to a void) loan should be liable.

^{254.} See also s.113(7) of the Consumer Credit Act 1974, as amended by the Minors' Contracts Act

1987 s.4.

[255.](#) See below, paras 9-072—9-074.

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(f) - Liability of Minor in Tort and Contract

Liability for tort

9-053

In principle, minors are liable for the torts which they commit, ²⁵⁶ though the incidence of liability in tort may be affected by their age. ²⁵⁷ However, if the claim in tort arises out of a contract upon which the minor is not liable, the claimant may not treat the breach of that contract as a tort and sue accordingly:

“If one delivers goods to an infant on a contract, knowing him to be a minor, he shall not be charged for them in trover or conversion.” ²⁵⁸


Therefore, where a minor, having hired a horse, injured it by riding it too hard, it was held that he was not liable in an action for the tort, ²⁵⁹ and where a minor obtained a loan by falsely misrepresenting his age he could not be made liable in damages for deceit. ²⁶⁰ In *Fawcett v Smethurst* ²⁶¹ a minor hired a car to fetch his bag from the station six miles away. He met a friend with whom he drove on further. The car caught fire and was damaged on the extra journey without the negligence of the minor. It was held that he was not liable in tort, as the extra journey did not take his actions outside the scope of the contract, nor in contract, as the hiring did not render him liable for loss arising without fault on his part. Although the hiring itself might have been necessary, the contract would not have been binding on him had its effect been to render him liable without fault.

Torts independent of the contract

9-054

⚠ On the other hand, if the tort may properly be considered as arising independently of the contract or outside its ambit altogether, the minor can be made liable. So a minor who hired a mare “merely for a ride” and was warned at the hiring that she was unfit for jumping, having lent her to a friend who killed her by that act, was held to be guilty of a bare trespass, not within the object of the hiring, and to be consequently liable. ²⁶² A minor who embezzled money belonging to his employer was held liable in an action for money had and received because he would have been liable in trover ²⁶³; and one who hired a microphone and improperly parted with it to a friend was held liable in an action of detinue. ²⁶⁴ It is generally assumed that a minor who buys non-necessary goods cannot be sued in conversion even where he fails to pay the price and keeps the goods. ²⁶⁵ ⚠ But it has been held that a bailee underage who refuses to return goods delivered to him by the bailor may be sued in detinue, ²⁶⁶ and that non-necessary goods sold to a minor can be recovered, when he refuses to pay for them, though the minor is not liable to damages for conversion. ²⁶⁷ It is more likely, however, that a court will exercise its discretion under s.3 of the Minors’ Contracts Act 1987 to require a minor to transfer to the

claimant any property acquired by the defendant under the contract, or any property representing it.

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- [24.](#) The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.
- [256.](#) *Bristow v Eastman* (1794) 1 Esp. 172; *Defries v Davis* (1835) 1 Scott 594. cf. above, para.1-192.
- [257.](#) e.g. in the tort of negligence the standard of care varies according to the age of a child defendant: *McHale v Watson* [1966] A.L.R. 513; *Mullin v Richards* [1998] 1 W.L.R. 1304 and cf. *Gough v Thorne* [1966] 3 All E.R. 398 (defence of contributory negligence).
- [258.](#) *Manby v Scott* (1659) 1 Sid. 109, 129; cf. *R. v McDonald* (1885) 15 Q.B.D. 323, 327.
- [259.](#) *Jennings v Rundall* (1799) 8 Term R. 335.
- [260.](#) *Johnson v Pye* (1665) 1 Sid. 258; *Stikeman v Dawson* (1847) 1 De G. & Sm. 90; *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607, 612.
- [261.](#) (1915) 84 L.J.K.B. 473.
- [262.](#) *Burnard v Haggis* (1863) 14 C.B.(N.S.) 45. See also *Walley v Holt* (1876) 35 L.T. 631.
- [263.](#) *Bristow v Eastman* (1794) 1 Esp. 172; *Re Seager* (1889) 60 L.T. 665. cf. *Cowern v Nield* [1912] 2 K.B. 419.
- [264.](#) *Ballett v Mingay* [1943] K.B. 281.
- [265.](#)  Atiyah (1959) 22 M.L.R. 273, 281. The view that the minor is not liable is supported by the generally accepted opinion that property in non-necessary goods may pass to the minor: *Stocks v Wilson* [1913] 2 K.B. 235, 246 and see Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.12–031. cf. Minors' Contracts Act 1987 s.3(1) which refers to "property acquired" by the minor and to the power of the court to order him to "transfer" such property.
- [266.](#) *Mills v Graham* (1804) 1 B. & P.N.R. 140 (minor refusing to return skins delivered for finishing). Detinue was abolished by s.2(1) of the Torts (Interference with Goods) Act 1977, and replaced by liability in conversion. See also *R. v McDonald* (1885) 15 Q.B.D. 323; *Robinson's Motor Vehicles Ltd v Graham* [1956] N.Z.L.R. 545.
- [267.](#) *Re Henderson* (1916) 12 Tas. L.R. 40; cf. *Hall v Wells* [1962] Tas. S.R. 122, 128–129.
- [268.](#) See below, paras 9-061 et seq.

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(g) - Liability of Minor to Make Restitution

Generally

9-055

In general a minor cannot be sued on his contracts, but this rule leaves open the question whether he may be made to make restitution to the other party for benefits conferred on him under the contract. Such benefits may consist of the receipt of money, goods, interests in land or services. Common law, equity and statute have different answers to this question of a minor's liability in restitution. ²⁶⁹

At common law

9-056

⚠ The common law rule is that a minor is not liable to restore benefits conferred on him under a contract which is unenforceable against him, even if the contract results from his fraudulent misrepresentation of majority. ²⁷⁰ Despite this rule, however, three possible routes may exist to recovery. The first route is for the other contracting party to rely on an independent tort which the minor has committed, for example, conversion or deceit, damages for which may compensate him for the loss which he has suffered by the minor's retention of the benefit, even though this may not always be the same as the minor's gain. ²⁷¹ The second route is for the other contracting party to find such an independent tort, "waive" it and sue for any money had and received in respect of property conferred on the minor. ²⁷² The third possible route to recovery at common law would be to claim restitution of money paid under an unenforceable contract to a minor based on a total failure of consideration, but this route has been rejected by the courts. ²⁷³ It has, however, been argued that, for the purposes of a claim at common law against a minor based on unjust enrichment, a distinction should be drawn between the repayment of benefits which they still have at the time of the claim (which should be recoverable) and claims for the value of benefits which are gone at the time of the claim (which should not be). ²⁷⁴ ⚠ Similar considerations apply to the denial of claims for the value of non-necessary goods and services supplied to a minor who has failed to pay the contractual price; for holding a minor even to a reasonable price would undermine his protection. Thus in *Lemprière v Lange*, for example, a lease which a minor had taken was set aside and possession by him given up, but the court refused to award a sum to the lessor as damages for use and occupation of the land on the ground that the two remedies were incompatible. ²⁷⁵

In equity

9-057

It is no answer at law to a plea of incapacity based on lack of age that the defendant at the time of entering into the contract fraudulently represented himself to be of full age, and that the other party

believing this representation and on the faith of it contracted with him ²⁷⁶ nor did these facts before the Judicature Act form the subject of a good replication on equitable grounds to a plea of infancy. ²⁷⁷ But in certain cases equity will grant relief against the minor, not on the ground of enforcing the contract, or recovering the debt, but of an equitable liability resulting from the fraud. He will be compelled to restore his illgotten gains, or to release the party deceived from obligations or acts in law induced by the fraud. ²⁷⁸ This obligation is, however, strictly limited in extent.

Restoration of gains ²⁷⁹

9-058

❗ If a minor has obtained property by fraudulently misrepresenting his age, ²⁸⁰ he can be compelled to restore it; if he has obtained money, he can be compelled to refund it. ²⁸¹ This remedy is an equitable one and arises quite independently of the contract. ²⁸² It lasts, however, only so long as the minor retains the property or money or, perhaps, the proceeds of the property or money. If he has sold the goods or spent the money, he cannot be compelled through a personal judgment to pay an equivalent sum out of his present or future resources, for this would be nothing but enforcing an unenforceable contract ²⁸³; “[r]estitution stopped where repayment began”. ²⁸⁴ In *Stocks v Wilson*, ²⁸⁵ however, a minor who had obtained non-necessary goods by fraudulently misrepresenting his age was held bound to account for the proceeds of their sale. This decision was criticised, although not expressly overruled by the Court of Appeal in *R. Leslie Ltd v Sheill*. ²⁸⁶ Sir Frederick Pollock ²⁸⁷ considered the decision to be correct on the principle of following the property (i.e. as represented by the money) and not otherwise. His view is supported by other textbook writers ²⁸⁸ ❗ and it is suggested that a fraudulent misrepresentation of full age by a minor will allow the person deceived to trace his property in equity by an action in rem similar to that possessed by a beneficiary in respect of trust property. ²⁸⁹ ❗

“Bankruptcy debt”

9-059

Under the Insolvency Act 1986 s.382, a “*bankruptcy debt*” means any debt or liability to which a bankrupt is subject either at the commencement of the bankruptcy or to which he may become subject after the bankruptcy by reason of any obligation incurred before the commencement of the bankruptcy and for this purpose “liability” includes “a liability to pay money, ... any liability in contract ... and any liability arising out of an obligation to make restitution”. ²⁹⁰ Thus, while a person who has loaned money to a minor may not prove this as a debt in the latter’s bankruptcy, there being no enforceable liability against the minor, ²⁹¹ if that person was induced to make the loan by the minor’s fraudulent misrepresentation of age, then any equitable liability in the minor arising from the fraud may be proved as a “bankruptcy debt”. ²⁹²

Release from obligations

9-060

A party who has been induced to enter into an obligation or to perform some act in law by the fraudulent misrepresentation of a minor that he is of full age will be released from that obligation and restored, where possible, to his former position. In *Clarke v Cobley* ²⁹³ the defendant, a minor, by such a misrepresentation, induced the plaintiff to accept a bond for the amount of two promissory notes drawn by the defendant’s wife before her marriage. The plaintiff accordingly gave up the notes. When the plaintiff discovered the fact of the defendant’s incapacity he filed a bill after the defendant had attained majority, praying that the defendant might be ordered to execute a fresh bond, or to pay the money secured, or deliver back the notes to him. The court ordered this last and also that the defendant should not plead limitation to any action brought upon them or set up any other plea open to him when the bond was executed, but refused to decree payment of the money, holding that the

court could do no more than see that the parties were restored to the same situation in which they were at the date of the bond. And where a minor obtained a lease by fraudulently misrepresenting that he was of full age, the court set it aside and ordered him to give up possession and to pay his costs.²⁹⁴

Minors' Contracts Act 1987 s.3

9-061

The most important means by which a minor may be ordered to make restitution of benefits obtained under a contract unenforceable against him is found in s.3 of the Minors' Contracts Act 1987, which provides that:

"... the court may, if it is just and equitable to do so, require the defendant [minor] to transfer to the plaintiff [other contracting party] any property acquired by the defendant under the contract, or any property representing it."

This provision gives a considerable discretion to the court to order restitution of property acquired by a minor under a contract, unless it is one for necessities and therefore binding on him.²⁹⁵ It is wider than the equitable remedy already described which is only available where fraud on the part of the minor is established.²⁹⁶

"Property"

9-062

⚠ Only property acquired by a minor under the contract is included: thus any property acquired by way of inducement to enter the contract falls outside the section. "Property" itself is not defined by the Act. Clearly, it includes chattels and it is submitted that it should be taken to include interests in land to the extent that a minor is permitted by law to hold them.²⁹⁷ More difficult is the question whether "property" includes money. Although there is some authority in the context of the equitable relief against fraud for recovery of money representing the proceeds of sale of goods transferred,²⁹⁸ this was subject to criticism.²⁹⁹ The better view, it is submitted, is that money should be included within the statutory definition of property.³⁰⁰ ⚠ The concern to prevent indirect enforcement of a minor's contract which led to the refusal of recovery of monies in equity as at common law may be fully taken into account as a factor in the discretion which s.3 confers.

"Any property representing it"


9-063





⚠ This phrase gives the court power to order the transfer, not only of property acquired by a minor, but also the product of its exchange, and, assuming money is included within the provision,³⁰¹ its proceeds on sale.³⁰² ⚠ This will give rise to a process of statutory tracing, for which cases at common law and in equity may, though in different contexts, serve as illustrations.³⁰³ However, it has been suggested that certain difficulties encountered in these cases, for example the identification of the exchange product of proceeds in a mixed fund, may go to the discretion of the court to make an award under s.3.³⁰⁴ For example, if a minor has sold non-necessary goods acquired under a contract of sale and placed the money in a bank account together with other monies, the court should hesitate to apply the rules as to tracing of money through accounts in equity which were constructed for and are appropriate to the context of trustees or fiduciaries.³⁰⁵ In the minor's context, the effect of the award should not be, or even, perhaps, risk being, the payment out of his present or future resources of a sum equivalent to that owed under a contractual obligation.

Discretion

9-064

It is submitted that a court should look in deciding whether to make an order under s.3 at the general fairness of the contract which the minor has made. In particular, if the other contracting party took advantage of the minor's inexperience or tricked him, then the latter should not be held liable to restore property acquired. Clearly, the question whether a minor appears or does not appear to be of full capacity, even in the absence of misrepresentation as to full age, will be relevant to the exercise of the discretion. The most important issue in this exercise will be the balance between the need to preserve the minor's protection which is the basis of his contractual incapacity and the interests of the other contracting party in recovery of benefits conferred by him on the minor.

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- [24.](#) The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.
- [269.](#) See Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2011), paras 34–11 et seq.; Burrows, *The Law of Restitution*, 3rd edn (2012) pp.700–702.
- [270.](#) *Johnson v Pye* (1665) 1 Sid. 258; *Liverpool Adelphi Loan Association v Fairhurst* (1854) 9 Exch. 422.
- [271.](#) See above, paras 9-053—9-054.
- [272.](#) *Bristow v Eastman* (1794) 1 Esp. 172 and see Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2011), para.34–13.
- [273.](#) *Cowern v Nield* [1912] 2 K.B. 491; *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607. cf. *Thavorn v Bank of Credit & Commerce International SA* [1985] 1 Lloyd's Rep. 259 (where it was held that a minor was not liable to make restitution for monies received under a mistake of fact).
- [274.](#)  Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 34-16–34-17.
- [275.](#) (1879) 12 Ch. D. 675 and see below, para.9-060.
- [276.](#) *Johnson v Pye* (1665) 1 Sid. 258; *Liverpool Adelphi Loan Association v Fairhurst* (1854) 9 Exch. 422, 430; *Inman v Inman* (1873) L.R. 15 Eq. 260; *Levene v Brougham* (1909) 25 T.L.R. 265 (no estoppel).
- [277.](#) *Bartlett v Wells* (1862) 1 B. & S. 836; *De Roo v Foster* (1862) 12 C.B.(N.S.) 272.
- [278.](#) See Atiyah (1959) 22 M.L.R. 273.
- [279.](#) See generally Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 34-18–34-29 et seq. and below, Ch.29.
- [280.](#) The representation must be explicit and not inferential: *Stikeman v Dawson* (1847) 1 De G. & Sm. 90; *Maclean v Dummett* (1869) 22 L.T. 710; *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109, 120–121. See also *Nelson v Stocker* (1859) 4 De G. & J. 458.
- [281.](#) *Stocks v Wilson* [1913] 2 K.B. 235.

- [282.](#) *Re King Ex p. Unity Joint Stock Mutual Banking Association* (1858) 3 De G. & J. 63; *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109; *Stocks v Wilson* [1913] 2 K.B. 235.
- [283.](#) *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607, 618.
- [284.](#) [1914] 3 K.B. 607, 618, per Lord Sumner.
- [285.](#) [1913] 2 K.B. 235, 247.
- [286.](#) [1914] 3 K.B. 607.
- [287.](#) Pollock, *Principles of Contract*, 13th edn (1950), p.64.
- [288.](#)  Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 30th edn (2016) pp.263–264; Peel, *Treitel on The Law of Contract*, 14th edn (2015) para.12–046. cf. Burrows, *The Law of Restitution*, 3rd edn (2012), pp.701–702; Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th edn (2007), pp.563–565.
- [289.](#)  cf. Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 34-29 who argue for a distinction between allowing recovery where the minor still has the value received at the time of the claim and denying it where he does not; Atiyah (1959) 22 M.L.R. 273. See below, paras 29-166 et seq.
- [290.](#) Insolvency Act 1986 s.382(4).
- [291.](#) *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109 (decided under the old law). For the position as to loans for necessities, see above, para.9-023.
- [292.](#) *Re King Ex p. Unity Joint-Stock Mutual Banking Association* (1858) 3 De G. & J. 63; *Stocks v Wilson* [1913] 2 K.B. 235, 246 and see above, paras 9-057—9-058.
- [293.](#) (1789) 2 Cox. 173 (fraud must be presumed though not appearing specifically in the report).
- [294.](#) *Lemprière v Lange* (1879) 12 Ch. D. 675. A claim by the lessor for damages for use and occupation was held inconsistent with this relief and dismissed. See also *Cory v Gertcken* (1816) 2 Madd. 40; *Overton v Banister* (1844) 3 Ha. 503; *Woolf v Woolf* [1899] 1 Ch. 343.
- [295.](#) See above, paras 9-010 et seq.
- [296.](#) See above, para.9-057.
- [297.](#) See above, para.9-040.
- [298.](#) *Stocks v Wilson* [1913] 2 K.B. 235.
- [299.](#) *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607.
- [300.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015) para.12–041.
- [301.](#) See above, para.9-062.
- [302.](#)  It has been suggested that the courts should to take a wider view of s.3(1), and be prepared to exercise their statutory discretion to allow claims against minors whose overall wealth is still swollen by value received by the claimant: Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.34-31.
- [303.](#) See below, paras 29-166 et seq.

[304.](#) Treitel at para.12-042.

[305.](#) Burrows, *Law of Restitution*, 7th edn (2007) at pp.88 et seq.

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(h) - Agency and Membership of Societies

Minor as principal

9-065

A minor cannot execute a valid power of attorney, ³⁰⁶ but he is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract. ³⁰⁷ A minor may validly appoint an agent where he earns his living in a manner which necessitates this. ³⁰⁸ And it seems that if a minor authorises an agent to purchase necessities for him, and the agent pays for them, the minor can be compelled to reimburse the agent. ³⁰⁹

Minor as agent

9-066

A minor can act as agent or as the donee of a power of attorney ³¹⁰ but is not personally liable on the contracts entered into on behalf of his principal. ³¹¹

Membership of societies

9-067

Subject to certain conditions, a minor may become an associate of a friendly society, ³¹² or a member of a registered co-operative or community benefit society, ³¹³ a trade union, ³¹⁴ or a building society. ³¹⁵

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

^{306.} *Zouch v Parsons* (1765) 3 Burr. 1794; *Olliver v Woodroffe* (1839) 4 M. & W. 650; *Doe d. Thomas v Roberts* (1847) 16 M. & W. 778, 780. An act done by an agent under a void power of attorney is itself void.

^{307.} See Vol.II, para.31-038; Megarry (1953) 69 L.Q.R. 446; Webb (1955) 18 M.L.R. 461. cf. *Shepherd v Cartwright* [1953] Ch. 728, 755, and see *G.(A.) v G.(T.)* [1970] 3 All E.R. 546, 549.

- [308.](#) *Denmark Productions Ltd v Boscobel Productions Ltd* (1967) 111 S.J. 715.
- [309.](#) See above, para.9-023.
- [310.](#) *Watkins v Vince* (1818) 2 Stark 368; *Re D'Angibau* (1880) 15 Ch. D. 228, 246.
- [311.](#) *Smally v Smally* (1700) 1 Eq. Cas. Abr. 283.
- [312.](#) Friendly Societies Act 1992 s.119A(1)(a).
- [313.](#) Co-operative and Community Benefit Societies Act 2014 s.31. The 2014 Act provides that societies registered for the purposes of the 2014 Act consist of those registered under its own provisions (which provide for the registration of co-operative societies and community benefit societies) and of societies already registered under the Industrial and Provident Societies Act 1965 s.20: ss.1 and 2.
- [314.](#) Explicit provision to this effect was formerly found in the Trade Union Act Amendment Act 1876 s.9 but this Act was repealed by the Industrial Relations Act 1971 and the right of a minor to be a member of a trade union seems now to depend on inference. cf. Trade Union and Labour Relations (Consolidation) Act 1992 s.174.
- [315.](#) Building Societies Act 1986 Sch.2 para.5(3), as amended by the Building Societies Act 1997 s.2(2)(b).

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(i) - Liability of Parent or Guardian

Parent not liable for minor's debts

9-068

A parent may be ordered to provide financial relief for the benefit of his or her child, ³¹⁶ but apart from agency ³¹⁷ or personal contract, he is no more liable to pay a debt contracted by the child with a third party (even for necessities) than a mere stranger would be. ³¹⁸ The same principles apply in the case of a guardian and ward.

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

^{316.} Children Act 1989 s.15(1), Sch.1 para.1. See also Social Security Administration Act 1992 ss.105–106.

^{317.} e.g. where a parent expressly or impliedly authorises the minor to contract on his behalf or where his wife or some other person, such as his servant, has authority to pledge his credit: *Cooper v Phillips* (1831) 4 C. & P. 581; *Bazeley v Forder* (1868) L.R. 3 Q.B. 559; *Collins v Cory* (1901) 17 T.L.R. 242. cf. *Fluck v Tollemache* (1823) 1 C. & P. 5; *Urmston v Newcomen* (1836) 4 A. & E. 899; *Ruttinger v Temple* (1863) 4 B. & s.491.

^{318.} *Fluck v Tollemache* (1823) 1 C. & P. 5; *Shelton v Springett* (1851) 11 C.B. 452; *Mortimore v Wright* (1840) 6 M. & W. 482. cf. *Hesketh v Gowing* (1804) 5 Esp. 131; *Gore v Hawsey* (1862) 3 F. & F. 509 (illegitimate children recognised by father); *Greenspan v Slate* (1953) 97 A. 2d. 390 (parent liable for cost of emergency medical treatment to child though he had refused to authorise it).

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(j) - Procedure in Actions

Procedure

9-069

Formerly, under the Rules of the Supreme Court and the County Court Rules, a minor sued by his next friend and defended by his guardian ad litem. ³¹⁹ However, since the coming into effect of the Civil Procedure Rules 1998, proceedings involving minors (termed by these rules, “children”) are governed by a uniform set of rules ³²⁰ under which “a child must have a litigation friend to conduct proceedings on his behalf” unless the court otherwise orders, and the former distinction between next friends and guardians ad litem is therefore no longer drawn. ³²¹ Under these rules, special provision is made for the assessment of costs of proceedings where the claimant is a child and where money is ordered to be paid to him or for his benefit or where money is ordered to be paid by him or on his behalf. ³²² As earlier noted, the CPR makes special provision for the approval by the court of settlements or compromises made by a minor. ³²³

Joint obligations

9-070

Where one of two joint contracting parties is a minor whose promise is voidable or unenforceable against him, there is no need to join him as a party to the action and the action may be maintained against the adult only; but if both are sued and the minor relies on his lack of capacity, a claimant may still recover against the adult defendant. ³²⁴ Moreover, in contrast with the position at common law, ³²⁵ since 1987 where a contract is entered by a minor and the latter’s obligations are guaranteed by an adult, the unenforceability of those obligations against the minor shall not alone render the guarantee unenforceable. ³²⁶

Defence of minority

9-071

Under the Civil Procedure Rules, where a defendant denies an allegation in the claimant’s particulars of claim, he must state his reasons for doing so ³²⁷ and so a child who intends to rely on a defence of minority to a claim for the enforcement of a contract should make this clear in the defence which he files.

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors’ contracts but the only recommendation

which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts (1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

- [319.](#) RSC Ord.80 rr.1 and 2; CCR Ord.10 r.1.
- [320.](#) CPR Pt 21 which also governs litigation involving “protected parties”, i.e. “a party, or an intended party, who lacks capacity to conduct the proceedings”. cf. below, para.9-097.
- [321.](#) CPR r.21.1(2).
- [322.](#) CPR r.46(4) (formerly r.48.5).
- [323.](#) CPR r.21(10), above para.9-035.
- [324.](#) See, e.g. *Burgess v Merrill* (1812) 4 Taunt. 468; *Gillow v Lillie* (1835) 1 Scott 597; *Lovell & Christmas v Beauchamp* [1894] A.C. 607; *Wauthier v Wilson* (1912) 28 T.L.R. 239. See below, para.17-005.
- [325.](#) *Coutts v Browne-Lecky* [1947] K.B. 104.
- [326.](#) Minors' Contract Act 1987 s.2(1) and see Vol.II, para.45-040.
- [327.](#) CPR r.16.5.

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(k) - Disposition of Property by Minors

Disposition of property by delivery

9-072

A minor can clearly dispose of property under a contract which is binding on him, but there are also cases in which a minor can effectively dispose of property belonging to him under a contract which is not binding on him. So, for instance, it has been held that a gift of a chattel by a minor is irrevocable after delivery. ³²⁸ And money paid by a minor under a contract which is voidable or unenforceable against him cannot be recovered by him unless there is a total failure of consideration, ³²⁹ although if the minor paid it under a mistake as to the voidable nature or unenforceability of the contract, he may be able to recover it on the basis of this mistake of law. ³³⁰

Disposition of property by grant

9-073

A disposition of property not accompanied by delivery is, in general, ineffective against a minor. ³³¹ So, for instance, an assignment of an interest in a trust fund by way of security (at least if it is intended to secure an unenforceable obligation) is, it seems, ineffective to pass any interest as against a grantor who is a minor. ³³² And a mortgage granted by a minor to secure an unenforceable loan is itself unenforceable. ³³³ On the other hand, in *Chaplin v Leslie Frewin (Publishers) Ltd*, ³³⁴ it was held that a contract whereby a minor assigned the copyright in a written work to a publisher was effective to pass the copyright and that even if the contract was voidable the minor could not revoke the contract so as to restore the copyright to himself. ³³⁵

Dispositions relating to land

9-074

A minor cannot grant a legal estate in land. But a minor may convey an equitable interest in land, whether by way of outright sale or by way of lease only. So long as the transfer is executory only it seems that the minor would not be bound by it, ³³⁶ but the position may be different after the grantee has gone into possession.

^{24.} The Report of the Committee on the Age of Majority (1967) Cmnd.3342 contained proposals for fundamental changes in the law relating to minors' contracts but the only recommendation which was implemented was the reduction of the age of majority to 18. Many other proposals for reform were canvassed in the Law Commission Working Paper No.81 on Minors' Contracts

(1982), including a possible further reduction in the age of contractual capacity to 16. The Law Commission's Report on Minors' Contracts (1984) Law Com. No.134 led to the Minors' Contracts Act 1987, on which see below, paras 9-051, 9-061—9-064.

- [328.](#) *Taylor v Johnston* (1882) 19 Ch. D. 603, 608 and see *Pearce v Brain* [1929] 2 K.B. 310 (where it was held that a minor who delivers a chattel belonging to him under a contract "absolutely void" under s.1 of the Infants' Relief Act 1874 cannot recover it unless there has been a total failure of consideration). cf. Halsbury's Laws of England, 4th edn, Vol.20, para.10 and see *G.(A.) v G.(T.)* [1970] 3 All E.R. 546, 549.
- [329.](#) *Wilson v Kearse* (1800) Peake Add. Cas. 196; *Corpe v Overton* (1833) 10 Bing. 252, 259; *Re Burrows* (1856) 8 De G.M. & G. 254, 256; *Valentini v Canali* (1889) 24 Q.B.D. 166; *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452.
- [330.](#) cf. *Kleinwort Benson v Lincoln City Council* [1998] 3 W.L.R. 1095, on which see below, paras 29-044 et seq.
- [331.](#) *Zouch v Parsons* (1765) 3 Burr. 1794, 1807, 1808; *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1772 at [22], [25]–[26].
- [332.](#) *Inman v Inman* (1873) 15 Eq. 260. See also *Martin v Gale* (1876) 4 Ch. D. 428.
- [333.](#) *Nottingham Permanent Benefit Building Society v Thurston* [1903] A.C. 6, which was decided under the Infants' Relief Act 1874 and held that a mortgage to secure a void loan was itself void.
- [334.](#) [1966] Ch. 71. There are dicta in this case (at 94) which appear to suggest that a minor can never, by repudiating a voidable contract, recover property which has passed to the other party. This may be true (at least if there is no total failure of consideration) where the contract is voidable in the normal sense of the word, but it is doubtful if this is correct where the contract is void as against the minor, rather than voidable. cf. at 96.
- [335.](#) cf. *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764 at [26], Baroness Hale of Richmond commenting that "the effect of even a contractual assignment of copyright by a minor is, to say the least, controversial" and explaining the majority decision in *Chaplin v Leslie Frewin (Publishers) Ltd* as resting on the proposition that "at least if copyright were effectively assigned as part of a beneficial contract to supply services, then it was binding upon the infant and could not be avoided".
- [336.](#) *Zouch v Parsons* (1765) 3 Burr. 1794.

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(a) - The Rule in *Imperial Loan Co Ltd v Stone* ³³⁷
(i) - The Requirement of Knowledge of a Party's Mental Incapacity

Background

9-075

The older English treatment of the validity of contracts made by lunatics ³³⁸ was uncertain: Bracton followed Roman law in holding that such contracts were void, ³³⁹ but later writers and courts qualified this position by holding that “no man could be allowed to stultify himself, and avoid his acts, on the ground of his being non compos mentis.” ³⁴⁰ However, putting aside the special treatment of a mentally incapable person's liability for necessities, ³⁴¹ the modern general approach was set out fairly clearly in *Molton v Camraux* in 1848–1849, Pollock C.B. stating that:

“unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shewn that the defendant was not of capacity to contract, and the plaintiff knew it.” ³⁴²

On appeal, the Exchequer Chamber agreed with this rule, considering that a contract made a person of unsound mind, but who appeared to be of sound mind, is valid as long as the incompetence was not known to the other party. ³⁴³

Imperial Loan Co Ltd v Stone

9-076

This position was confirmed by the Court of Appeal in what became the leading English authority, *Imperial Loan Co Ltd v Stone* ³⁴⁴ where Lord Esher M.R. said:

“When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.”

The Court of Appeal in *Imperial Loan Co Ltd* therefore held that in general a contract made by a mentally incapable person is valid unless he or she establishes both that he was mentally incapable at the time and that the other party was aware of this, the burden of proof on both issues lying on the

person so claiming.³⁴⁵ It will be seen that the common law position governing mental incapacity therefore differs very considerably from the position governing minors' incapacity, where the general rule is that a contract made by a minor is voidable at his or her option, without any requirement of knowledge of the minor's lack of age by the other contracting party.³⁴⁶ This difference is sometimes explained on the basis that mental incapacity is harder to detect than minority because it is a matter of medical opinion rather than an objectively verifiable fact,³⁴⁷ but a minor's age may be equally undetectable as a person's mental incapacity where the other contracting party deals at a distance, by post, email or the internet.

No special equitable ground of avoidance based on "unfairness"

9-077

Moreover, in *Hart v O'Connor*³⁴⁸ the Privy Council rejected the New Zealand Court of Appeal's view that references in *Imperial Loan Co Ltd* and other authorities to a contract made by a mentally incapable person as being voidable on the ground of "unfairness" reflected a distinct ground of equitable relief special to the context,³⁴⁹ holding that they instead referred to cases where "the conscience of the plaintiff was in some way affected", that is to cases of:

"actual fraud (which the courts of common law would equally have remedied) or constructive fraud, i.e. conduct which falls below the standards demanded by equity, traditionally considered under its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power."³⁵⁰

As a result:

"the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of 'unfairness' unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane."³⁵¹

These more widely applicable doctrines have been discussed earlier.³⁵²

^{337.} So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale DPSC.

^{338.} The terminology used by English lawyers to refer to persons suffering from a mental incapacity has changed significantly, earlier cases referring to "lunatics", cases decided while the Mental Health Act 1983 was in force referring to "patients", and more recent cases (especially after the passing of the Mental Capacity Act 2005) referring to the mental incapacity of a person.

^{339.} Bracton, *De legibus*, Lib. 3, tit. 19 §8, p. 100.

^{340.} *Molton v Camroux* (1848) 2 Exch. 487 at 500 per Pollock C.B., affd (1849) 4 Exch. 17 and see Holdsworth, *History of English Law*, Vol.VIII, pp.52–53; *Hart v O'Connor* [1985] A.C. 1000 at 1018–1019.

^{341.} See below, para.9-095. *Manby v Trott* (1662) 1 Sid. 109, 112; *Baxter v Earl of Portsmouth* (1826) 5 B. & C. 170; *Re Rhodes* (1890) 44 Ch. D. 94. This distinct law was accepted by Pollock C.B. in *Molton v Camroux* (1848) 2 Exch. 487 at 501.

^{342.} *Molton v Camroux* (1848) 2 Exch. 487 at 501 per Pollock C.B.

- [343.](#) *Molton v Camroux* (1849) 4 Exch. 17 esp. at 18–19; followed by *Beavan v M'Donnell* (1854) 9 Exch. 309. Earlier cases include *Niell v Morely* (1804) 9 Ves. 478; *Browne v Joddrell* (1827) Moo. & M. 105;
- [344.](#) [1892] 1 Q.B. 599, 601.
- [345.](#) *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599 at 601 (Lord Esher M.R.); 603 (Lopes L.J.); Goudy (1901) 17 L.Q.R. 147, Wilson (1902) 19 L.Q.R. 21.
- [346.](#) Above, paras 9-007, 9-049 et seq. A minor is in principle not liable in the tort of deceit for fraudulently misrepresenting his or her age: above, para.9-053. The main exception to the general position is found in relation to the minor's liability for necessities: above, paras 9-010 et seq.
- [347.](#) Burrows, *The Law of Restitution*, 3rd edn (2012), pp.315–316.
- [348.](#) *Hart v O'Connor* [1985] A.C. 1000.
- [349.](#) *Archer v Cutler* [1980] 1 N.Z.L.R. 386 discussed (and not followed) by the PC in *Hart v O'Connor* [1985] A.C. 1000 at 1016–1028. The earlier English dicta are found in *Molton v Camroux* (1848) 2 Exch. 487 at 502–503, (1849) 4 Exch. 17 at 19; *Imperial Loan Co Ltd* [1892] 1 Q.B. 599 at 603; *York Glass Co Ltd v Jubb* [1925] All E.R. 285 at 289, 292 and 295. Lord Brightman's view of the authorities was criticised by Hudson (1986) Conv. 178.
- [350.](#) *Hart v O'Connor* [1985] A.C. 1000 at 1024 per Lord Brightman (PC). This rejection of the wider doctrine is criticised by Hudson (1986) Conv. 178.
- [351.](#) *Hart v O'Connor* [1985] A.C. 1000, 1027, per Lord Brightman (PC).
- [352.](#) Above, paras 8-057 et seq. and 8-130 et seq.

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(ii) - Constructive Knowledge of a Party's Mental Incapacity

The Supreme Court's view in *Dunhill v Burgin*

9-078

⚠ In *Imperial Loan Co Ltd* the Court of Appeal expressed the rule allowing a mentally incapable person to avoid a contract as subject to a condition that the other party *knew* of the incapacity³⁵³ and this is the way in which the rule has been expressed by earlier editions of the present work,³⁵⁴ and by other works on English contract law.³⁵⁵ ⚠ However, in 2014 in *Dunhill v Burgin*, Baroness Hale of Richmond DPSC, with whom the other members of the Supreme Court agreed without further comment,³⁵⁶ expressed the rule in *Imperial Loan Co Ltd v Stone*³⁵⁷ in distinctly different terms from the way in which it was expressed both in the judgments of the Court of Appeal in *Imperial Loan Co Ltd* itself, and more generally, observing that it is now generally accepted that a person may avoid a contract which he or she has concluded without the requisite mental capacity where the other party to the contract either knew or *ought to have known* of this incapacity (the latter being referred to for convenience in the present discussion as constructive knowledge).³⁵⁸ This observation was made in the context of holding that a settlement of a claim by a mentally incapable person is valid only with the approval of the court, this result being held to follow from the terms of the CPR.³⁵⁹ Given this interpretation of the CPR, the Supreme Court held that the normal rule applicable to contracts made by a mentally incapable person which it had described does not apply to settlements of claims and, therefore, did not apply to the case before it.³⁶⁰ This means that the Supreme Court's observations on the content of the normal rule applicable to contracts generally were expressly obiter. They have, nevertheless, been accepted by the High Court as an accurate statement of English law.³⁶¹

Comments

9-079

However, with the greatest respect to the learned justices of the Supreme Court, the extension of the availability of avoidance of contracts made by a person incapable of doing so to situations where the other party merely ought to have known of the incapacity should not be seen as generally accepted, since it finds little direct support in the English authorities or in the principle of the objective theory of contract, to which Baroness Hale related the reformulation. Moreover, given this relative lack of support in the authorities and the very considerable practical differences which this extension could involve, it is submitted that such an extension of the situations in which contracts are invalid on grounds of mental incapacity should be made by the Supreme Court only after a full consideration of the authorities (English and otherwise) after argument by counsel, taking into account, to the extent to which it is appropriate for it to do so, the competing considerations of policy. For this extension may be a very significant one in practice, for it could be seen as requiring the courts to work out the circumstances in which a contracting party (and especially those providing goods or services in the

course of a business) should have known of the other party's mental capacity so as to be fixed by this species of constructive knowledge. That this might not be straightforward may be supported by reference to the considerable litigation which followed the House of Lords' decision in *Barclays Bank Plc v O'Brien* ³⁶² which held that a bank/creditor could be fixed with constructive knowledge of the rights of a surety (typically a wife) against a principal debtor (typically her husband or his company). For, as this case-law suggests, a test of constructive knowledge could lead to certain types of factual circumstance putting a would-be contracting party on notice of the possibility of the other's mental incapacity, notice which that other party could then avoid only by investigation or third party advice. ³⁶³ It is submitted, therefore, that the most that should be said is that earlier authorities support the proposition that a party may be fixed with knowledge of another party's mental incapacity where that incapacity is apparent. These points will be supported in the following paragraphs.

Earlier authority supporting extension to constructive notice

9-080

While the judgments of the Court of Appeal in *Imperial Loan Co Ltd* do not themselves support the view that constructive knowledge is enough to allow a mentally incapable person to avoid a contract, ³⁶⁴ there is some support for this view in other cases prior to *Dunhill v Burgin*. ³⁶⁵

Mental incapacity apparent

9-081

In *Molton v Camroux*, ³⁶⁶ which was itself approved in *Imperial Loan Co Ltd*, ³⁶⁷ Pollock C.B.'s judgment in the Court of Exchequer requiring knowledge in the other contracting party and, Patteson J.'s judgment affirming it in the Exchequer Chamber, were both expressed as being restricted to cases where the mental incapacity of the party was not apparent. ³⁶⁸ The reservation of the requirement of knowledge of mental incapacity by the other party to the situation where the incapacity was not ostensible also formed part of Lord Brightman's exposition of the modern law in *Hart v O'Connor*. ³⁶⁹ This qualification suggests that where a person's mental incapacity is apparent, then he or she can avoid any contract made without establishing that the other contracting party actually *knew* of the incapacity. Moreover, for this purpose the apparent nature of the mental incapacity could be judged according to the standard of the reasonable person in the position of the other contracting party, rather than his or her actual apprehension (and so knowledge) of the incapacity. If this was all that was intended by Lady Hale DPSC in *Dunhill v Burgin* in recognising that avoidance of a contract for mental incapacity extends to cases where the other party ought to have known of the incapacity, then this view is supported by these earlier dicta and is, moreover, clearly limited in its extent. On the other hand, this interpretation of Lady Hale's formulation would restrict its significance considerably, for, as earlier suggested, such a test could extend the availability of avoidance of a contract concluded by a mentally incapable person to situations where, owing to the circumstances of the parties or surrounding the conclusion of the contract, the other party was put on notice of the possibility of that incapacity and did not take such steps as to avoid being fixed with constructive knowledge. ³⁷⁰ Such circumstances might not be restricted to cases of apparent mental incapacity.

York Glass Co Ltd v Jubb

9-082

That mental incapacity in a contracting party can lead to avoidance of the contract where the other party ought to have known of that incapacity appears to find its explicit origin in *York Glass Co Ltd v Jubb*. ³⁷¹ There, the receiver of a company had sold the company's buildings and machinery to the defendant, who was later held to have been mentally incapable of contracting at the time. The defendant claimed that at common law he could avoid the contract on the ground that the plaintiff knew of his incapacity or, in the alternative, that he could do so in equity on the ground that the plaintiff knew "or ought to have known" of his incapacity, and that the sale had been made at an overvalue, in the absence of proper advice, and in the absence of equality between the parties. ³⁷² As

regards the first basis of claim, Sir Ernest Pollock M.R. (with whom Warrington and Sargant L.J.J. agreed, while delivering their own judgments ³⁷³) held that a contract made by a person who is apparently sane is valid unless his or her mental incapacity was known to the other contracting party, following *Molton v Camroux* and *Imperial Loan Co Ltd*. ³⁷⁴ For this purpose, he identified the underlying reason for this position, that is that “it would imperil contracts if a party was afterwards entitled to say that he was a lunatic”, ³⁷⁵ quoting Lord Cranworth L.C. in *Elliott v Ince* to similar effect. ³⁷⁶ As regards the alternative basis of defence, Sir Ernest Pollock upheld the decision of the trial judge that the price agreed was not excessive, that the defendant did have the benefit of advice and that there was no reasonable degree of inequality and that, therefore, the terms of the contract entered were fair. ³⁷⁷ It will be seen, therefore, that the defendant’s reliance on what the plaintiff ought to have known as to his mental incapacity formed part of this wider basis for avoidance of the contract, supposedly in equity: as earlier noted, however, such a wider equitable basis of avoidance for mental incapacity was firmly rejected by the Privy Council in *Hart v O’Connor*. ³⁷⁸ Warrington L.J. agreed with Sir Ernest Pollock, but he expressed himself differently, glossing the position set out by Lord Esher in *Imperial Loan Co Ltd* by adding

“the slight corollary that if circumstances are proved which are such that any reasonable man would have inferred from these circumstances that the man was insane, then the man who contracts with him, although he may, without swearing by the card, say he did not know, would be taken to know that the man who was of unsound mind.” ³⁷⁹

Warrington L.J. noted, though, that this position had been accepted by the defendant’s counsel, ³⁸⁰ and that the judge below had decided that the plaintiff had no suspicion of the defendant’s incapacity and that no appeal had been made on this issue. ³⁸¹ Warrington L.J. then held that the alleged distinct equitable defence also failed on the facts for the reasons set out by the judge below. ³⁸² Sargant L.J. agreed, though without referring to Warrington L.J.’s gloss of the rule in *Imperial Loan Co Ltd*. In his view, the defence of lunacy at common law did not apply on the facts as the plaintiff had not known of the lack of incapacity, holding that there was in this respect no difference between the courts of common law and equity. ³⁸³ He expressly reserved the question whether lack of fairness of a contract made by a lunatic could lead to its avoidance in the absence of such knowledge. ³⁸⁴ The most that can be said, therefore, is that the parties in *York Glass Co Ltd* had agreed that constructive knowledge of a party’s mental incapacity would be enough for the latter to avoid the contract, and that Warrington L.J. was content to accept this view of the law; on the other hand, as pleaded, this gloss formed part of the alleged distinct and (possibly) equitable wider ground of avoidance on the basis of unfairness rejected by the Privy Council in *Hart v O’Connor*. ³⁸⁵

Hart v O’Connor

9-083

In the proceedings in *Hart v O’Connor* before the New Zealand courts the plaintiff had claimed that the defendant had known or ought reasonably to have known of his mental incapacity, and while the defendant had denied these claims, he did not dissent from this formulation of the rule in *Imperial Loan Co Ltd* in the proceedings before the Privy Council. ³⁸⁶ As the New Zealand court at trial had rejected this claim on the facts and as this decision was subject to appeal neither before the New Zealand Court of Appeal nor the Privy Council, ³⁸⁷ the issue before these courts was instead whether a contract concluded by a mentally incapable person could be avoided on a distinct and wider ground of unfairness as had been recognised by the New Zealand Court of Appeal in *Archer v Cutler*. ³⁸⁸ In holding that no such distinct ground exists in law, the Privy Council therefore did not have occasion directly to consider the nature (actual or constructive) of the knowledge of mental incapacity required by the established law in *Imperial Loan Co Ltd*, but it nevertheless expressed this law in language which refers exclusively to knowledge rather than adding that this includes what the other party ought to have known. ³⁸⁹ The most that can be said is that Lord Brightman did not dissent from the view expressed in the Australian case of *Tremills v Benton* that the rule would extend to cases where a party suspected rather than actually knew that the other did not possess the requisite mental capacity ³⁹⁰ and that, as earlier noted, Lord Brightman restricted the rule that a contract made by a mentally incapable person is valid unless the other party knew of this incapacity to the situation where the first person was “ostensibly sane”. ³⁹¹

Earlier authorities in the context of settlement of claims

9-084

As earlier noted, the Supreme Court in *Dunhill v Burgin* was directly concerned with the question whether a settlement of a claim concluded when the claimant's mental incapacity was unknown to the defendant the Supreme Court required the approval of the court to be valid or whether it could be valid under the general law governing contracts in *Imperial Loan Co Ltd*.³⁹² When the Court of Appeal in *Masterman-Lister v Brutton & Co (Nos 1 & 2)* first considered the question of mental capacity in this procedural context, the judges expressed the general rule in *Imperial Loan Co Ltd* (which they held inapplicable) in terms of the party's knowledge of a person's mental incapacity.³⁹³ This remained true in the later Court of Appeal decision in *Bailey v Warren* of two of its members,³⁹⁴ but Arden L.J. expressed the rule differently, noting that:

"[t]he position in relation to the compromise of a claim may therefore be different from the usual position in relation to a contract made by a person who is not known to be a patient. In such a case, the contract is enforceable unless the other party was aware or ought to have been aware that the person was a patient. In that event, the contract is voidable: *Imperial Loan Co Ltd v Stone*." ³⁹⁵

Arden L.J. did not, however, provide any further authority beyond *Imperial Loan Co Ltd* or arguments in support of the proposition that the general rule governing contracts extends to cases of constructive knowledge; nor should this be surprising given that the content of this test was not in issue before the court as the claimant had not suggested that the defendant had known or ought to have known of his mental incapacity.³⁹⁶ However, Arden L.J.'s view that the claimant did not have the mental capacity to conclude the settlement meant that the question whether general contract law applies to compromises of claims by a mentally incapable claimant became central, and on this question she held (and Ward L.J. agreed³⁹⁷) that it did not, as the CPR required such settlements to be approved by the court.³⁹⁸ This view of the majority in *Bailey v Warren* was then accepted by the Supreme Court in *Dunhill v Burgin*, which rejected the argument foreshadowed in *Masterman-Lister* that the CPR could not change the substantive law of contract in this way.³⁹⁹ It is understandable, therefore, that Lady Hale in *Dunhill v Burgin* should have followed Arden L.J. in *Bailey v Warren* (if without direct citation) in describing the general contract law rule so as to include constructive notice.⁴⁰⁰

Wider authority

9-085

The Privy Council in *Hart v O'Connor* noted that the rule in *Imperial Loan Co Ltd* had been adopted by the High Court of Australia in 1904,⁴⁰¹ but more recent Australian authority is conflicting as the leading authority in the High Court of Australia, *Gibbons v Wright*, appeared generally to require knowledge of a party's mental capacity, but also referred to English authority prior to *Molton v Camroux*⁴⁰² which suggested that constructive knowledge might suffice.⁴⁰³ As a result, some Australian courts allow that constructive knowledge is enough,⁴⁰⁴ while others have held that actual knowledge is required.⁴⁰⁵ Canadian common law courts have taken a different approach, accepting that contracts entered by a mentally incapable person are voidable even where the other party has no notice (actual or constructive) of the incapacity as long as their terms are unfair,⁴⁰⁶ a position similar to the New Zealand cases not followed by the Privy Council in *Hart v O'Connor*.⁴⁰⁷ The position in Scots law is often put forward as providing a striking contrast with the English law requiring (actual) knowledge of mental incapacity, as it holds that a contract made by a person incapable of doing so is "null and void", following in this respect the Scottish institutional writers, who themselves followed Roman law.⁴⁰⁸ This stark position therefore rests on civil law authorities and on a very subjective view of contract, and finds no support in the modern English authorities.

Relevance of the objective theory of contract?

9-086

In *Dunhill v Burgin* Lady Hale appeared to adopt the argument of counsel for the defendant (there, the party seeking to uphold the settlement on the basis that the normal rule of contract law applied to its validity) that the extension of the rule in *Imperial Loan Co Ltd* to constructive notice is “consistent with the objective theory of contract, that a party is bound, not by what he actually intended, but by what objectively he was understood to intend.”⁴⁰⁹ This idea, it would seem, finds its source in a passage of the most recent edition of Bowstead & Reynolds on Agency⁴¹⁰ which was cited to the Supreme Court in relation to the question of effect of a principal's incapacity on a contract of agency, an issue which the Supreme Court did not find it necessary to determine.⁴¹¹ It is, of course, the case that English law generally adopts an objective test to the existence of agreement, with the effect that an apparent intention to be bound may suffice, so that, notably, an alleged offeror (A) may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention.⁴¹² The objective approach does therefore appear to give some analogous support to a position according to which a person who ostensibly has mental capacity to make a contract should be bound by it. However, as explained above,⁴¹³ the state of mind of the offeree may also be relevant. So, if B actually and reasonably believes that A has the requisite intention, then the objective test is satisfied, but if B knows that, in spite of the objective appearance, A does not have the requisite intention, A is not bound as the objective test needs to be qualified in this situation.⁴¹⁴ However, with respect, it is submitted that the approach of English law to offer and acceptance does not provide a helpful analogy with the law governing the effect on contracts of a party's mental incapacity. While the law governing offer and acceptance is generally concerned to facilitate commerce by protecting the reasonable reliance of parties on what others say or do even if they do not actually so intend, the question whether a person has the mental capacity to agree to the particular contract with another party is not generally one on which it is reasonable for that party to take a view, in the absence of knowledge or at least suspicion of the incapacity, or circumstances which make the incapacity apparent. Perhaps a closer analogy would be with the law of unilateral mistake which is also seen as reflecting the objective approach to contract, where a mistake as to the terms of a contract, if known to the other party, may affect the validity of the contract.⁴¹⁵ However, as explained above, there is no clear authority that a contract is void for mistake where A's mistake ought to have been known by to a reasonable person in B's position.⁴¹⁶ A further possible analogy could be drawn with the approach of the courts to the knowledge of a unilateral mistake for the purposes of rectification, where actual knowledge is held to include cases where a party wilfully shuts its eyes to the obvious, or wilfully and recklessly fails to make such enquiries as an honest and reasonable man would make.⁴¹⁷ Overall, however, the objective theory of contract does not provide clear support for the proposition that constructive knowledge of a person's mental incapacity should be sufficient to avoid a contract.

Competing considerations of policy

9-087

In *Dunhill v Burgin* Baroness Hale DPSC noted that much had been made in argument before the Supreme Court of the competing policy arguments in favour or against the validity of settlements of claims made by persons incapable of doing so where the other party to the settlement did not know (and ought not to have known) of the incapacity.⁴¹⁸ In Baroness Hale's view, “[p]olicy arguments do not answer legal questions”, but she then saw the relevant policy underlying the CPR as being the protection of children and the mentally incapable “not only from themselves but also from their legal advisers”.⁴¹⁹ It is submitted that a future court considering the general law governing the conditions for the avoidance of contracts by persons who were incapable of concluding them, should take into account the competing policies pursued by this area of the law. In this respect, the need to protect a person mentally incapable of entering the contract should be balanced against the practical need for commerce to take place without traders and others requiring to consider the mental incapacity of their contracting parties where it is not apparent.⁴²⁰

Summary

9-088

❗ There is, therefore, good support in the authorities for the proposition that the general rule according to which a contract may be avoided for mental incapacity only where the other party knew of a person's mental incapacity is restricted to the situation where that incapacity was not apparent.⁴²¹ Secondly, it may be that a suspicion rather than actual knowledge of the other party's mental incapacity is enough for this purpose.⁴²² Beyond this, the general judicial statements which accept that a contract may be avoided where the other party ought to have known of the mental incapacity are not supported by binding authority: the dicta of Warrington L.J. to this effect in *York Glass Co Ltd* were based on a concession by counsel and their wider authority is further undermined by their link in that case to the alleged equitable doctrine rejected in *Hart v O'Connor*⁴²³; the dicta of Arden L.J. in *Bailey v Warren* were clearly obiter, as, on her view of the case, the general law governing mental capacity and contracts was not in issue on the facts, which concerned the validity of a settlement of a claim.⁴²⁴ The same can be said of Baroness Hale's own acceptance of this position in *Dunhill v Burgin*: the Supreme Court was not concerned to determine the limits of the test applicable to contracts generally, but rather whether this test applied to settlements of claims.⁴²⁵ By contrast, in *Molton v Camroux*, *Imperial Loan Co Ltd* and *Hart v O'Connor* the law is stated in a way which requires knowledge and not merely constructive knowledge of the other's mental incapacity.⁴²⁶ Thirdly, the objective principle of contract does not give convincing support for the acceptance of constructive as well as actual knowledge. Given this state of the authorities, the practical significance of such an extension of the established law prior to *Dunhill v Burgin*, and the competing considerations of policy which are in play, it is submitted that English law should not be seen as allowing the avoidance of a contract by a person mentally incapable of concluding it unless this incapacity was apparent to or known by the other contracting party.⁴²⁷ ❗

^{337.} So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale DPSC.

^{353.} Above, para.9-076.

^{354.} See the 31st edition (2012), para.8-069.

^{355.} ❗ Notably, Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 29th edn (2010), p.247; Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.12-055; McKendrick, *Contract Law*, 9th edn (2011), p.291; Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.24-09 (observing that the rule is "arguably harsh"); Burrows, *A Restatement of the English Law of Unjust Enrichment*, (2012), p.85. cf. Watts, *Bowstead & Reynolds on Agency*, 20th edn (2010), para.2-009 and n.28 (referring to the situation where a party "knew, or ought to have known, of the incapacity", without citation of explicit authority justifying "ought to have known").

^{356.} [2014] UKSC 18, [2014] 1 W.L.R. 933. Lord Kerr, Lord Dyson, Lord Wilson and Lord Reed agreed without further comment.

^{357.} [2014] UKSC 18 at [1].

^{358.} [2014] UKSC 18 at [1] and [25]. The Supreme Court did not specify the source of its formulation of the rule so as to include cases where the other party ought to have known of the incapacity, but it may have come from *Bowstead & Reynolds on Agency*, 20th edn (2010) by Watts, para.2-009, which takes this position and which was cited by the defendant's counsel in relation to the question of the effect of a principal's incapacity on a contract of agency, a question on which the Supreme Court did not find it necessary to form a view: [2014] UKSC 18 at [31].

^{359.} CPR r.21.10(1). On this decision, see below, para.9-097.

^{360.} [2014] UKSC 18 at [25]–[30].


^{361.} *Josife v Summertrot Holdings Ltd* [2014] EWHC 996 (Ch), (2014) B.P.I.R. 1250 at [19] and [20] (Norris J.) (holding that the correct test was to consider whether it would have been obvious to

the other party that the person lacked capacity and holding that there was no real prospect of showing that that it would have been).

- [362.](#) [1994] 1 A.C. 180 discussed above at paras 8-110 et seq.
- [363.](#) cf. above, paras 8-118 et seq. This view of the possible significance of constructive notice is given some support by its treatment by Canadian courts which have accepted it as an element of invalidity of contracts on the ground of mental incapacity (on which see below, para.9-085). So, in *Hardman v Falk* [1955] B.C.J. No.199 especially [2] and [9] the court considered whether the surrounding circumstances should put a contracting party on enquiry as to her lack of capacity; and in *Lingard v Thomas* (1984) 46 Nfld. & P.E.I.R. 245, 135 A.P.R. 245 (Newfoundland SC Tr. Div.) at [20]–[22], the court adopted the explanation of constructive notice in the context of fraud on a person's creditors in *Re Gomersall* (1875) 1 Ch. D. 137, 146 (once put on enquiry, a wilful shutting of eyes to knowledge or means of knowledge), following *McNab v The Imperial Trust Co* [1935] 4 D.L.R. 570 at [11]–[13].
- [364.](#) *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599, above para.9-076.
- [365.](#) [2014] UKSC 18.
- [366.](#) (1848) 2 Exch. 487, (1849) 4 Exch. 17.
- [367.](#) *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599 at 602 (Fry L.J.); *Hart v O'Connor* [1985] A.C. 1000 at 1019; above, paras 9-075–9-076.
- [368.](#) (1848) 2 Exch. 487 at 503, (1849) 4 Exch. 17 at 19 respectively.
- [369.](#) *Hart v O'Connor* [1985] A.C. 1000, 1027, above, para.9-077.
- [370.](#) cf. above, para.9-079.
- [371.](#) [1925] All E.R. 285, (1925) 42 T.L.R. 1. cf. *Broughton v Snook* [1938] 1 All E.R. 411, 417 where the HC gave *Imperial Loan Co Ltd* as authority for the test that the other party knew or ought to have known of a person's mental incapacity, without further support and obiter (as the court decided on the basis of unconscionable conduct in the other party).
- [372.](#) [1925] All E.R. 285 at 287.
- [373.](#) [1925] All E.R. 285 at 291 and 295 respectively.
- [374.](#) [1925] All E.R. 285 at 288–289.
- [375.](#) [1925] All E.R. 285 at 289.
- [376.](#) (1857) 7 De G.M. & G. 475 at 487, 26 L.J. Ch. 821 at 824 referring to *Molton v Camroux* as “a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe. How is a shopkeeper who sells his goods to know whether a customer is or is not of sound mind?”.
- [377.](#) [1925] All E.R. 285 at 290.
- [378.](#) [1985] A.C. 1000 at 1024–1026, above, para.9-077.
- [379.](#) [1925] All E.R. 285 at 292.
- [380.](#) [1925] All E.R. 285 at 292.
- [381.](#) [1925] All E.R. 285 at 293.
- [382.](#) [1925] All E.R. 285 at 293.

- [383.](#) [1925] All E.R. 285 at 296.
- [384.](#) [1925] All E.R. 285 at 295.
- [385.](#) [1985] A.C. 1000 at 1024–1026, above, para.9-077.
- [386.](#) [1985] A.C. 1000, 1003.
- [387.](#) [1985] A.C. 1000, 1016.
- [388.](#) [1980] 1 N.Z.L.R. 386.
- [389.](#) See, notably, [1985] A.C. 1000, 1019–1020, 1022–1023. This is particularly striking in Lord Brightman’s treatment of *York Glass Co Ltd v Jubb* [1925] All E.R. 285 where he makes no reference to the gloss of the rule in *Imperial Loan Co Ltd* which Warrington L.J. ([1925] All E.R. 285 at 292) had there accepted: [1985] A.C. 1000 at 1022–1024.
- [390.](#) *Tremills v Benton* (1892) 18 V.L.R. 607 (SC Vict.) at 621–622 per Holroyd J.; *Hart v O’Connor* [1985] A.C. 1000 at 1026.
- [391.](#) [1985] A.C. 1000, 1013 (original claim); 1027 (before PC).
- [392.](#) [2014] UKSC 18 and see above, para.9-078 and below para.9-097.
- [393.](#) *Masterman-Lister v Brutton & Co* (Nos 1 & 2) [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [57] per Chadwick L.J., with whom Potter L.J. at [55] agreed; Kennedy L.J. did not refer to the test under the general law.
- [394.](#) [2006] EWCA Civ 51, [2006] C.P. Rep. 26 at [102] (Hallett L.J.) and at [155] (Ward L.J.) respectively. Hallett L.J. dissented from the view of the majority of the Court of Appeal as to the question whether the claimant’s mental capacity should relate just to the compromise or more broadly to the ability to start proceedings: [2006] EWCA Civ 51, [2006] C.P. Rep. 26 at [90], [120]–[124] and [178].
- [395.](#) [2006] EWCA Civ 51 at [109] (emphasis added).
- [396.](#) [2006] EWCA Civ 51 at [130].
- [397.](#) [2006] EWCA Civ 51 at [161]–[162]. The Court of Appeal held, however, that the settlement should be given the approval by the court under CPR r.21(10).
- [398.](#) [2006] EWCA Civ 51 at [129].
- [399.](#) [2014] UKSC 18 at [24]–[30].
- [400.](#) [2014] UKSC 18 at [25].
- [401.](#) [1985] A.C. 1000 at 1022–1023; *McLaughlin v Daily Telegraph Newspaper Co Ltd* (No.2) (1904) 1 C.L.R. 243, 272–274, where the HC Aus. held that this law did not apply to a power of attorney made by a person of unsound mind which was void, a decision from which the PC refused special leave to appeal on the basis that there was no reason to doubt that the judgment of the HC had been right: [1904] 1 C.L.R. 479 at 482.
- [402.](#) (1848) 2 Exch. 487, (1849) 4 Exch. 17, above, para.9-075.
- [403.](#) (1954) 91 C.L.R. 423 especially at 441 quoting *Dane v Viscountess Kirkwall* (1838) 8 C. & P. 679 at 670 (“or at least proof of ‘the greatest reason to believe’ that the lunacy existed”).
- [404.](#) *Ashton v Melbourne Money Pty Ltd* (1992) A.N.Z. Conv.R. 95 at 99; *Collins by her next friend Poletti v May* [2000] WASC 29 (SC West. Aus.). See to the same effect Australian Law

- Commission, Equality, Capacity and Disability in Commonwealth Law ALRC Report 124 (2014), para.11.6; The Laws of Australia Encyclopedia (Westlaw 2014) para.7.3.590 citing *Tremills v Benton* (1892) 18 V.L.R. 607; *York Glass Co Ltd v Jubb* [1925] All E.R. 285, (1925) 42 T.L.R. 1. as well as *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599; Carter, *Contract Law in Australia*, 6th edn (2013), para.15–38 citing *Molton v Camroux* (1848) 2 Exch. 487 at 501, (1849) 4 Exch. 17; *Broughton v Snook* [1938] 1 All E.R. 411 and *Gibbons v Wright* (1954) 91 C.L.R. 423.
- [405.](#) *The Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 at [90]–[96] (SC West. Aus.) following *Giles v Rooney* (1996) 23 M.V.R. 510, 513 and 514 (SC West. Aus.). *The Public Trustee (WA) v Brumar Nominees Pty Ltd* was relied on by counsel in the English HC in *Josife v Summertrot Holdings Ltd* [2014] EWHC 996 (Ch) at [18], but the HC took the SC's view in *Dunhill v Burgin* as the statement of the law for the purposes of its own decision: [2014] EWHC 996 (Ch) at [19].
- [406.](#) *Fyckes v Chisholm* (1911) 3 O.W.N. 21 at [8]–[10]; *Hardman v Falk* [1955] B.C.J. No. 199 especially [9]; *Lingard v Thomas* (1984) 46 Nfld. & P.E.I.R. 245, 135 A.P.R. 245 (Newfoundland SC Tr. Div.) at [20]–[22]; Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2012) para.24-09.
- [407.](#) Above, para.9-077. The current position in New Zealand is much affected by the statutory provision for the care of persons lacking mental capacity. As a result, where the court appoints a person (the “manager”) to manage the affairs of a person lacking mental competence, the latter no longer has the capacity to exercise the power vested and any contract so made is voidable by that person or by the manager (though the court also has a power to adjust): Burrows, Finn and Todd, *Law of Contract in New Zealand*, 4th edn (2012), para.14.3.1; Protection of Personal and Property Rights Act 1988 s.53. As regards the common law position governing the invalidity of a contract for mental incapacity, the test is stated as probably requiring that the other party “knew or should have known of the other's lack of capacity”: Burrows, Finn and Todd, *Law of Contract in New Zealand* para.14.3.1 at pp.555–557; *Scott v Wise* [1986] 2 N.Z.L.R. 484 (contract); *Dark v Boock* [1991] 1 N.Z.L.R. 496 (gift).
- [408.](#) *John Loudon & Co v Elder's Curator bonis* [1923] S.L.T. 226 at 228 (Outer House Ct. Sess.), specifically rejecting *Imperial Loan Co Ltd v Stone* (which had been argued on the basis that the contract is voidable only if the other party was or ought to have been aware of the other's insanity). For the Roman law see Gaius Inst. 306; D. 44.7.1.12.
- [409.](#) [2014] UKSC 18 at [25].
- [410.](#) Watts, *Bowstead & Reynolds on Agency*, 20th edn (2010), para.2–009, stating that “the principle that transactions other than gifts cannot be set aside unless the person with whom the transaction was entered into knew, or ought to have known, of the incapacity” is “consistent with the higher level general principle that intention in the formation of contracts and other transactions is judged objectively”.
- [411.](#) [2014] UKSC 18 at [31].
- [412.](#) Above, para.2-003. The objective approach also has important implications for the construction of contracts: below, para.13-043.
- [413.](#) Above, para.2-004.
- [414.](#) Above, para.2-004, which notes that English law gives no clear answer to the case where B does not know, but ought to have known, that A does not have the requisite intention.
- [415.](#) *Smith v Hughes* (1870)–(1871) L.R. 6 Q.B. 597; *Hartog v Colin and Shields* [1939] E All E.R. 566.
- [416.](#) Above, paras 3-022 et seq. discussing, inter alia, *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com L.R. 158 (CA); *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700, 703 (Mance J.).

- [417.](#) *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] B.L.R. 135, above, para.3-070 but see also at para.3-076.
- [418.](#) [2014] UKSC 18 at [32].
- [419.](#) [2014] UKSC 18 at [33].
- [420.](#) cf. the dicta of Sir Ernest Pollock M.R. in *York Glass Co Ltd v Jubb* [1925] All E.R. 285 at 289 and Lord Cranworth L.C. in *Elliott v Ince* (1857) 26 L.J. Ch. 821 at 824, quoted above, para.9-082.
- [421.](#) Above, para.9-081.
- [422.](#) Above, para.9-083.
- [423.](#) Above, para.9-082.
- [424.](#) Above, para.9-084.
- [425.](#) Above, para.9-078.
- [426.](#) Above, paras 9-075—9-076, 9-083.
- [427.](#)  See similarly Peel, *Treitel on The Law of Contract*, 14th edn (2015) para.12–055 n.179; Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 30th edn (2016), p.267 at n.194 (stating the rule as being that the other party needs to have been aware of the incapacity, though noting Baroness Hale J.S.C.'s view that constructive knowledge is sufficient).

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(iii) - The Nature of Mental Capacity and Establishing Incapacity

Nature of understanding required

9-089

⚠ At common law, the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. ⁴²⁸ There is no fixed standard of mental capacity which is requisite for all transactions. ⁴²⁹ What is required in relation to each particular matter or piece of business transacted, is that the party in question should have the capacity to understand ⁴³⁰ ⚠ the general nature of what he is doing. ⁴³¹ ⚠ So, as was observed in *Re Beaney* in the context of the capacity to make a will:

“The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction.” ⁴³² ⚠

The assessment of a person’s mental capacity in relation to a contract should take into account relevant information or advice which could be available for this purpose. ⁴³³ ⚠

Evidence of lack of capacity

9-090

As earlier noted, at common law, the burden of proof as to a lack of mental capacity to make a contract lies on the person alleging it. ⁴³⁴ If the party possessed the requisite mental capacity when the contract was made, evidence of previous or subsequent mental incapacity is not material, ⁴³⁵ but in a doubtful case it might create a suspicion that he was mentally incapable at the time of making the contract. ⁴³⁶ The mere existence of a delusion in the mind of a person making a contract is not conclusive of his inability to understand it, even though the delusion is connected with the subject matter of the contract. ⁴³⁷

Decisions as to a person’s mental capacity under the Mental Capacity Act 2005

9-091

The Court of Protection which was set up under the Mental Capacity Act 2005 with a comprehensive jurisdiction over the health, welfare and financial affairs of people who lack capacity ⁴³⁸ has the power to make declarations as to a person's capacity in relation to specified decisions or matters and on the lawfulness of any act done or to be done in relation to such a person ⁴³⁹ and it may either itself make decisions on behalf of a person lacking capacity in relation to a matter concerning that person's personal welfare or his property and affairs ⁴⁴⁰ or appoint another person (a "deputy") to make decisions on that person's behalf in relation to such a matter. ⁴⁴¹ For this purpose, it is provided that a person:

"... lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain" ⁴⁴²

and that:

"... a person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means)." ⁴⁴³

In coming to their decisions, both the Court of Protection and any depute which it appoints must follow new statutory principles and give effect to the best interests of the person affected by the lack of capacity. ⁴⁴⁴

Relationship of common law and statutory tests of mental capacity

9-092


⚠ While the test for mental capacity provided by the Mental Capacity Act 2005 does not apply on its terms to the question of capacity to contract ⁴⁴⁵ (which is still determined by the common law), the Code of Practice made under the 2005 Act states that:

"... the Act's new definition of capacity is in line with the existing common law tests ... When cases come before the court [involving the issue of contractual capacity], judges can adopt the new definition if they think it appropriate." ⁴⁴⁶

Similarly, in *Dunhill v Burgin* Baroness Hale DPSC explained that:

"The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally." ⁴⁴⁷


However, this does not mean that judges are free to adopt the new statutory test in contexts governed by the common law, ⁴⁴⁸ not least as the test of capacity in the Act is expressed as being "for the purposes of the Act" ⁴⁴⁹ and its purposes do not include the conclusion of contracts. ⁴⁵⁰ Rather, according to Munby J.:


“... [w]hat is being said [in the Code of Practice] is that judges sitting elsewhere than in the Court of Protection and deciding cases where what is in issue is, for example, capacity to make a will, capacity to make a gift, capacity to enter into a contract, capacity to litigate or capacity to enter into marriage, can adopt the new definition if it is appropriate—appropriate, that is, having regard to the existing principles of the common law.” ⁴⁵¹ 


^{337.} So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale DPSC.


^{428.} *Manches v Trimborn* (1946) 115 L.J.K.B. 305; cf. *In the Estate of Park* [1954] P. 112 and see *Fridman* (1963) 79 L.Q.R. 502, 518–519; *Re Beaney* [1978] 1 W.L.R. 770.

^{429.} *Gibbons v Wright* (1954) 91 C.L.R. 423.

^{430.}  What is required is an ability to understand, rather than actual understanding: *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [81] and [85], referring to *Manches v Trimborn* (1946) 115 L.J.K.B. 305 and *Re Smith (deceased)* [2015] 4 All E.R. 329 at [27]. See also *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [58].

^{431.}  *In the Estate of Park* [1954] P. 112; *Bennett v Bennett* [1969] 1 W.L.R. 430; *Mason v Mason* [1972] Fam. 302 (consent to decree of divorce). cf. *Clarke v Prus* [1995] N.P.C. 41 in relation to gifts; *Gibbons v Wright* (1954) 91 C.L.R. 423 at 427; *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [58]. In *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [87]–[103], which concerned the capacity to conclude an individual voluntary arrangement (IVA) under Pt VIII of the Insolvency Act 1986, the reference to understanding “the general nature of what he is doing” stated in the text was held to be accurate, although in so holding Stephen Jourdan QC clarified that what is required is “the capacity to absorb, retain, understand, process and weigh information about the key features and effects of the contract, and the alternatives to it, if explained in broad terms and simple language” (at [102]).


^{432.}  *Re Beaney* [1978] 1 W.L.R. 770, 774 per Mr Martin Nourse QC.; *A County Council v MS* (2014) 17 C.C.L. Rep. 229, [2014] W.T.L.R. 931 at [64]–[72]. On the application of this test to the context of the capacity to litigate, see below, para.9-097.

^{433.}  *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [82]–[83] and [102] (capacity to enter individual voluntary arrangement under Pt VIII of the Insolvency Act 1986). According to Stephen Jourdan QC in *Fehily* at [82], “in a case where a person needs advice to enable them to understand the transaction, the question is whether they have: (1) the insight and understanding to realise that they need advice; (2) the ability to find an appropriate adviser and instruct them with sufficient clarity to get the advice; and (3) to understand and make decisions based on that advice”, referring to *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 at [18] and [75] (which concerned capacity for the purposes of CPR Pt 21).

^{434.} *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599, 601 and 603, above, para.9-076.

^{435.} *Hall v Warren* (1804) 9 Ves. Jun. 605.

^{436.} *M’Adam v Walker* (1813) 1 Dow. 148, 177, HL.

- [437.](#) *Jenkins v Morris* (1880) 14 Ch. D. 674.
- [438.](#) Mental Capacity Act 2005 ss.15–19; Pt 2 in force on October 1, 2007 (Mental Capacity Act (Commencement No.2) Order 2007 (SI 2007/1897) art.2(1)(a) and (b)).
- [439.](#) Mental Capacity Act 2005 s.15.
- [440.](#) 2005 Act ss.16(1) and (2)(a), 17 and 18.
- [441.](#) 2005 Act s.16(2)(b). On “deputies” see further ss.16–21.
- [442.](#) 2005 Act s.2(1).
- [443.](#) Mental Capacity Act s.3(1).
- [444.](#) ss.1, 4, 16(3) and 20(6).
- [445.](#) See above, para.9-089. The statutory test does apply to the statutory liability of a person lacking capacity for necessities: below, para.9-096.
- [446.](#) Mental Capacity Act, Code of Practice (2007) 4.32 and 4.33.
- [447.](#) [2014] UKSC 18, [2014] 1 W.L.R. 933 at [13].
- [448.](#) *Kicks v Leigh* [2014] EWHC 3926 (Ch) at [37]–[67] reviewing earlier authorities including *Scammell v Farmer* [2008] EWHC 1100 (Ch), [2008] W.T.L.R. 1261, *Local Authority X v MM (an adult)* [2007] EWHC 2003 (Fam), [2009] 1 F.L.R. 443; *Sutton v Sutton* [2009] EWHC 2576 (Ch.) [2010] W.T.L.R. 115; *Fisher v Diffley* [2013] EWHC 4567 (Ch), [2014] W.T.L.R. 757.
- [449.](#) Mental Capacity Act 2005 s.1(1).
- [450.](#) *Kicks v Leigh* [2014] EWHC 3926 (Ch) at [64] (in relation to the making of a gift).
- [451.](#)  *Local Authority X v MM (an adult)* [2007] EWHC 2003 (Fam), [2009] 1 F.L.R. 443 at [79]–[80], per Munby J.; *Saulle v Nouvet* [2007] EWHC 2902 (QB), [2008] LS Law Medical 201 at [15]–[16].cf. *A County Council v MS* (2014) 17 C.C.L. Rep. 229, [2014] W.T.L.R. 931 at [64]–[72] (capacity to make gift for purposes of Mental Capacity Act 2005).

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(iv) - The Effect of Mental Incapacity where operative

Contract voidable

9-093

⚠ Where a mentally incapable person concludes a contract and the other party knows of this incapacity, the contract is voidable at his or her option rather than being void. ⁴⁵² ⚠ It has been said that the mentally incapable person's right of rescission is subject to the usual bars (lapse of time, affirmation, third party rights and restitutio in integrum being impossible) familiar from the context of rescission for misrepresentation, ⁴⁵³ though it should be added that an act of affirmation (as a declaration of intention ⁴⁵⁴) would itself require the person allegedly affirming to have possessed the requisite mental capacity to do so at the time. Where a person is entitled to and does rescind a contract on the ground of mental incapacity, then it would appear that any property or money transferred under it is recoverable without the need for any total failure of consideration, this marking a further distinction in the law's treatment of mental incapacity and minority. ⁴⁵⁵ ⚠

Ratification

9-094

It would appear that a person who lacked mental capacity at the time of making a contract (so as to render it voidable in principle) may nevertheless be bound by it if he ratifies it subsequently after recovery or during an interval where he possesses the capacity to do so. ⁴⁵⁶


^{337.} So described by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] per Baroness Hale DPSC.

^{452.} ⚠ *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599, 602–603; *Manches v Trimbourn* (1946) 115 L.J.K.B. 305; *Gibbons v Wright* (1954) 91 C.L.R. 423 (HC Aus.) at 449; *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1], [25]. In *Sutton v Sutton* [2009] EWHC 2576 (Ch), [2010] W.T.L.R. 115 at [46] it was acknowledged that there is real doubt as to whether mental incapacity renders a gift void or voidable (not deciding the issue) and cf. *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus. L.R. 695 at [118]–[127] where it was said, obiter, that the approach to the effect of mental incapacity on a contract applies to an individual voluntary arrangement (IVA) made under Pt VIII of the Insolvency Act 1986, distinguishing the position as regards voluntary dispositions which are rendered void by mental incapacity. cf. *Daily*

Telegraph v McLaughlin [1904] A.C. 776, 779 where the PC held that it was clear law that a power of attorney made by a mentally incapable person was void and so a deed executed under it was also void.

[453.](#) Burrows, *The Law of Restitution*, 3rd edn (2011), p.316. On these bars in the context of rescission for misrepresentation see above, paras 7-131 et seq.

[454.](#) Above, paras 7-132—7-133.

[455.](#)  Burrows, *The Law of Restitution*, 3rd edn (2011), p.316; Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 24-10–24-11. This would appear from the approach of the PC in *Hart v O'Connor* [1985] A.C. 1000, though it held that the contract was not voidable as the party receiving the property (there land) was not aware of the other's mental incapacity.

[456.](#) *Matthews v Baxter* (1873) L.R. 8 Ex. 132 (drunken person). The possibility of ratification was accepted by Andrew Smith J. in *Crédit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), [2015] Bus. L.R. D5 at [187].

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(b) - Liability for Necessaries

Liability for necessities: the old law

9-095

⚠ At common law, a lunatic was held liable for necessities on the basis of an “implied contract” with their supplier although it was realised that this was a “most unfortunate expression, because there cannot be a contract by a lunatic”.⁴⁵⁷ The liability was restricted to the situation where the person who supplies the necessities acted with the intention of claiming payment rather than by way of gift⁴⁵⁸ and was later sometimes explained by the need to reverse the incapable person’s unjustified enrichment rather than by implied contract.⁴⁵⁹ ⚠ This position at common law was amended by s.2 of the Sale of Goods Act 1893⁴⁶⁰ (subsequently s.3 of the Sale of Goods Act 1979) which provided that:

“... where necessities are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.”⁴⁶¹

And further that:

‘... necessities’ means goods suitable to the condition in life of such a person, and to his actual requirements at the time of the sale and delivery.’

While s.3 of the 1979 Act (unlike the common law governing necessitous intervention⁴⁶²) does not in terms subject the liability of a mentally incapable person for necessary goods to a condition that they were supplied with the intention of claiming payment rather than by way of gift, this restriction can be seen implicitly in its requirement that the goods be “sold”. In common with the liability of minors for necessities,⁴⁶³ it is unclear whether this provision *defines* the liability of mentally incapable persons for necessary goods or whether it leaves open the possibility of liability arising at common law beyond its terms: it certainly leaves aside their liability for necessary *services* which remained governed by the common law. If s.3 were to define liability in respect of necessary goods, then liability would arise only when goods actually sold and delivered were necessary at the time of sale and delivery and not therefore to executory contracts for necessities (as the goods would not be “sold and delivered”) nor to contracts for goods necessary when sold but not necessary when delivered.⁴⁶⁴ On the other hand, it has been said that s.3 does not preclude liability of a mentally incapable person arising for necessary goods under a contract which would be valid under the general common law rules on the ground that his mental incapacity was unknown to the other contracting party.⁴⁶⁵ And this must be right as otherwise where the other party does not know of his incapacity the mentally incapable person could be liable to the contract price for non-necessary goods but only a reasonable sum for

necessary ones. Moreover, in some cases, a person's mental incapacity may be so severe that it cannot be said that "necessaries are sold and delivered" to him and yet in these circumstances it has been argued that the common law rules governing necessitous intervention should still apply. ⁴⁶⁶ Finally, it is submitted that, unlike the more arguable position as regards the liability of minors for necessaries, ⁴⁶⁷ the liability for necessaries under s.3 of a person who lacks the mental capacity to make a contract for necessary goods should not be seen as arising from contract but rather on the basis of the principle of unjust enrichment.

Liability for necessaries: the new law

9-096

⚠ However, as from October 1, 2007, s.7 of the Mental Capacity Act 2005 removed the reference to mentally incapable persons from s.3 of the Sale of Goods Act and itself instead provided that:

"If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them." ⁴⁶⁸

And that for this purpose "*necessary*" means "*suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied*". ⁴⁶⁹ As has been noted, the 2005 Act provides an explanation of "lack of capacity" for this purpose, ⁴⁷⁰ a test which can be seen to be broadly consistent with the test previously applied by the courts, ⁴⁷¹ but the shift of statutory locus of the provisions regarding necessary goods (and its addition of necessary services) into the 2005 Act brings with it the application of important new general principles governing mental capacity. ⁴⁷² In *Aster Healthcare Ltd v Shafi* the High Court held that the definition of "necessaries" in s.7(2) relates only to the nature of the services themselves and "the word 'requirements' does not extend to the recipient's subjective wishes, however reasonable, as to the location at which those necessary services are to be provided." ⁴⁷³ ⚠ Moreover, the High Court considered that s.7 enacted the common law rule and was therefore:

"designed to cure the hardship that would otherwise arise where a supplier who intended the person under a mental incapacity to pay for necessary goods or services would be unable to recover payment from him under a contract, if there was one. There is no need to show that there was any purported contract between them." ⁴⁷⁴

While s.7 may apply where a third party has made the arrangements for the provision of the necessary goods or services by a supplier, it cannot apply if it was not intended by the supplier that the person making those arrangements, or someone else, should pay for them. ⁴⁷⁵ As a result, s.7 does not apply where the services supplied to the mentally incapacitated person were provided by the service provider under an arrangement with a local authority exercising its statutory duty under the National Assistance Act 1948. ⁴⁷⁶ Finally, it is clear that the changes introduced by s.7 of the 2005 Act do not alter the general common law position which remains that a person lacking the capacity to enter a contract is liable on the contract (including for necessaries) unless the other party knew of this incapacity. ⁴⁷⁷

^{457.} *Re Rhodes* (1890) 44 Ch. D. 94, 105 Cotton L.J. The liability of a lunatic for necessaries was established much earlier: *Manby v Trott* (1662) 1 Sid. 109, 112; *Baxter v Earl of Portsmouth* (1826) 5 B. & C. 170.

^{458.} (1890) 44 Ch. D. 94, 107.

- [459.](#) **!** *Re Rhodes (1890) 44 Ch. D. 94; Re J. [1909] Ch. 574* (expressed in terms of “implied contract”). cf. above, para.9-014 (liability of minors for necessities). For a discussion of the legal basis of the liability of incapable persons for necessities at common law in the context of minors see Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 24-15–24-19. The estate of a husband who is mentally disordered is also liable at common law for necessities supplied to his wife: *Read v Legard (1851) 6 Exch. 636*.
- [460.](#) s.2.
- [461.](#) Sale of Goods Act 1979 s.3(2) (as enacted).
- [462.](#) Below, paras 29-136 et seq.
- [463.](#) Above, paras 9-010 et seq.
- [464.](#) cf. above, paras 9-013—9-015 concerning minors’ liability.
- [465.](#) Peel, *Treitel on The Law of Contract*, 13th edn (2011), p.558.
- [466.](#) Treitel, 11th edn (2003) at p.558 referring to *Re Rhodes (1890) 44 Ch. D. 94*.
- [467.](#) Above, para.9-014.
- [468.](#) Mental Capacity Act 2005 s.7(1) (which came into force on October 1, 2007 (Mental Capacity Act (Commencement No.2) Order 2007 (SI 2007/1897) art.2(1)(d))). It is to be noticed that s.7(1) did not retain the phrase “sold and delivered” from s.3 of the 1979 Act and this avoids the difficulty that they appear to assume that the person was capable of *some* element of consent in order to be liable for necessities: cf. Mathews (1982) 33 N. Ir. L.Q. 148.
- [469.](#) Mental Capacity Act s.7(2). The Mental Capacity Act 2005 Code of Practice para.6.58 (made under s.42 of the 2005 Act and to be taken into account in deciding questions which arise under it) explains that: “The aim is to make sure that people can enjoy a similar standard of living and way of life to those they had before lacking capacity.”
- [470.](#) Above, para.9-091.
- [471.](#) Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.12–053.
- [472.](#) Mental Capacity Act 2005 s.1.
- [473.](#) **!** *[2014] EWHC 77 (QB)*, *[2014] P.T.S.R. 888* at [54]; permission to appeal on the application of s.7 of the 2005 Act was refused and the provider of the services’ appeal regarding the existence of the local authority’s duty under the 1948 Act was rejected: *[2014] EWCA Civ 1350*, *[2014] P.T.S.R. 1507* (note).
- [474.](#) *[2014] EWHC 77 (QB)* at [55] per Andrews J.
- [475.](#) *[2014] EWHC 77 (QB)* at [55].
- [476.](#) *[2014] EWHC 77 (QB)* at [59].
- [477.](#) This is apparent from the Parliamentary passage of the Mental Capacity Act 2005 where an amendment was proposed (and then withdrawn) which would have altered this position so as to render a contract unenforceable in certain circumstances where it was made with a person lacking capacity to do so even though the other party was unaware of this incapacity: Hansard, HL Vol.670, cols 1469–1472.

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(c) - Settlement or Compromise of Claims

Dunhill v Burgin

9-097

In *Dunhill v Burgin* the claimant had claimed damages from the defendant vehicle driver in respect of a serious road accident and had settled her claim on the advice of her lawyers at a level which was later accepted as reflecting a gross undervaluation of her claim. ⁴⁷⁸ The claimant therefore brought further proceedings by her litigation friend seeking a declaration that she had not had the mental capacity to conclude the earlier settlement. For this purpose, the Supreme Court (Baroness Hale of Richmond DPSC, with whom Lords Kerr, Dyson, Wilson and Reed agreed), held that the proper test of mental capacity under CPR Pt 21 was and is ⁴⁷⁹ whether the party, or person intending to bring proceedings, had capacity to conduct proceedings. ⁴⁸⁰ The Supreme Court further held that the relevant “proceedings” for this purpose were the proceedings which she might have brought had her lawyers given her different advice, rather than the proceedings which she had actually brought on the advice of her legal representatives (where the relevant decision related to whether or not to accept the sum offered). ⁴⁸¹ Given that the parties had agreed that the claimant did not have capacity under this test, ⁴⁸² the Supreme Court then held that the effect of this incapacity on the validity of the settlement was determined by the CPR, according to which any step taken by a person lacking mental capacity before he or she has a litigation friend “shall be of no effect, unless the court otherwise orders”. ⁴⁸³ Moreover, CPR r.21.10(1) specifically provides that:

“[w]here a claim is made—

(a)

by or on behalf of a child or protected party; or

(b)

against a child or protected party,

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim, by, on behalf of, or against a child or protected party without the approval of the court.” ⁴⁸⁴

The Supreme Court held that this means that a settlement made by a mentally incapable person (the “protected party”) is not valid without the approval of the court, with the effect that in these circumstances the normal rule of contract law in *Imperial Loan Co Ltd v Stone* ⁴⁸⁵, according to which a contract made by a mentally incapable person is valid unless the other party knew or ought to have

known of the incapacity, does not apply.⁴⁸⁶ The reason for this special rule is that “the court needs, for the purpose of protecting his interests, full control over any settlement compromising his claim”.⁴⁸⁷

^{478.} [2014] UKSC 18, [2014] 1 W.L.R. 933 at [4].

^{479.} The current provision is found in CPR r.21.1.(2)(c), which assimilates the test under the CPR to the test under the Mental Capacity Act 2005. The SC found that the CPR provision applicable at the time of the earlier proceedings provided substantially the same test.

^{480.} [2014] UKSC 18 at [13]–[14] following *Masterman-Lister v Brutton & Co (Nos 1 & 2)* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 and *Bailey v Warren* [2006] EWCA Civ 51, [2006] C.P. Rep. 26.

^{481.} [2014] UKSC 18 at [7], [14]–[15], [18].

^{482.} [2014] UKSC 18 at [18].

^{483.} CPR r.21.3(4).

^{484.} The version of CPR r.21(10) in force at the time of the earlier claim and of the settlement referred to “patient” instead of “protected party”, reflecting the terminology then current under Pt VII of the Mental Health Act 1983. The change to “protected party” was made by SI 2007/2204 (L20) when the Mental Capacity Act 2005 came into force: [2014] UKSC 18 at [12] and [14].

^{485.} [1892] 1 Q.B. 599.

^{486.} [2014] UKSC 18 at [21], [25]–[30] following *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170 in the context of a claim by a minor. On the general rule in *Imperial Loan Co Ltd* and the SC’s formulation of it, see above, paras 8-075–8-076, 8-078–8-088 respectively.

^{487.} *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170, 189 per Lord Pearson quoted with approval *Burgin v Dunhill* [2014] UKSC 18 at [28].

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(d) - Property and Affairs Under the Control of the Court

Background


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Under the Lunacy and Mental Treatment Acts 1890 to 1930 a person might be found to be of unsound mind by inquisition, and if so found was held to be incapable of making a valid disposition of property by deed even during a lucid interval,⁴⁸⁸ though whether the validity of ordinary contracts was similarly affected was not clear. The reason for this rule was that the statutory purpose of protecting and administering the property of a person of unsound mind would be frustrated if he remained capable of disposing of it by contract.

Position under Mental Capacity Act 2005

9-099

⚠ The Lunacy and Mental Treatment Acts were repealed⁴⁸⁹ and the relevant provisions are now found in the Mental Capacity Act 2005. This Act establishes the Court of Protection and gives it the power, inter alia, to make decisions or appoint deputies to make decisions “if a person (“P”) lacks capacity in relation to a matter or matters ... concerning P’s property or affairs”.⁴⁹⁰ The powers in relation to P’s property and affairs extend to the control and management of P’s property, the disposition of P’s property or the acquisition of property in P’s name or on P’s behalf, and the carrying out of any contract entered into by P.⁴⁹¹ The question remains, however, whether a person who has been found by the Court of Protection to lack capacity in relation to a matter or matters concerning his property or affairs and whose property is therefore the subject of its powers of management (or the powers of management of a deputy which it has appointed) can execute a valid deed or enter into a valid contract in relation to those same matters. There is no direct authority on this point, though it has been argued that he cannot do so at least as regards contracts which potentially may interfere with the court’s or court appointed deputy’s control over the property.⁴⁹² ⚠ For this purpose, a court could see an analogy with the decision of the Supreme Court in *Burgin v Dunhill* in relation to the court’s power under the CPR to approve settlements or compromises of claims by a person lacking capacity.⁴⁹³ As earlier explained, in that case the Supreme Court held that the CPR’s express provision that no settlement or compromise made by an incapable person can be valid without the approval of the court disapplies the general rules of contract law applicable to mental incapacity.⁴⁹⁴ This exception was explained by reference to the court’s need to have full control over any settlement of a claim by an incapable person in the interests of protecting the latter’s interests.⁴⁹⁵ A similar argument could be made in relation to the situation where the Court of Protection had decided under the Mental Capacity Act that a matter or matters concerning a person’s property or affairs should be subject to its own or a deputy’s decision-making on the ground of that person’s mental incapacity, with the result that in this situation the normal rules governing the validity of that person’s contracts would not apply.

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- [488.](#) *Re Walker* [1905] 1 Ch. 160; *Re Marshall* [1920] 1 Ch. 284. cf. *In the Estate of Walker* (1912) 28 T.L.R. 466 (disposition by will).
- [489.](#) Mental Health Act 1959 Sch.8.
- [490.](#) Mental Capacity Act 2005 s.16(1)(b), (2) and see further ss.15, 16 and 18; Sch.7 para.1; ss.45 and 64(1).
- [491.](#) Mental Capacity Act 2005 s.16(1)(b); s.18(1)(a), (b), (c) and (f).
- [492.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015) paras 12–056—12–057.
- [493.](#) [2014] UKSC 18, [2014] 1 W.L.R. 933, above para.9-097.
- [494.](#) [2014] UKSC 18, [2014] 1 W.L.R. 933 at [21], [25]–[30], above para.9-097.
- [495.](#) *Burgin v Dunhill* [2014] UKSC 18 at [28] quoting *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170, 189 per Lord Pearson.

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Deeds

9-100

A deed executed by a person who lacks mental capacity for some purposes may still be valid if he is capable of understanding the effect of the deed at the time of its execution. ⁴⁹⁶ Thus deeds executed during a lucid interval are valid. ⁴⁹⁷ Where a deed executed by a mentally incapable person gives effect to an agreement supported by consideration, then the general rule in *Imperial Stone Co Ltd* applies so as to subject its avoidance to knowledge of the incapacity in the other party. ⁴⁹⁸ As with contracts in general, a deed made with such a person may be set aside on equitable grounds, such as relief against unconscionability. ⁴⁹⁹ On the other hand, where property is transferred by a deed without any consideration, the gift is voidable irrespective of the donee's knowledge. ⁵⁰⁰

Effect of principal's lack of capacity upon agency

9-101

It has been said that at common law the insanity of a principal terminates the authority of an agent to act on the ground that where the principal "can no longer act for himself, the agent whom he has appointed can no longer act for him". ⁵⁰¹ It is submitted that (with the important exception of lasting powers of attorney ⁵⁰²) where a principal develops a lack of capacity in respect of a particular transaction which he has entrusted to an agent, then the agent's actual authority to make such a transaction is also terminated. However, the agent's apparent authority may continue beyond such a time, and the agent may himself be liable for breach of an implied warranty of authority. ⁵⁰³ However, this view of the authorities is not taken by the most recent edition of Bowstead & Reynolds on Agency, which prefers instead to hold that the general rules governing the validity of contracts made by an incapable person apply here too, with the result that:

"mental incapacity in a principal will not preclude his conferring actual authority on an agent when the agent had no reason to know of the incapacity, [⁵⁰⁴] and such authority will endure until the agent becomes aware of the incapacity (or the agency otherwise terminates upon general principles) ... The same principles should apply to the existence of apparent authority, the incapacity of the principal not preventing any representation made by him to the third party as to the agent's authority from being effective, unless the third party is aware of the incapacity." ⁵⁰⁵

According to the Supreme Court in *Dunhill v Burgin*, the authorities are in a state of some confusion on these points and, given that the issue did not arise for their decision, did not express any opinion on the state of the law. ⁵⁰⁶ Subsequently, the Court of Appeal has expressed considerable sympathy for the view that it is potentially unfair for the supervening incapacity of a principal (a litigant/client) to

have the effect of automatically terminating the authority of their agent (a solicitor), exposing that agent to the risk of liability for breach of warranty of authority. ⁵⁰⁷ However, the Court of Appeal did not need to re-examine the authorities on this point as the issue before it concerned the narrower point whether the incapacity frustrated the conditional fee agreement (CFA) between the litigant and their solicitor, ⁵⁰⁸ holding that it did not as any instructions could be given by a litigation friend or receiver/deputy after a delay for their appointment. ⁵⁰⁹

Powers of attorney

9-102

In general, an instrument creating a power of attorney must be executed by deed. ⁵¹⁰ Unlike the general effect of mental incapacity on a contract (which renders it voidable rather than void ⁵¹¹), an instrument purporting to create a power of attorney executed by a mentally incapable person has been said to be void at common law rather than voidable with the effect that any instrument made under the purported exercise of that power is also void. ⁵¹² However, the Powers of Attorney Act 1971 provides protection to a person who has dealt with a donee of a power of attorney without knowledge that it has been revoked, rendering any transaction between them “in favour of that person, as valid as if the power had then been in existence”. ⁵¹³ Special rules apply to “lasting powers of attorney” as noted immediately below. ⁵¹⁴

Lasting powers of attorney

9-103


⚠ The Mental Capacity Act 2005 Act made new provision for “lasting powers of attorney” which replaced the “enduring powers of attorney” provided for by the Enduring Powers of Attorney Act 1985. ⁵¹⁵ Under the provisions, a “lasting power of attorney” can include a power of attorney under which the donor confers on the donee authority to make decisions about the donor’s property and affairs or specified matters concerning his property or affairs “and which includes authority to make such decisions in circumstances where [the donor] no longer has capacity”. ⁵¹⁶ At the time of the execution of the instrument conferring the lasting power of attorney, the donor must be adult and have “the capacity to execute it”. ⁵¹⁷ On the other hand, the donor may revoke the power “at any time when he has capacity to do so”. ⁵¹⁸ ⚠

Legal estate vested in person lacking capacity

9-104

By s.22(1) of the Law of Property Act 1925 (as amended by the Mental Capacity Act 2005 ⁵¹⁹), where a legal estate in land (whether settled or not) is vested in a person lacking capacity within the meaning of the 2005 Act to convey or create a legal estate, a deputy appointed for him by the Court of Protection or (if no deputy is appointed for him) any person authorised in that behalf shall, under an order of the Court of Protection, or of the court, or under any statutory power, make or concur in making all requisite dispositions for conveying or creating a legal estate in his name and on his behalf. And by s.22(2) of the 1925 Act, if land subject to a trust of land is vested in a person who lacks capacity within the meaning of the 2005 Act to exercise his functions as trustee, a new trustee shall be appointed in the place of that person, or he shall be otherwise discharged from the trust, before the legal estate is dealt with by the trustees. ⁵²⁰

^{496.} *Ball v Mannin* (1829) 3 Bli. N.S. 1, 22; *Elliott v Ince* (1857) 7 De G.M. & G. 475; *Re Beaney* [1978] 1 W.L.R. 770. But see above, para.9-098.

- [497.](#) *Hall v Warren* (1804) 9 Ves. 605; *Selby v Jackson* (1844) 6 Beav. 192; *Birkin v Wing* (1890) 63 L.T. 80; *Re Beaney* [1978] 1 W.L.R. 770. cf. *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] A.C. 776.
- [498.](#) *Gibbons v Wright* (1954) 91 C.L.R. 423, 444 and see above, paras 9-075 et seq.
- [499.](#) See above, paras 8-130 et seq.
- [500.](#) *Ernst v Elliott* (1857) 7 De G.M. & G. 475 at 487, 26 L.J. Ch. 821 at 824; *Sutton v Sutton* [2009] EWHC 2576 (Ch), [2010] W.T.L.R. 115 at [40]. On the effect of mental incapacity on powers of attorney see *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] A.C. 776 and below, para.9-102.
- [501.](#) *Drew v Nunn* (1879) 4 Q.B.D. 661, 666–667. See also *McLaughlin v Daily Telegraph Newspaper Co Ltd* (No.2) (1904) 1 C.L.R. 243 (HC Aus.); [1904] 1 C.L.R. 479 at 482 (PC refusing special leave to appeal).
- [502.](#) Below, para.9-103.
- [503.](#) *Drew v Nunn* (1879) 4 Q.B.D. 661; *Yonge v Toynbee* [1910] 1 K.B. 215. See Vol.II, para.31-056.
- [504.](#) On this formulation of the general test at common law see above, paras 9-078—9-088.
- [505.](#) Watts, *Bowstead & Reynolds on Agency*, 20th edn (2010), para.2–009 (citations omitted). This passage did not appear in previous editions of the work.
- [506.](#) [2014] UKSC 18, [2014] 1 W.L.R. 933 at [31]. See also Hudson (1959) 37 Canadian Bar Rev. 497.
- [507.](#) *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18, [2015] 1 Costs L.R. 119 at [36]–[37].
- [508.](#) [2015] EWCA Civ 18 at [37].
- [509.](#) [2015] EWCA Civ 18 at [38]–[39].
- [510.](#) Powers of Attorney Act 1971 s.1.
- [511.](#) Above, para.9-093.
- [512.](#) *Daily Telegraph v McLaughlin* [1904] A.C. 776, 780 (P.C.) referring to *Elliot v Ince* (1857) 7 D.M. & G. 475.
- [513.](#) Powers of Attorney Act 1971 s.5(2); Watts, *Bowstead & Reynolds on Agency*, 20th edn (2010), para.2–009.
- [514.](#) Below, para.9-103.
- [515.](#) Mental Capacity Act 2005 ss.9–14 (in force on October 1, 2007: Mental Capacity Act (Commencement No.2) Order 2007 (SI 2007/1897) art.2(1)(a)).
- [516.](#) Mental Capacity Act 2005 s.9(1).
- [517.](#) s.9(2)(c).
- [518.](#)  s.13(2) and see *TB v KJP* [2016] EWCOP 6, [2016] W.T.L.R. 687.
- [519.](#) Sch.6 para.4(2)(c).

[520.](#) 2005 Act Sch.6 para.4(2)(c).

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Section 4. - Drunken Persons

Effect of drunkenness

9-105

In *Pitt v Smith* ⁵²¹ in 1811, Lord Ellenborough held that a person in a state of complete intoxication has “no agreeing mind”; and later, in an action for work and labour, held that proof that the plaintiff was drunk when he signed what the defendant insisted was an agreement, dispensed with the necessity of producing it, the instrument being a nullity. ⁵²² It would appear that the test of incapacity by reason of drunkenness is the same as that for persons lacking mental capacity, viz whether the person alleged to be incapable was so drunk as not to understand what he was doing, and whether the other party knew of his condition. ⁵²³ Moreover, given this close relationship between avoidance of a contract on the ground of mental incapacity and on the ground of intoxication, if the former extends to cases where the other party *ought to have known* of the incapacity, as stated by the Supreme Court in *Burgin v Dunhill*, ⁵²⁴ then this extension of the rule should apply equally to cases of intoxication. Where these conditions are satisfied, then the effect of drunkenness on a contracting party is voidable at his or her option, and can accordingly be ratified when sober. ⁵²⁵ But other authorities suggest that equity has a wider jurisdiction to set aside an unfair or unconscionable transaction entered into by a person affected by drink. ⁵²⁶ It would seem that a similar approach would be taken to a contract made under the influence of intoxicating substances other than alcohol, notably drugs. ⁵²⁷ In *Barclays Bank Plc v Schwartz*, ⁵²⁸ Millett L.J. accepted that the reason for drunkenness of a party to a contract affecting its validity is that like mental incapacity it deprives a person not only of a full understanding of a transaction, but also of the awareness that he does not understand it.

Liability for necessary goods

9-106

For necessities sold and delivered, the liability of a drunken person is, by s.3 of the Sale of Goods Act 1979, ⁵²⁹ similar to that of a minor.

^{521.} (1811) 3 Camp. 33.

^{522.} *Fenton v Holloway* (1815) 1 Stark. 126.

^{523.} *Gore v Gibson* (1845) 13 M. & W. 623; *Molton v Camroux* (1848) 2 Exch. 487 at 501, (1849) 4 Exch. 17; *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599; *Hart v O'Connor* [1985] A.C. 1000; *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412, 425 and see above, para.9-075.

^{524.} [2014] UKSC 18, [2014] 1 W.L.R. 933 at [1] and [25] on which see above, paras 9-078—9-088 where this view is considered.

- [525.](#) *Matthews v Baxter* (1873) L.R. 8 Ex. 132.
- [526.](#) *Cory v Cory* (1747) 1 Ves. Sen. 19; *Cooke v Clayworth* (1811) 18 Ves. 12; *Butler v Mulvihill* (1823) 1 Bligh 137; *Wiltshire v Marshall* (1866) 14 L.T.(N.S.) 396; *Blomley v Ryan* (1956) 99 C.L.R. 362. cf. *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412, 425. This question is related to the wider question whether or not English law accepts a wide doctrine of "unconscionability", on which see above, paras 8-130 et seq.
- [527.](#) *Irvani v Irvani* [2000] Lloyd's Rep. 412.
- [528.](#) *The Times*, August 2, 1995.
- [529.](#) See above, paras 9-010 et seq.