

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 7 - Performance and Discharge
Chapter 21 - Performance
Section 1. - In General

Introduction

21-001

The general rule is that a party to a contract must perform exactly ¹ what he undertook to do. ² When an issue arises as to whether performance is sufficient, the court must first interpret ³ the contract in order to ascertain the nature of the obligation (which is traditionally considered to be a question of law ⁴); the next question is to see whether the actual performance measures up to that obligation (which is a question of “mixed fact and law” in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation ⁵). This means that although an appellate court, or a court reviewing the decision of an arbitrator, may not normally question a finding of pure fact by the lower court or arbitrator, it may review the construction of the contract and draw its own conclusion as to whether or not the facts amount to performance. ⁶

Purported performance

21-002

The fact that a party to a contract has, in purported performance, acted in a way which may appear, in a commercial sense, to be just as valuable to the other party as the way specified in the contract does not amount to performance in law. ⁷ Thus, a contract to carry goods by sea from Singapore to New York with liberty to tranship at other ports was held not to be performed by their carriage partly by sea and partly by rail. ⁸

Promisor need not perform stipulation for its own benefit

21-003

A party to a contract need not carry out a stipulation inserted solely for its own benefit. ⁹ Thus a covenant by a lessee to insure in the names of the lessors is not performed by insuring in their names and its own jointly ¹⁰; nor a covenant by a lessee to insure in the joint names of the lessor and itself by the lessee insuring in its own name only ¹¹; but a covenant by a lessee to insure in the joint names of the lessor and itself is well performed by it insuring in the name of the lessor only. ¹²

Substituted or vicarious performance

21-004

The promisor, in the absence of waiver ¹³ or subsequent variation by agreement, ¹⁴ cannot substitute for the agreed performance anything different, even though the substituted performance might appear to be better than, or at least equivalent to, the agreed performance. ¹⁵ If no personal skill of or

supervision by the promisor is envisaged by the contract, the promisor may arrange for performance by another person on his behalf ¹⁶; but where the contract expressly or impliedly requires personal performance by the promisor, he may not delegate performance to any other person. ¹⁷

Place of performance

21-005

If the contract does not specify where performance is to take place, the place of performance depends upon the implied intention of the parties, to be judged from the nature of the contract and all the surrounding circumstances. ¹⁸ If no place of performance is specified even by implication, but performance requires the concurrence of the promisee, the general rule is that the promisor must seek out the promisee and perform his promise wherever the promisee may be. ¹⁹

Promises in the alternative

21-006

Where a contractual promise is in the alternative, in that the promisor agrees to do one or more things, the legal effect of the promise depends on the kind of alternative involved: there may be a promise to perform in one of two or more alternative ways, where the form of the promise *requires* an election to be made; or there may be a primary or basic obligation to perform in one way *unless* the party who holds the “option” chooses to substitute another way. ²⁰ Under the first kind of alternative promise, there is no primary or basic obligation and there must be an election of an alternative by one of the parties. The contract may provide which party may choose the alternative to be performed ²¹; in the absence of such a provision, the right to elect the alternative is impliedly vested in the promisor, the rule being that the party who is obliged to perform the first act may choose which alternative he wishes to perform. ²² If the promisee is entitled to elect between the alternatives, he must give notice of his election, and until such notice has been given the liability of the other party does not arise. ²³ Once the person entitled to elect chooses the alternative to be performed, ²⁴ he is absolutely bound by his choice ²⁵ even though the chosen mode of performance afterwards becomes impossible to carry out. ²⁶

A matter of construction

21-007

In the absence of any such election, if it becomes impossible to perform one alternative, it depends on the construction of the contract, in the particular circumstances, whether the promisor is still obliged to perform the remaining alternative, or whether he is discharged from his obligation ²⁷; normally, however, the promisor is still bound to perform another alternative ²⁸:

“... if the court is satisfied that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of the modes becomes impossible by the act of God, he is still bound to perform it in the other mode.” ²⁹

In *Anderson v Commercial Union Assurance Co* ³⁰ an insurance policy contained a condition giving the insurers the option “to reinstate or replace property damaged or destroyed instead of paying the amount of the loss or damage”. The defendants argued that they would be discharged from performing either alternative if what had happened made it impossible for them to reinstate the property, but Bowen L.J. said:

“It is clear law that if one of two things which have been contracted for subsequently

becomes impossible, it becomes a question of construction whether, according to the true intention of the document, the obligor is bound to perform the alternative or is discharged altogether.”³¹

If, however, the promisor puts it out of his power to perform one alternative, he is bound to perform the other alternative.³²

“Business” options

21-008

The second type of alternative promise is a “true” or “business” option, and it must be contrasted with a contractual obligation which may be performed in different ways (as discussed in the preceding paragraphs). In a “business” option, the contract specifies a single, primary or basic obligation to be performed in one way, unless the holder of the option chooses to substitute another way, and does so by the effective exercise of his option³³; this power of choice is conferred by the contract on the option-holder “solely for his own advantage” and “in exercising the option ... the holder is not bound to consider the convenience or the interest of the other party”.³⁴ Hence, if performance of the primary obligation is impeded or frustrated, the option-holder is not obliged to exercise his choice so as to permit performance in the substituted way.³⁵

When notice to perform is required

21-009

⚠ Some promises may be made conditional upon the happening of a particular event; the contract may stipulate that notice of the happening of the event must be given to the promisor by the other party. But in the absence of such a provision, the general rule is that where the matter does not lie more properly within the knowledge of the other party than of the promisor, such notice is not required.³⁶ So where houses were let on the understanding that the landlord was to repair a sea-wall necessary to preserve the houses, no notice to the landlord of want of repair was required.³⁷ Again, if A agrees to indemnify B against the acts of a third person, the liability attaches without B giving notice of such acts to A.³⁸ In certain circumstances, however, notice requiring performance is necessary despite the absence of a clause in the contract requiring such notice:

“The general rule is, that a party is not entitled to notice unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for.”³⁹ ⚠

Thus, where only one party has knowledge of the relevant facts, notice is necessary⁴⁰ ⚠; so, if a landlord agrees to repair the inside of a house⁴¹ or to keep drains in repair,⁴² the tenant must give notice of the disrepair,⁴³ since:

“... the landlord is not the occupier of the premises and has no means of knowing what is the condition of the premises unless he is told.”⁴⁴

Notice to the landlord of the need for repair is also required where the covenant to repair is inserted by statute into the contract of letting⁴⁵; this rule applies whether the defect is latent or patent.⁴⁶ But notice of disrepair is not necessary where the landlord retains in its own control that part of the premises whose defective condition causes the damage.⁴⁷ The obligation on the tenant to give notice

⚠ However, exceptionally, the law may imply an obligation on the part of the tenant to give notice where the property is neither in the possession of the landlord nor the tenant and the tenant, but not the landlord, is in a position to know of the disrepair. ⁴⁹ ⚠

When request to perform is necessary

21-010





Normally, no request or demand for performance is necessary ⁵⁰ and the promisor is bound to perform its contractual obligation without being requested to do so; an illustration is the common case of a promise to pay a sum of money, either in general terms or on a specified day. ⁵¹ A request to perform is essential to complete the promisee's cause of action only if the contract expressly requires such a request, ⁵² or the nature of the contract shows that it is an implied condition precedent to the promisor's liability that a request for performance should be made. Thus, where the amount of a debt is uncertain and depends on facts known to the creditor, the creditor must make a demand for a specific sum. ⁵³ Similarly, no right of action against the drawer or indorser accrues on a bill of exchange or promissory note until a demand has been made ⁵⁴; a bank balance is not due until the depositor claims to withdraw it ⁵⁵; a bailor of chattels at will cannot sue for their return until there has been a demand and a refusal to return ⁵⁶; and where goods are consigned to an agent for sale on commission, an action will not lie against the agent for failure to account until such an account has been demanded from the agent. ⁵⁷ Obviously, where an individual has disabled himself or herself from performing his or her contract, it is unnecessary to make any request or demand of performance. ⁵⁸

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1. On the doctrine of substantial performance, see below, para.21-033; on the doctrine of waiver, see below, paras 22-040 et seq.
 2. See below, paras 21-004, 21-033. cf. s.30 of the Sale of Goods Act 1979 (Vol.II, para.44-256). A party may be held to have failed to perform his contractual obligation, despite the existence of an exemption clause purporting to cover the matter, if as a matter of construction, the clause is held not to cover the loss which has been suffered: see above, paras 15-008 et seq. Under s.3(2)(b) of the Unfair Contract Terms Act 1977, two types of terms are ineffective unless they satisfy the test of reasonableness (as defined in s.11): they are terms under which a party acting in the course of a business and dealing on the other party's "written standard terms of business" claims to be entitled either: "(i) [T]o render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation to render no performance at all". (See further above, paras 15-066 et seq.). A wide range of clauses may also be affected by Pt 1 of Sch.2 to the Consumer Rights Act 2015 (which Act revokes the Unfair Terms in Consumer Contracts Regulations 1999), on which see below, Vol.II, Ch.38).
 3. See also below, paras 21-028, 21-033, 21-038. On the construction of the terms of a contract, see above, paras 13-041 et seq.; on the question of the *order* in which the different promises of the parties have to be performed, see below, paras 21-028, 24-036—24-038.
 4. In addition to the cases cited in nn.17 and 18 below; see above, para.13-047 on the question whether the interpretation of a contract is one of law or of mixed fact and law, and *Dixon v Holdroyd* (1857) 7 E. & B. 903; *Parry v Great Ship Co Ltd* (1864) 4 B. & S. 556; *Edmundson v Longton Corp* (1902) 19 T.L.R. 15; *Vigers v Cook* [1919] 2 K.B. 475. cf. *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] A.C. 209 (obligation to give actor "one of the three leading comedy parts in a musical play").
 5. *Margaronis Navigation Agency Ltd v Henry W. Peabody & Co of London Ltd* [1965] 1 Q.B. 300, 318. Where A and B each enter into a contract with C and, subsequently, both A and B subcontract performance of their contractual obligations to the same sub-contractor, D, the question which contract (i.e. the contract between A and B or the contract between A and C) is being performed when D provides a service or delivers goods to C must be decided by

reference to all the facts and circumstances of the case: *Albright & Wilson UK Ltd v Biachem Ltd* [2002] UKHL 37, [2002] 2 All E.R. (Comm) 753 (where, as a result of a mix-up, the sub-contractor delivered the goods which A had contracted to supply to C but the documents relating to the goods which B had contracted to supply—it was held that it was A that was in breach of contract, and not B, given that the documents were merely ancillary to the substance of what was taking place, namely the delivery of the goods).

6. [1965] 1 Q.B. 300 cf. *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93 (a frustration case: see below, para.23-014); *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] A.C. 724 (see below, para.23-097, n.417).
7. *Arcos Ltd v E.A. Ronaasen & Son* [1933] A.C. 470. The courts may, however, ignore a trivial failure to perform, under the de minimis principle: *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109; *Margaronis Navigation Agency Ltd v Henry W. Peabody & Co of London Ltd* [1965] 1 Q.B. 300, 316.
8. *Re L. Sutro & Co and Heilbut, Symons & Co* [1917] 2 K.B. 348. cf. *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 113.
9. *Beswick v Beswick* [1968] A.C. 58, 92.
10. *Penniall v Harborne* (1848) 11 Q.B. 368.
11. *Doe d. Muston v Gladwin* (1845) 6 Q.B. 953. As to severable contracts in such cases, see *Green v Low* (1856) 22 Beav. 625.
12. *Havens v Middleton* (1853) 22 L.J. Ch. 746. (The lessor was in no way prejudiced by the departure from the contractual undertaking.)
13. Below, paras 22-040 et seq.
14. Below, paras 22-032 et seq.
15. *Legh v Lillie* (1860) 6 H. & N. 165; *Forman & Co Proprietary Ltd v The Liddesdale* [1900] A.C. 190; *Re L. Sutro & Co and Heilbut, Symons & Co* [1917] 2 K.B. 348 (see para.21-002); *Arcos Ltd v E.A. Ronaasen & Son* [1933] A.C. 470 (above, para.21-002).
16. On such vicarious performance, see above, paras 19-082—19-085.
17. *Davies v Collins* [1945] 1 All E.R. 247; *Martin v N. Negin Ltd* (1945) 172 L.T. 275; *Edwards v Newlands & Co* [1950] 2 K.B. 534.
18. *Reynolds v Coleman* (1887) 36 Ch. D. 453; *Mutzenbecher v La Aseguradora Espanola* [1906] 1 K.B. 254. See also the cases on the place of payment, below, para.21-056. cf. *Comber v Leyland & Bullins* [1898] A.C. 524; *Re Parana Plantations Ltd* [1946] 2 All E.R. 214. On the place of delivery in a contract for the sale of goods, see s.29(1) and (2) of the Sale of Goods Act 1979; Vol.II, paras 44-242 et seq.
19. This is the general rule in promises to pay money (see below, para.21-056), but it applies to other promises where the promisee must concur in performance: *Rippinghall v Lloyd* (1833) 5 B. & Ad. 742. cf. *Cranley v Hillary* (1813) 2 M. & S. 120.
20. The second kind of alternative is discussed below, para.21-008.
21. *Chippendale v Thurston* (1829) 4 C. & P. 98 (contract provided for notice to be given by one party). On the assessment of damages where the promisor could choose the method or extent of performance, see *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All E.R. 390 (below, para.26-075).
22. *Layton v Pearce* (1778) 1 Dougl. 15; *Re Brookman's Trusts* (1869) L.R. 5 Ch. App. 182; *Reed v*

- Kilburn Co-operative Society* (1875) L.R. 10 Q.B. 264; *Christie v Wilson* 1915 S.C. 645. However, there is no rule of law to the effect that the right to elect the alternative is impliedly invested in the promisor. In all cases it is a question of construction of the contract: *Mora Shipping Inc v AXA Corporate Solutions Assurance SA* [2005] EWCA Civ 1069, [2005] 2 Lloyd's Rep. 769 at [44], albeit that the natural meaning of a clause which imposes an obligation on a party to do A or B is likely to be that it is for the promisor to choose whether to do A or B.
23. *Vyse v Wakefield* (1840) 6 M. & W. 442; affirmed 7 M. & W. 126; *Thorn v City Rice Mills* (1889) 40 Ch. D. 357; *Narbeth v James* [1967] 1 Lloyd's Rep. 591, 598; affirmed on appeal [1968] 1 Lloyd's Rep. 168. See also *Rippinghall v Lloyd* (1833) 5 B. & Ad. 742; *Calaminus v Dowlais Iron Co Ltd* (1878) 47 L.J.Q.B. 575.
24. On the time by which a selection must be made among "alternative cargoes", see *Brightman & Co v Bunge y Born Limitada Sociedad* [1924] 2 K.B. 619; affirmed on other grounds [1925] A.C. 799; *Reardon Smith Line Ltd v Ministry of Agriculture* [1963] A.C. 691, 717, 720.
25. *Schneider v Foster* (1857) 2 H. & N. 4; *Rugg v Weir* (1864) 16 C.B.(N.S.) 471; *Gath v Lees* (1865) 3 H. & C. 558; cf. *Mallam v Arden* (1833) 10 Bing. 299. A tender of performance which is not up to the contractual requirements may, however, be withdrawn, and a proper tender substituted within the time fixed for performance (see below, para.21-092 n.495).
26. *Brown v Royal Insurance Society* (1859) 1 E. & E. 853.
27. *Da Costa v Davis* (1798) 1 B. & P. 242; *Stevens v Webb* (1835) 7 C. & P. 60; *Marquis of Bute v Thompson* (1844) 13 M. & W. 487; *Barkworth v Young* (1856) 26 L.J. Ch. 153, 163; *Anderson v Commercial Union Assurance Co* (1885) 55 L.J.Q.B. 146, 150 (quoted below); *McIlquham v Taylor* [1895] 1 Ch. 53.
28. *Barkworth v Young* (1856) 26 L.J. Ch. 153; *Brightman & Co v Bunge y Born Limitada Sociedad* [1924] 2 K.B. 619; *Reardon Smith Line Ltd v Ministry of Agriculture* [1963] A.C. 691, 717, 730. cf. below, para.21-008.
29. *Barkworth v Young* (1856) 26 L.J. Ch. 153, 163.
30. (1885) 55 L.J.Q.B. 146.
31. (1885) 55 L.J.Q.B. 146, 150.
32. *McIlquham v Taylor* [1895] 1 Ch. 53 (following *Studholme v Mandell* (1698) 1 Ld.Raym. 279). cf. *Honck v Muller* (1881) 7 Q.B.D. 92. See also, in the context of "self-induced" frustration, the case of *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1 (below, paras 23-061—23-067).
33. "There must, therefore, be some provision, express or implied, for its exercise within a reasonable time and for the communication of the election to the other party": *Reardon Smith Line Ltd v Ministry of Agriculture* [1963] A.C. 691, 731; *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728, 766.
34. *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728, 766. Such a contractual provision will, however, in some circumstances fall within s.3 of the Unfair Contract Terms Act 1977: see above, para.21-001 n.2; and paras 15-066 et seq.
35. *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728, 766, 730. See also at 719–720.
36. *Vyse v Wakefield* (1840) 6 M. & W. 442, especially 453–454; 7 M. & W. 126; *Dawson v Wrench* (1849) 3 Exch. 359, 362; *Murphy v Hurly* [1922] 1 A.C. 369 (distinguishing *Makin v Watkinson* (1870) L.R. 6 Ex. 25, below). As to the requirement of notice when one party has the right to choose the mode of performance in an alternative promise, see above, para.21-006; as to notice of dishonour of a bill, see the Bills of Exchange Act 1882 ss.48 and 49 (considered in Vol.II, para.34-109).

- [37.](#) *Murphy v Hurley* [1922] 1 A.C. 369 (the sea wall was not in the exclusive occupation of any tenant).
- [38.](#) *Cutler v Southern* (1668) 1 Wms. Saund. 116; *Lilley v Hewitt* (1822) 11 Price 494. See Vol.II, para.45-081. But a demand is necessary where the surety promises “to pay on demand” if the principal debtor defaults: *Sicklemore v Thistleton* (1817) 6 M. & S. 9.
- [39.](#)  *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [29]–[38]; *Vyse v Wakefield* (1840) 6 M. & W. 442, 453. See also *Davies v McLean* (1873) 21 W.R. 264.
- [40.](#)  In most of these cases the obligation of the tenant to give notice operates as an implied term of the contract, so that the implication is based on the normal principles applicable to the implication of terms, namely necessity or obviousness: *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [30], [47], [57] and [63]. See also *Makin v Watkinson* (1870) L.R. 6 Ex. 25; *London and South Western Ry v Flower* (1875) 1 C.P.D. 77, 85; *Manchester Bonded Warehouse Co v Carr* (1880) 5 C.P.D. 507.
- [41.](#) *Makin v Watkinson* (1870) L.R. 6 Ex 25; *Broggi v Robins* (1899) 15 T.L.R. 224; *Tredway v Machin* (1904) 91 L.T. 310. See also n.45, below.
- [42.](#) *Hugall v M'Lean* (1885) 53 L.T. 94; *Torrens v Walker* [1906] 2 Ch. 166.
- [43.](#) Knowledge of the want of repair may come from a source other than the tenant: *Griffin v Pillet* [1926] 1 K.B. 17; *Uniproducts (Manchester) Ltd v Rose Furnishers Ltd* [1956] 1 W.L.R. 45; *O'Brien v Robinson* [1973] A.C. 912, 926.
- [44.](#) *Tredway v Makin* (1904) 41 L.T. 310, 311.
- [45.](#) *O'Brien v Robinson* [1973] A.C. 912 (Housing Act 1961 s.32; see now Landlord and Tenant Act 1985 s.11); *McCarrick v Liverpool Corp* [1947] A.C. 219. The landlord's right to enter and inspect the premises does not excuse the tenant from giving notice: [1947] A.C. 219.
- [46.](#) *O'Brien v Robinson* [1973] A.C. 912 (following *Morgan v Liverpool Corp* [1927] 2 K.B. 131).
- [47.](#) *Melles & Co v Holme* [1918] 2 K.B. 100; *Bishop v Consolidated London Properties Ltd* (1933) 102 L.J.K.B. 257; *British Telecommunications Plc v Sun Life Assurance Society Plc* [1996] Ch. 69 (although the court refrained from expressing a concluded view on the case where the defect is caused by an occurrence which is wholly outside the landlord's control). cf. also s.4(2) of the Defective Premises Act 1972.
- [48.](#)  *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [42].
- [49.](#)  *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [48]–[59]. However, as a general rule, the obligation to give notice is unlikely to apply to the common parts of a block of flats let by the landlord because the landlord would ordinarily be in possession of the common parts.
- [50.](#) *Brown v Dean* (1833) 5 B. & Ad. 848; *Radford v Smith* (1838) 3 M. & W. 254, 258; *Hooper v Woolmer* (1850) 10 C.B. 370.
- [51.](#) *Gibbs v Southam* (1834) 5 B. & Ad. 911; *Walton v Mascall* (1844) 13 M. & W. 452; *Bell & Co v Antwerp, London & Brazil Line* [1891] 1 Q.B. 103, 107. On payment, see below, paras 21-040 et seq. It is a criminal offence for a creditor to “harass” his debtor with the object of coercing him to pay the debt: Administration of Justice Act 1970 s.40.
- [52.](#) e.g. *Rawson v Johnson* (1801) 1 East 203 (contract to deliver goods on request: if the buyer sues for non-delivery, he need only prove a request to deliver and his readiness to pay the price).

- [53.](#) *Brown v Great Eastern Ry* (1877) 2 Q.B.D. 406.
- [54.](#) Bills of Exchange Act 1882 s.45. (The acceptor is liable even where the bill has not been presented for payment: s.52(1).) cf. s.87. (See Vol.II, paras 34-105—34-106, 34-151, 34-187.)
- [55.](#) *Joachimson v Swiss Bank Corp* [1921] 3 K.B. 110; *Bagley v Winsome and National Provincial Bank Ltd* [1952] 2 Q.B. 236; *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1954] A.C. 495; *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728, 748–749.
- [56.](#) *Cullen v Barclay* (1881) 10 L.R.Ir. 224; *Miller v Dell* [1891] 1 Q.B. 468. See Vol.II, para.33-010.
- [57.](#) *Topham v Braddick* (1809) 1 Taunt. 572.
- [58.](#) *Lovelock v Franklyn* (1846) 8 Q.B. 371; *Caines v Smith* (1846) 15 M. & W. 189, 190. An old illustration is *Short v Stone* (1846) 8 Q.B. 358, where A, who had promised to marry B, later married C instead. (Such promises no longer have legal effect: see below, para.26-044 n.236.)

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Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 21 - Performance

Section 2. - Time of Performance ⁵⁹

Time “of the essence of the contract” ⁶⁰

21-011

! A number of difficulties surround the law relating to time stipulations in contracts. The first is that the phrase which is commonly employed, namely “time is of the essence of the contract”, is potentially misleading in that the question in each case is whether time is of the essence of the particular term which has been broken, not whether time is of the essence of the contract as a whole. ⁶¹ The second is that, historically, common law and equity adopted a divergent approach to time stipulations in contracts. At common law a strict approach was taken so that, as was once stated by Sir John Romilly M.R.:

“... at law time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for breach of it.” ⁶²

However, even at common law there were exceptional cases where time was held not to be of the essence of the contract. ⁶³ But the thrust of the approach of the courts at common law was clear: stipulations as to time were generally of the essence of the contract, so that a party could treat the contract as repudiated if the other party’s performance was not completed on the date stipulated by the contract. A different set of rules, however, evolved in equity where time was not of the essence of the contract, except in the three cases considered below:

“The court of equity was accustomed to relieve against a failure to keep the date assigned ... if it could do justice between the parties” ⁶⁴; “relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract.” ⁶⁵

Law of Property Act 1925 s.41

21-012

Section 41 of the Law of Property Act 1925, ⁶⁶ provides that:

“Stipulations in a contract, as to time or otherwise, which according to the rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.”

Thus the rules at law are now the same as those in equity: the effect of s.41 is that:

“... contractual stipulations as to time ... shall not be construed as essential, except where equity would before 1875 have so construed them—i.e. only when the strict observance of the stipulated time for performance was a matter of express agreement or of necessary implication”⁶⁷,”

or, in other words, s.41:

“... does not negative the existence of a breach of contract where one has occurred,⁶⁸ but in certain circumstances it bars any assertion that the breach has amounted to a repudiation of the contract”,⁶⁹

which entitles the innocent party to treat the contract as terminated. Following the enactment of s.41, it is only in the three cases set out in the next two paragraphs that time is of the essence of a contract.⁷⁰

Time made expressly or implicitly “of the essence”

21-013

⚠ Time is of the essence:

(1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with,⁷¹ or that time is to be “of the essence”.⁷² (2) Where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with, e.g. the purchase of a leasehold house required for immediate occupation⁷³; the sale of business land or premises,⁷⁴ such as a public-house as a going concern⁷⁵; the sale of a reversionary interest⁷⁶; the exercise of an option for the purchase or repurchase of property,⁷⁷ or for determining a lease under a “break” clause⁷⁸ or an option to acquire a leasehold interest in futuro⁷⁹ (since in these cases, “the parties on the exercise of the option, are brought into a new legal relationship”⁸⁰); “mercantile contracts”,⁸¹ such as a contract for the sale of goods where a time is fixed for delivery,⁸² or for the sale of shares liable to fluctuate in value (where the contract stipulated a time for payment).⁸³ However, the mere fact that the contract can be labelled “mercantile” or “commercial” does not determine the issue.⁸⁴ Nor does the fact that the contract confers on a party the right to terminate or withdraw from the contract on the breach of a term of the contract, such as the failure to pay hire “punctually” under a charterparty, have the inevitable consequence that the term relating to the payment of hire has the status of a condition.⁸⁵ Whether a time limit is of the essence of a contractual provision is a question of interpretation of the provision in the context of the contract as a whole.⁸⁶ The question is whether the time specified in the particular clause was (expressly or by necessary implication) intended by the parties to be essential, e.g. because they needed to know precisely what were their respective obligations.⁸⁷ Thus, where the buyers were required to give 15 days’ notice of readiness of the vessel so that the sellers could then nominate the port for loading, the House of Lords held time to be of the essence: performance by the buyers was a condition precedent to the sellers’ ability to perform their obligation.⁸⁸ (However, under the Sale of Goods Act 1979 s.10, unless a different intention appears from the terms of the contract, stipulations as to time of *payment* are not deemed to be of the essence of the contract of sale.⁸⁹) Similarly, a court is unlikely to be willing to infer that the parties have agreed that time is to be of the essence in the case of a contract of employment, a commercial agency contract⁹⁰ or an analogous contract.⁹¹ In the latter contexts parties wishing to make time of the essence should make express provision to that effect in their contract.

Notice making time “of the essence”⁹²

21-014

(3) Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice ⁹³ requiring the contract to be performed within a reasonable time. ⁹⁴ Notice can be served at the moment of breach: it is not necessary to wait until there has been an unreasonable delay by the party in breach before serving the notice. ⁹⁵ The period of notice given must, however, be reasonable and what is reasonable will depend upon all the facts and circumstances of the case. ⁹⁶ Factors to which the courts will have regard in assessing the reasonableness of the period of notice include what remains to be done at the date of the notice; the fact that the party giving the notice has continually pressed for completion, or has before given similar notices which it has waived ⁹⁷; or that it is especially important for it to obtain early completion. ⁹⁸ A party who elects to give notice immediately upon the breach of contract would be well advised to be "cautious" in its selection of the period to be included in the notice. ⁹⁹ Notice making time of the essence of the contract can be given in relation to any term of the contract: entitlement to give notice is not confined to essential terms of the contract. ¹⁰⁰ The party serving the notice must not itself be in default. ¹⁰¹ Once notice has been given, both parties are bound by it so that, if the party giving the notice is not ready to perform on the expiry of the notice, the other party may be entitled to terminate. ¹⁰² If, by notice, a party has made time of the essence, but later allows a further extension to another fixed date, time remains of the essence. ¹⁰³ The notice procedure laid down in the contract may be held to be exhaustive of the rights of the parties so that it will not be open to them to serve a notice (for example, of shorter duration) under the general law rather than the contract. ¹⁰⁴

Consequences of time being "of the essence"

21-015

In determining the consequences of a stipulation that time is to be "of the essence" of an obligation, it is vital to distinguish between the case where both parties agree that time is to be of the essence of the obligation and the case where, following a breach of a nonessential term of the contract, the innocent party serves a notice on the other stating that time is to be of the essence. ¹⁰⁵ In the former case the effect of declaring time to be of the essence is to elevate the term to the status of a "condition" ¹⁰⁶ with the consequences that a failure to perform by the stipulated time will entitle the innocent party to: (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed ¹⁰⁷; and (b) claim damages from the contract-breaker on the basis that it has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction"). ¹⁰⁸

Loss of right to terminate: relief

21-016

The right to terminate may, of course, be lost where the innocent party affirms the contract ¹⁰⁹ or is held to have waived (or to be estopped from exercising) the right to terminate. ¹¹⁰ Additionally, equity may intervene to grant relief in cases of late payment of money due under a mortgage or rent due under a lease, ¹¹¹ but equity will not intervene at the request of a purchaser who has failed to comply with an essential time stipulation in a contract for the sale of land. ¹¹² The need for certainty in such cases is paramount and the very existence of a jurisdiction to grant relief in cases where it would be unconscionable ¹¹³ for the vendor to exercise its right to terminate would detract from that need for a certain rule. The harshness of this general rule may, however, be tempered by the prospect of relief being granted in extreme cases. Where, for example, the vendor has been unjustly enriched by improvements made at the purchaser's expense, then the court may either relax the principle that specific performance will not be granted to a purchaser who has broken an essential condition as to time ¹¹⁴ or, preferably, recognise that the purchaser has a personal restitutionary claim against the vendor. ¹¹⁵

Form of relief: additional time to pay

21-017

The equitable jurisdiction to grant relief is limited both in terms of the contracts which attract this type of relief and the form which the relief takes. In relation to the types of contract, the jurisdiction to grant relief against forfeiture is limited to contracts concerning the transfer or creation of proprietary or possessory rights ¹¹⁶ so that a charterer under a time charter ¹¹⁷ was held not to be entitled to relief against forfeiture when the shipowner withdrew the ship because the charterer had failed to make punctual payment of an instalment of hire. As to the form of the relief, the courts will seldom do more than give the contract-breaker more time in which to pay the sum it failed to pay on time. ¹¹⁸ This relief has the effect that the contract-breaker does not forfeit the rights which it had under the contract, provided that it pays within the time fixed by the court.

Consequences of “time being made of essence”

21-018

Where, however, notice is given by one party purporting to make “time of the essence” in respect of a breach of a non-essential term of the contract, the consequences are altogether different. Such a notice does not serve to make time of the essence so far as the obligations in the original contract are concerned, because one party cannot unilaterally vary the terms of a contract by turning what was previously a nonessential term of the contract into an essential term ¹¹⁹ nor can one party by serving a notice on the other “impose *additional* obligations on a party to a contract” ¹²⁰; the notice “has in law no contractual import”. ¹²¹ The effect of the notice is rather to bring to an end the interference of equity with the legal rights of the parties ¹²² so that the entitlement of the innocent party to terminate future performance of the contract is then governed solely by ordinary common law rules. ¹²³ Given that the notice cannot have the effect of turning the non-essential term of the contract into a condition, the party giving the notice can only terminate where the failure of the other party to comply with the terms of the notice goes to the root of the contract so as to deprive that party of a substantial part of the benefit to which it was entitled under the terms of the contract. ¹²⁴ Failure to comply with the terms of the notice can therefore only be used as evidence of a repudiatory breach; it is not a repudiatory breach per se. ¹²⁵

Where time is not of the essence

21-019

Where none of the three exceptions mentioned in the preceding paragraphs applies, the effect of s.41 of the Law of Property Act 1925 (above) is that the breach of a stipulation as to time is not of itself a repudiatory breach ¹²⁶ which entitles the innocent party to terminate further performance of the contract. Thus, in a contract for the sale and purchase of land, if the purchaser fails to complete on the date fixed for completion, the effect of s.41 is that the purchaser does not commit a repudiatory breach of contract (entitling the vendor to terminate the contract) ¹²⁷ provided the purchaser either completes, or is ready to complete, within a reasonable time thereafter ¹²⁸; it is not essential for the purchaser to prove that he was ready and willing to complete on the date fixed for completion. ¹²⁹ Even where time is not (or has not subsequently been made) of the essence in a contract for the sale and purchase of land, a failure to complete the contract on or before the date stipulated for completion is still a breach leading to liability to pay damages for any loss ¹³⁰ caused by the delay in completion. ¹³¹ A further example comes from leases. The presumption is that time is not of the essence in the timetable specified in a rent review clause in a lease, under which various steps must be taken to determine the rent payable during the period following the review date ¹³²; strict adherence to the timetable will be necessary only if that is expressly stated, or if it is a “necessary implication” from the surrounding circumstances ¹³³ (e.g. in the interrelation between the rent review clause and other clauses). ¹³⁴ The fact that the time specified in a rent review clause is held not to be of the essence does not itself mean that there is an implied term that the right to a review must be exercised within a reasonable time. ¹³⁵

Other principles affecting the time fixed for performance

21-020

Apart from the rules considered in the preceding paragraphs, the time fixed for performance may be postponed by waiver ¹³⁶ or subsequent variation by agreement. ¹³⁷ On the other hand, where, before the time fixed for performance, the party obliged to perform renounces its obligation, or puts it out of its power to perform, the other party may, at its option, treat this as an “anticipatory breach” without waiting for the time fixed for performance. ¹³⁸

Where no precise time for performance is specified. ¹³⁹

21-021

Where a party to a contract undertakes to do an act, the performance of which depends entirely on itself, and the contract is silent as to the time of performance (or merely uses indefinite words such as “with all dispatch”) the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case. ¹⁴⁰ Thus, where, by the terms of a charterparty, the cargo was “to be discharged with all dispatch according to the custom of the port” of discharge, it was held by the House of Lords that this bound the charterer to discharge the cargo within a reasonable time, regard being had to every impediment arising out of the custom or practice of the particular port, which the charterer could not have overcome by the use of reasonable diligence. ¹⁴¹ Where the act to be done is one in which both parties to the contract are to concur, the implied engagement is not that the act shall be done within either a fixed or a reasonable time, or within the time usually taken, but that each shall use reasonable diligence in performing its part. ¹⁴² When deciding whether or not performance has taken place within a reasonable time, a court is not limited to what the parties contemplated or ought to have foreseen at the time of entry into the contract but can, with the benefit of hindsight, take account of a broad range of factors, including any estimate given by the performing party of the time which it would take for it to perform, whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance, whether it was necessary for a third party to collaborate with the performing party in order to enable it to perform, and the nature of the cause or causes of any delay in performance. ¹⁴³

Meanings of general terms relating to time

21-022

Where a contract is to be performed “directly”, this does not mean “within a reasonable time”, but “speedily”, or “as soon as possible”, ¹⁴⁴ which is a more stringent obligation, like “immediately”. ¹⁴⁵ A contract by a manufacturer to supply certain specified goods “as soon as possible” means that it is to supply them, not within a time which he thinks reasonable, but within such a time as would be sufficient to enable a party, who had all the necessary appliances, to execute the contract, regard being had to the other contracts it may already have in hand. ¹⁴⁶ Where under a policy of insurance notice of an accident was to be given “as soon as possible”, it was held that all existing circumstances must be taken into account, including the available means of knowledge of the insured’s personal representative of the existence of the policy. ¹⁴⁷ The meaning of words referring to time may sometimes be explained by other terms of the contract. Thus, where the contract was to sell certain goods to the defendants:

“... the said goods to be delivered forthwith, and the price to be paid by the defendants in cash in 14 days from the time of the making of the said contract,”

it was held that, by the use of the word “forthwith” in connection with the payment in 14 days, it was manifest that the parties intended the goods to be delivered at some time within 14 days. ¹⁴⁸ Otherwise, “forthwith” means “without delay or loss of time.” ¹⁴⁹

Meaning of “day” ¹⁵⁰

21-023

The exact meaning of the word “day” in contracts, particularly in charterparties where the charterer is allowed so many days, has given rise to much litigation. Though every case must turn on the words of the particular contract, certain general rules of interpretation can be given. Usually, “days” include Sundays and holidays, unless there is a custom to the contrary, and this is the meaning of the words “running days” ¹⁵¹; on the other hand, the phrase “working days” excludes days when work is not ordinarily done, ¹⁵² and the terms of a contract may show that the word “day” has this meaning. ¹⁵³ A day is a period of time as from midnight to midnight, and not a period of 24 consecutive hours, ¹⁵⁴ unless it is clear that the latter was intended. ¹⁵⁵ Where a person under an obligation to do an act has to do it on or before a specified day, he has the whole of that day to fulfil that obligation, viz until midnight. ¹⁵⁶ It is a general rule that a day is indivisible; so in shipping contracts part of a day counts as a day, ¹⁵⁷ but this is inapplicable where the day referred to is not a natural day, but an artificial period to be computed in accordance with the provisions of the contract. ¹⁵⁸ The law will take account of parts of a day whenever that is intended by Parliament (or by the parties to a contract), as where the question concerns the sequence of events happening on the same day. ¹⁵⁹ If a notice must be received by a specified person by a prescribed day, it must be received at a time when, as an ordinary matter of routine, it will convey the relevant information to that person or his agent, e.g. in the case of an office address, during normal business hours. ¹⁶⁰

Computation of time ¹⁶¹

21-024

Expressions relating to time, in deeds and other instruments and documents, are (by the Interpretation Act 1978) ¹⁶² to be held to refer to Greenwich mean time, or, in the summer time period, to summer time. ¹⁶³

Period from a date or event

21-025

Where the time is to be computed *from* a certain date, or an act to be done on the happening of an event, the mode of calculating the time must depend on the circumstances of the particular contract. ¹⁶⁴ The general rule is now well established that where a particular time is given from a certain date, within which an act is to be done, the day of the date is to be excluded, ¹⁶⁵ but “there is no absolute rule with regard to the inclusion or exclusion of the day on which a particular event takes place”, and the court has to decide the meaning of the particular contract. ¹⁶⁶ The mode of calculation must therefore depend on the wording of the contract, and where the act done is one to which the party against whom time runs is privy the computation may be inclusive as he has had the benefit of some portion of the day included, but where this is not so and the event is foreign to the party against whom time runs, the general rule will be adopted. So it has been held that the words “not later than 21 days before” mean 21 full or clear days between, not counting the day from which the calculation is to be made. ¹⁶⁷

Period within which to act

21-026

Where a contract gives the first party a certain period of time in which to do some act, which period is between two other acts to be done by the second party, both the days for doing the second party's acts should be excluded from the computation of the period, so that the first party has the whole of the period of time in which to do his act. ¹⁶⁸ But a notice to quit “within” a period of three months can mean “during” or “before or at the expiry of” the period, thus including the final moment of the period so as to amount to a full three months' notice. ¹⁶⁹

Meaning and computation of “month”

21-027

By s.61 of the Law of Property Act 1925, in all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of the Act, unless the context otherwise requires, “month” means calendar month.¹⁷⁰ In the computation of a calendar “month”, the House of Lords has upheld¹⁷¹ the “corresponding date” rule, viz, that if a period of time in “months” is to be computed *from* or *after* a given date, that day is excluded from the computation,¹⁷² and the period elapses at midnight on the corresponding day of the month of expiry.¹⁷³ Thus where under a statute, a tenant’s application had to be made “not more than four months after the giving of the landlord’s notice”,¹⁷⁴ which was given on September 30, time began to run from midnight on that day (September 30/October 1) and ended at midnight on January 30/31.¹⁷⁵ No account is taken of the fact that some months have more days than others.¹⁷⁶ In the same enactment, the phrase permitting the application only if it was made “*not less than ... two months after*” the landlord’s notice has been interpreted to allow the application to be made on the corresponding date itself¹⁷⁷: “[i]f the application is made on the corresponding date, it cannot be said to be either before or after the corresponding date”.¹⁷⁸

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- ^{59.} Stoljar (1955) 71 L.Q.R. 527; Peel, *Treitel on Law of Contract*, 14th edn (2015), paras 18–096–18–107; Carter’s *Breach of Contract* (2012), paras 5-38–5-69; J.E. Stannard, *Delay in the Performance of Contractual Obligations* (Oxford, 2007), especially Chs 1–3; Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012), Ch.12.
 - ^{60.} J.E. Stannard, *Delay in the Performance of Contractual Obligations* (Oxford, 2007), Ch.2.
 - ^{61.} *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] Q.B. 842, 856–857; *Fitzpatrick v Sarcon (No.177) Ltd* [2012] NICA 58 at [20].
 - ^{62.} *Parkin v Thorold* (1852) 16 Beav. 59, 65.
 - ^{63.} See, e.g. *Martindale v Smith* (1841) 1 Q.B. 389, 395 (although note the criticism levelled against the case by Lord Simon in *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 941); Sale of Goods Act 1979 s.10(1); *Woolfe v Horne* (1877) 2 Q.B.D. 355; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 172.
 - ^{64.} *Lock v Bell* [1931] 1 Ch. 35, 43. The equitable rule was developed in cases of the sale of land: see *Stickney v Keeble* [1915] A.C. 386, 415–416; *Williams v Greatrex* [1957] 1 W.L.R. 31. For the history of the law on stipulations as to time, see *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 924–929, 940–945; *Raineri v Miles* [1981] A.C. 1050.
 - ^{65.} *Lennon v Napper* (1802) 2 Sch. & Lef. 682, 684–685.
 - ^{66.} Re-enacting s.25(7) of the Judicature Act 1873.
 - ^{67.} *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 943–944, per Lord Simon.
 - ^{68.} This means that damages may be recovered for any loss caused by the breach: *Raineri v Miles* [1981] A.C. 1050 (below, para.21-019).
 - ^{69.} *Raineri v Miles* [1981] A.C. 1050, 1059, per Buckley L.J., approved by the House of Lords in the same case: 1085.
 - ^{70.} *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904; *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] Q.B. 842, 857; *Hammond v Allen* [1994] 1 All E.R.

307, 311.

71. *Hudson v Temple* (1860) 29 Beav. 536; *Steedman v Drinkle* [1916] 1 A.C. 275; *Brickles v Snell* [1916] 2 A.C. 599; *Mussen v Van Diemen's Land Co* [1938] Ch. 253; *Harold Wood Brick Co Ltd v Ferris* [1935] 2 K.B. 198. The same result follows if the contract provides that the provision is to be a "condition" in this sense, or that any breach of the clause shall entitle the innocent party to "rescind" or terminate.
72. *Lombard North Central Plc v Butterworth* [1987] Q.B. 527 (below, para.21-015).
73. *Tilley v Thomas* (1867) L.R. 3 Ch. App. 61; *Hudson v Temple* (1860) 29 Beav. 536, 543.
74. *Macbryde v Weekes* (1856) 22 Beav. 533; *Harold Wood Brick Co Ltd v Ferris* [1935] 2 K.B. 198.
75. *Tadcaster Tower Brewery Co v Wilson* [1897] 1 Ch. 705, 711; *Lock v Bell* [1931] 1 Ch. 35.
76. *Newman v Rogers* (1793) 4 Bro. C.C. 391.
77. *Dibbins v Dibbins* [1896] 2 Ch. 348; *Hare v Nicoll* [1966] 2 Q.B. 130. cf. *Millichamp v Jones* [1982] 1 W.L.R. 1422.
78. *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 929; *Coventry City Council v J. Hepworth & Son Ltd* (1982) 46 P. & C.R. 170; *Metrolands Investments Ltd v J.H. Dewhurst Ltd* [1986] 3 All E.R. 659.
79. Whether or not it is an option to renew an existing lease: *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 929, 945, 961. An option to a tenant to determine his interest under a "break clause" must also be strictly complied with.
80. [1978] A.C. 904, 945 (see also at 951, 961). cf. a rent review clause: below, para.21-019.
81. *Reuter Hufeland & Co v Sala Co* (1879) 4 C.P.D. 239, 249; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 716. See further above, paras 13-037 et seq.
82. *Bowes v Shand* (1877) 2 App. Cas. 455, 463, 464; *Sharp v Christmas* (1892) 8 T.L.R. 687 (perishable goods); *Hartley v Hymans* [1920] 3 K.B. 475, 484. See below, Vol.II, para.44-244.
83. *Hare v Nicoll* [1966] 2 Q.B. 130. See also *Re Schwabacher* (1908) 98 L.T. 127, 129; *Sprague v Booth* [1909] A.C. 576, 579–580; *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] Q.B. 842, 857; *Grant v Cigman* [1996] 2 B.C.L.C. 24, 31 (although Judge Weeks Q.C. stated that the dicta in *Re Schwabacher* and *Hare v Nicoll* "may be too wide" and that "a property company may be different from a trading company, and a company in one line of business may be different from a company trading in another less dynamic market". Ultimately, the question of is one of the interpretation of the particular contract: *Msas Global Logistics v Power Packaging Inc* [2003] EWHC 1393 (Ch), [2003] All E.R. (D) 211 (Jun) at [43]–[47]. The implication that time is of the essence may be made more readily where the subject-matter of the sale is not simply a parcel of shares in a private company, but the entirety of the shares: at [44]).
84. *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 729 (cf. at 716); *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 924, 938, 950; *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 W.L.R. 1465 (obligation to make timely redelivery in time charterparty held not to be a condition). *Re Simoco Digital UK Ltd: Thunderbird Industries LLC v Simoco Digital UK Ltd* [2004] EWHC 209 (Ch), [2004] 1 B.C.L.C. 541 at [14]; *Haugland Tankers AS v RMK Marine Gemi Yapim Sanayii ve Deniz Tasimaciliii Isletmesi AS* [2005] EWHC 321 (Comm), [2005] 1 Lloyd's Rep. 573; *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239, [2005] Info. T.L.R. 294 at [15]; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [56].

85. *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447, which resolved a conflict of authority on the question whether the obligation to make punctual payment of hire is a condition of a time charterparty by concluding that it is not a condition, but an innominate term. In so concluding the Court of Appeal took account of a number of factors, including the fact that the contract contained an express term of the contract which entitled the owner of the vessel to withdraw it in the event that hire was not made punctually, the need to strike a balance between the promotion of certainty and the need to avoid disproportionate consequences in the case of trivial breaches, the understanding or reaction of the market and previous authority.
86. *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 719; *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [9].
87. The *Bunge Corp* case [1981] 1 W.L.R. 711. See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 A.C. 694, 703–704; *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776, 783, 793; *Hyundai Merchant Marine Co Ltd v Karander Maritime Inc (The Niizuru)* [1996] 2 Lloyd's Rep. 66, 71; *B.S. & N. Ltd (BVI) v Micado Shipping Ltd (Malta) (The "Seaflower")* [2001] 1 Lloyd's Rep. 341; *Tennara Ltd v Majorarch Ltd* [2003] EWHC 2601 (Ch) (on the facts it was held that time was not expressly or impliedly of the essence. Where time is not of the essence and there has been unreasonable delay in performance, a court may be able to infer that the delay nevertheless amounts to a repudiation of the contract where the consequences of the delay are sufficiently serious. When deciding whether or not the delay amounts to a repudiation of the contract, the court will have regard to all the facts and circumstances of the case).
88. The *Bunge Corp* case [1981] 1 W.L.R. 711. Other illustrations given in this case of time being of the essence in mercantile contracts include the date fixed for the sailing of a ship, for the opening of a banker's credit, or for payment against documents. See also *Toepfer v Lenersan-Poortmann NV* [1980] 1 Lloyd's Rep. 143 (seller's obligation to tender documents by a specified time); *Société Italo-Belge pour le Commerce et Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All E.R. 19 (seller's obligation to provide declaration of ship); *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1985] 1 Lloyd's Rep. 621 ("at latest").
89. See Vol.II, para.44-128. cf. s.48(3) of the Act (Vol.II, para.44-351). Similarly, the times of payment of bills of exchange regularly given under the terms of a long-term distributorship were not treated as of the essence (*Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361), nor the time for payment under a long-term contract for the provision of services (*Jet2.com Ltd v SC Compania Nationala De Transporturi Aeriene Romane Tarom SA* [2012] EWHC 622 (QB), [2012] All E.R. (D) 218 (Mar)). See also *Dominion Corporate Trustees Ltd v Debenham Properties Ltd* [2010] EWHC 1193 (Ch), [2010] 23 E.G. 106 (C.S.) where the time of payment was held not to be of the essence of an agreement for a lease and *Simmers v Innes* [2008] UKHL 24, 2008 S.C.(H.L.) 137 where the same conclusion was reached in the context of a shareholders' agreement. cf. however, the time for payment of a deposit: *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd* [1981] 2 Lloyd's Rep. 180 and *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [24]. While the time of payment may not be of the essence of the contract, a court may infer that a failure to pay amounts to a repudiatory breach, especially in the case where the failures to pay on time are substantial, persistent and cynical: *Alan Auld Associates Ltd v Rick Pollard Associates* [2008] EWCA Civ 655, [2008] B.L.R. 419. A court is less likely to conclude that the failure to pay on time is repudiatory where the court is satisfied that the party in breach will eventually make payment and time has not been agreed to be of the essence of the contract: *Valilas v Januzaj* [2014] EWCA Civ 436, 154 Con. L.R. 38.
90. *Crocs Europe BV v Anderson (t/a Spectrum Agencies)* [2012] EWCA Civ 1400, [2013] 1 Lloyd's Rep. 1 at [62].
91. *Warren v Burns* [2014] EWHC 3671 (QB).
92. J.E. Stannard, *Delay in the Performance of Contractual Obligations* (Oxford, 2007), Ch.8.

93. No notice need be given if it is clear that the party in default does not intend to proceed: *Re Stone and Saville's Contract* [1963] 1 W.L.R. 163, 171. The inclusion in the contract of express provision for the service of a notice requiring performance within a specified time (where the recipient of the notice has failed to complete performance on the due date) does not exclude the rights and remedies at law or in equity which subsist apart from such notice: *Woods v Mackenzie Hill Ltd* [1975] 1 W.L.R. 613 (approved by the House of Lords in *Raineri v Miles* [1981] A.C. 1050, 1085–1086. Such a notice does not waive or expunge the previous breach of contract in failing to complete at the due date).
94. *Parkin v Thorold* (1852) 16 Beav. 59; *Green v Sevin* (1879) 13 Ch. D. 589; *Compton v Bagley* [1892] 1 Ch. 313; *Stickney v Keeble* [1915] A.C. 386; *Re Bagley and Shoesmith's Contract* (1918) 87 L.J. Ch. 626; *Hartley v Hymans* [1920] 3 K.B. 475; *Charles Rickards Ltd v Oppenheim* [1950] 1 K.B. 616 (sale of goods); *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 934, 946–947. cf. *Finkelkraut v Monohan* [1949] 2 All E.R. 234; *Thorpe v Fasey* [1949] Ch. 649; *Ajit v Sammy* [1967] 1 A.C. 255. cf. s.48(3) of the Sale of Goods Act 1979. The notice must make it sufficiently clear that time has been made of the essence: *Shawton Engineering Ltd v DGP International Ltd* [2005] EWCA Civ 1359, [2006] B.L.R. 1 at [44].
95. *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, in this respect overruling *Smith v Hamilton* [1951] Ch. 174 where Harman J. held that it was necessary to wait until there has been an unreasonable delay before serving the notice. Where the contract does not specify a date for completion it remains necessary to wait for a reasonable time before serving the notice but that is because it is only where there has been an unreasonable delay by the other party that there will be a breach of contract which justifies the serving of the notice: see *Mahase v Ramlal* [2003] UKPC 12 at [27].
96. *Stickney v Keeble* [1915] A.C. 386; *Re Barr's Contract* [1956] Ch. 551; *Ajit v Sammy* [1967] 1 A.C. 255; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 27; *Bidaisee v Sampath* (1995) 46 W.I.R. 461 PC; *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1999) 62 Con. L.R. 64; *Barclays Bank Plc v Savile Estates Ltd* [2002] EWCA Civ 589; *Sentinel International Ltd v Cordes* [2008] UKPC 60, [2008] All E.R. (D) 141 (Dec); *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715.
97. *Luck v White* (1973) 26 P. & C.R. 89 (the notice may be waived by the party who gave it re-opening negotiations, while failing to act upon the other party's neglect to comply with the notice). cf. *Buckland v Farmar & Moody* [1979] 1 W.L.R. 221.
98. *Charles Richards Ltd v Oppenheim* [1950] 1 K.B. 616.
99. *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 24.
100. *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 171.
101. *Mahase v Ramlal* [2003] UKPC 12 at [28].
102. *Finkelkraut v Monohan* [1949] 2 All E.R. 234; *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 W.L.R. 68; *Oakdown Ltd v Bernstein & Co* (1984) 49 P. & C.R. 282; *Clarke Investments Ltd v Pacific Technologies Ltd* [2013] EWCA Civ 750, [2013] 2 P. & C.R. 20 at [31]–[33].
103. *Buckland v Farmar & Moody* [1979] 1 W.L.R. 221, citing *Howe v Smith* (1884) 27 Ch. D. 89 and *Lock v Bell* [1931] 1 Ch. 35; *Etzin v Reece* [2002] All E.R. (D) 405 (Jul).
104. *Rightside Properties Ltd v Gray* [1975] Ch. 72; *Country and Metropolitan Homes Ltd v Topclaim Ltd* [1996] Ch. 307, 314–315. The position is, of course, otherwise where the parties expressly reserve “any other right or remedy” available: *Dimsdale Developments (South East) Ltd v De Haan* (1983) 47 P. & C.R. 1.
105. *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] R.P.C. 289, 432–433.

- [106.](#) In the sense examined above, paras 13-025 et seq.
- [107.](#) The first consequence was the only one mentioned by Lord Diplock in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 A.C. 694, 703, when he referred to the effect of making time of the essence of an obligation. See also below, paras 24-049 et seq.
- [108.](#) *Lombard North Central Plc v Butterworth* [1987] Q.B. 527, 545, 546; *State Securities Plc v Initial Industry Ltd* [2004] EWHC 3482 (Ch.), [2004] All E.R. (D) 317 (Jan).
- [109.](#) See below, paras 24-003—24-004.
- [110.](#) See below, paras 24-007—24-009.
- [111.](#) *G. and C. Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] A.C. 25, 35; *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 722.
- [112.](#) *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514; *Etzin v Reece* [2002] All E.R. (D) 405 (Jul) (Union Eagle applied to analogous case of an agreement to purchase freehold pursuant to the Leasehold Reform, Housing and Urban Development Act 1993).
- [113.](#) Such a jurisdiction has been developed in Australia: see, for example, *Legione v Hateley* (1983) 152 C.L.R. 406 and *Stern v McArthur* (1988) 165 C.L.R. 489. These developments generate too much uncertainty for English tastes.
- [114.](#) As has been done in Australia (see n.111). The occasional English example can also be found (see *In Re Dagenham (Thames) Dock Co Ex p. Hulse* (1873) L.R. 8 Ch. App. 1022) but the authorities are generally hostile to such an approach (see *Steedman v Drinkle* [1916] 1 A.C. 275). The English courts may “on some future occasion” have to consider whether to “relax” the principle in *Steedman v Drinkle* (see *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514, 523B and see also *Bidaisee v Sampath* (1995) 46 W.I.R. 461, 466–467 where the point was left open by the Privy Council).
- [115.](#) It seems clear that Lord Hoffmann’s preference in *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514, 523 was for the development of an appropriate restitutionary remedy. There is much to be said for this view. It avoids the land being sterilised while the courts sort out whether or not the vendor is entitled to terminate, but at the same time it gives to the court a jurisdiction to remove any unjust enrichment which a vendor has obtained as a result of the termination. A further approach would be to develop the law of estoppel to deal with the case of the vendor who leads the purchaser to believe that the contractual time-scale will not be enforced.
- [116.](#) *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 A.C. 694; *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776. The jurisdiction is not, however, confined to proprietary or possessory rights in land but extends to proprietary or possessory rights arising under a commercial contract: *BICC Plc v Burndy Corp* [1985] Ch. 232. The scope of the jurisdiction, while clear in legal terms, has resulted in the drawing of distinctions which are difficult to defend in commercial terms (for example, the distinction between *Sport International Bussum* and *BICC v Burndy* is particularly difficult to defend). Although there have been criticisms of the scope of the jurisdiction, the courts continue to affirm that the jurisdiction does not extend to mere contractual rights and is confined to the forfeiture of proprietary or possessory rights: *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2, [2015] 2 W.L.R. 875 at [94].
- [117.](#) Had the charter been by demise, the charterer could potentially have invoked the equitable jurisdiction because in such a case the charterer would have had a possessory interest in the ship.
- [118.](#) *Re Dagenham (Thames) Dock Co* (1872–73) L.R. 8 Ch. App. 1022; *John H. Kilmer v British Columbia Orchard Lands Ltd* [1913] A.C. 319; *Steedman v Drinkle* [1916] 1 A.C. 275; *Starside Properties Ltd v Mustapha* [1974] 1 W.L.R. 816; *BICC Plc v Burndy Corp* [1985] Ch. 232. While in the ordinary course relief will take the form of giving the party in breach a longer period of

- time in which to perform its contractual obligation, this is not an “inflexible rule”. In an appropriate case a court can grant relief in other forms, particularly “where there are strong countervailing considerations of equity or unconscionability associated with events subsequent to a forfeiture”: *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20, [2015] 2 W.L.R. 875 at [13].
- [119.](#) *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 12, 24; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 171–173; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] R.P.C. 289, 432–433; *Etzin v Reece* [2002] All E.R. (D) 405 (Jul).
- [120.](#) *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [65]; *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [44]; *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 at [184].
- [121.](#) [1992] Ch. 1, 24.
- [122.](#) *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 12; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 173; *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd’s Rep. 599 at [131]; *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm), 132 Con. L.R. 177; *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [65]; *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [44].
- [123.](#) In *Multi Veste 226 BV v NI Summer Row Unitholder BV* [2011] EWHC 2026 (Ch), 139 Con. L.R. 23 Lewison J. stated (at [201]) that the service of a notice making time of the essence had the effect of changing the question from whether delay amounts to a repudiation to the question whether failure to perform the obligation at all amounted to a repudiation. However, in *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [42] he conceded that his statement may have been “too prescriptive” in the sense that, where the breach is of an intermediate term, it “may be wrong to equate delay in performance (even after notice) with refusal to perform”. That said, a court may be more willing to infer from non-compliance with a notice making time of the essence that the failure is attributable to a refusal to perform that obligation. In *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [44] Sir Terence Etherton C. expressed his agreement with the “further thoughts” of Lewison L.J. as expressed in his judgment in *Samarenko* at [42].
- [124.](#) *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] R.P.C. 289, 432–433; *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd’s Rep. 599 at [131]; *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm), 132 Con. L.R. 177.
- [125.](#) *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr) at [147]–[148]; *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 at [184]. cf. *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 946–947; *Louinder v Leis* (1982) 149 C.L.R. 509, 526.
- [126.](#) See below, paras 24-001 et seq. It would become such a breach only if it amounted to a substantial failure of performance.
- [127.](#) cf. the failure to pay the deposit: *Millichamp v Jones* [1982] 1 W.L.R. 1422, although the decision in *Millichamp* has since been held to be “suspect” and of “questionable assistance”: *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [20], [58] and [63].
- [128.](#) *Rightside Properties Ltd v Gray* [1975] Ch. 72, 83.
- [129.](#) *Rightside Properties Ltd v Gray* [1975] Ch. 72, 82 (following *Howe v Smith* (1884) L.R. 27 Ch. D. 89, 103, and *Stickney v Keeble* [1915] A.C. 386, 404).
- [130.](#) It should be noted in this context that the rule in *Bain v Fothergill* (1874) L.R. 7 H.L. 158 has

- been abolished by s.3 of the Law of Property (Miscellaneous Provisions) Act 1989 (below, para.26-165).
- [131.](#) *Raineri v Miles* [1981] A.C. 1050 (following *Stickney v Keeble* [1915] A.C. 386, 415–416; *Phillips v Lamdin* [1949] 2 K.B. 33, 42). (Sometimes, however, the date for completion is “only a target”: *Williams v Greatrex* [1957] 1 W.L.R. 31, 35.)
- [132.](#) *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904; *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305 (mere delay, however lengthy, does not destroy the landlord’s right to have the rent reviewed: the tenant can always serve notice on the landlord making time of the essence: above, para.21-014); *McDonald’s Property Co Ltd v HSBC Bank Plc* [2001] 3 E.G.L.R. 19.
- [133.](#) The *United Scientific* case [1978] A.C. 904. (No question of damages was involved in this decision, but the failure to adhere to the timetable was clearly a breach of contract: *Raineri v Miles* [1981] A.C. 1050.)
- [134.](#) On the inter-relation between the timetable in a rent review clause and that in a “break” clause, see *Metrolands Investments Ltd v J.H. Dewhurst Ltd* [1986] 3 All E.R. 659 and *Central Estates Ltd v Secretary of State for the Environment* [1997] 1 E.G.L.R. 239.
- [135.](#) *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305.
- [136.](#) Below, paras 22-040 et seq. But, in a contract requiring payment by instalments, time may continue to be of the essence despite a waiver of strict compliance with a fixed date for payment of earlier instalments: *Tropical Traders Ltd v Goonan* (1964) 111 C.L.R. 41, 52–55. See also *Bird v Hildage* [1948] 1 K.B. 91, 94–96; *Barclay v Messenger* (1874) 43 L.J. Ch. 449, 456.
- [137.](#) Below, paras 22-032 et seq.
- [138.](#) Below, paras 24-022, 24-031 et seq.
- [139.](#) On the time for repayment of a loan, see Vol.II, Ch.39.
- [140.](#) *Postlethwaite v Freeland* (1880) 5 App. Cas. 599; *Castlegate Shipping Co Ltd v Dempsey* [1892] 1 Q.B. 854; *Hick v Raymond* [1893] A.C. 22; *Carlton S.S. Co Ltd v Castle Mail Packet Co Ltd* [1898] A.C. 486; *Lyle Shipping Co Ltd v Cardiff Corp* [1900] 2 Q.B. 638; *Hulthen v Stewart & Co* [1903] A.C. 389; *Barque Quilpué Ltd v Brown* [1904] 2 K.B. 264; *Monkland v Jack Barclay Ltd* [1951] 2 K.B. 252; *Re Longlands Farm* [1968] 3 All E.R. 552; *Jolley v Carmel Ltd* [2000] 2 E.G.L.R. 153, 160; *National Car Parks Ltd v Baird (Valuation Officer)* [2004] EWCA Civ 967, [2005] 1 All E.R. 53 at [58]; *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft “Hansa Murcia” mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd’s Rep. 273 at [21]–[30] cf. *Hartwells of Oxford Ltd v British Motor Trade Association* [1951] Ch. 50. See also s.29(3) of the Sale of Goods Act 1979 (Vol.II, para.44-245), which, however, will not apply to a contract which falls within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 (Sch.1 para.18 of the Consumer Rights Act 2015). Section 28 of the Consumer Rights Act 2015 makes specific provision for rules about delivery of goods in consumer contracts: below, Vol.II, para.38-489).
- [141.](#) *Postlethwaite v Freeland* (1880) 5 App. Cas. 599. If performance is to be “in a customary manner”, the manner is to be judged as at the time when performance is due: *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] A.C. 562; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1960] 2 Q.B. 318; affirmed [1962] A.C. 93, 113–114.
- [142.](#) *Ford v Cotesworth* (1868) L.R. 4 Q.B. 127; (1870) L.R. 5 Q.B. 544.
- [143.](#) *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239, [2005] Info. T.L.R. 294 at [15]; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr) at [144].
- [144.](#) *Duncan v Topham* (1849) 8 C.B. 225.

145. *Alexiadi v Robinson* (1861) 2 F. & F. 679.
146. *Hydraulic Engineering Co Ltd v McHaffie* (1879) 4 Q.B.D. 670, 673; *Attwood v Emery* (1856) 1 C.B.(N.S.) 110, 115.
147. *Verlest v Motor Union Insurance Co Ltd* [1925] 2 K.B. 137. As to these expressions of time, cf. Odgers, *Construction of Deeds and Statutes*, 5th edn, pp.126–140.
148. *Staunton v Wood* (1851) 16 Q.B. 638; cf. *Hyde v Watts* (1843) 12 M. & W. 254.
149. *Roberts v Brett* (1865) 11 H.L.C. 337, 355; *Hudson v Hill* (1874) 43 L.J.C.P. 273.
150. See Odgers at pp.128–134.
151. *Nielsen & Co v Wait, James & Co* (1885) 16 Q.B.D. 67, 71–73.
152. In *Lafarge (Aggregates) Ltd v London Borough of Newham* [2005] EWHC 1377 (Comm), [2005] 2 Lloyd's Rep. 577, Cooke J. stated that “in ordinary parlance in the UK, ‘working days’ are Mondays to Friday, excluding Christmas, Easter and Bank Holidays” (at [57]).
153. *Commercial S.S. Co v Boulton* (1875) L.R. 10 QB 346; *Nielsen v Waite* (1885) 16 Q.B.D. 67; *Reardon Smith Line Ltd v Ministry of Agriculture* [1963] A.C. 691 (“weather working days” in a charterparty).
154. *The Katy* [1895] P. 56; *Cartwright v MacCormack* [1963] 1 W.L.R. 18 (above, para.13-096). When payment has to be made on a specified day, it can (in the absence of any custom to the contrary) be made at any time up to midnight on that day: *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan* [1983] 1 W.L.R. 195.
155. *Cornfoot v Royal Exchange Assurance Corp* [1904] 1 K.B. 40; *Leonis S.S. Co v Rank (No.2)* (1908) 13 Com. Cas. 161, 295; *Momm v Barclays Bank International Ltd* [1977] Q.B. 790, 803 (“For banking purposes [a day] ends at the close of working hours ...”).
156. *The Afovos Shipping case* [1983] 1 W.L.R. 195, 201; *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep. 249.
157. *Commercial S.S. Co v Boulton* (1875) L.R. 10 Q.B. 346; *The Katy* [1895] P. 56; *Houlder v Weir* [1905] 2 K.B. 267; *L. & Y Ry v Swann* [1916] 1 K.B. 263.
158. *Verren v Anglo-Dutch Brick Co (1927) Ltd* (1929) 45 T.L.R. 404, 556.
159. *Eaglehill Ltd v J. Needham Builders Ltd* [1973] A.C. 992, 1006, 1010.
160. *Rightside Properties Ltd v Gray* [1975] Ch. 72, 78–80; *The Brimnes (Tenax S.S. Co Ltd v The Brimnes (Owners))* [1975] Q.B. 929, 945–946, 967, 970. cf. *Eaglehill Ltd v J. Needham Builders Ltd* [1973] A.C. 992, 1011. cf. *The Afovos Shipping case* [1983] 1 W.L.R. 195.
161. See above, para.13-096; below, para.21-027; on the computation of time for a period of limitation, see below, paras 28-063—28-064; and in a bill of exchange, see Vol.II, paras 34-017, 34-018.
162. Interpretation Act 1978 ss.9, 23(3).
163. Summer Time Act 1972. (By s.3(1), any reference to time in (inter alia) any “deed, notice or other document whatsoever” is to be taken as a reference to summer time during the period of summer time fixed by or under the Act.)
164. *Re North* [1895] 2 Q.B. 264, 269; *Lester v Garland* (1808) 15 Ves. 248. See above, para.13-096.

- [165.](#) *Goldsmiths' Co v West Metropolitan Ry* [1904] 1 K.B. 1, 5 (distinguished in *Hare v Gocher* [1962] 2 Q.B. 641 ("beginning with the commencement" of a statute); and in *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 Q.B. 899 ("beginning with the date of ..." in RSC Ord.6 r.8(1)); *Dodds v Walker* [1981] 1 W.L.R. 1027, above, para.13-096. See also *Radcliffe v Bartholomew* [1892] 1 Q.B. 161; *Stewart v Chapman* [1951] 2 K.B. 792; *Cartwright v MacCormack* [1963] 1 W.L.R. 18 ("15 days from the commencement date").
- [166.](#) *English v Cliff* [1914] 2 Ch. 376, 383. See above, para.13-096.
- [167.](#) *Carapanayoti & Co Ltd v Comptoir Commercial André & Cie SA* [1972] 1 Lloyd's Rep. 139. See also below, para.21-027.
- [168.](#) *Young v Higgon* (1840) 6 M. & W. 49, 54; *Re Railway Sleepers Supply Co* (1885) 29 Ch. D. 204; *Rightside Properties Ltd v Gray* [1975] Ch. 72, 80 (a period of "at least 21 days" between serving a notice and forfeiting a deposit).
- [169.](#) *Manorlike Ltd v Le Vitas Travel Agency, etc., Ltd* [1986] 1 All E.R. 573.
- [170.](#) See above, para.13-063. For similar provisions in other statutes, see s.10(3) of the Sale of Goods Act 1979; s.14(4) of the Bills of Exchange Act 1882; Interpretation Act 1978 Sch.1. (For the former rule, see *P. Phipps & Co Ltd v Rogers* [1925] 1 K.B. 14.)
- [171.](#) *Dodds v Walker* [1981] 1 W.L.R. 1027.
- [172.](#) See above, para.21-025.
- [173.](#) *South Staffordshire Tramways Co Ltd v Sickness and Accident Assurance Association Ltd* [1891] 1 Q.B. 402. See also *Webb v Fairmaner* (1838) 3 M. & W. 473; *Freeman v Read* (1863) 4 B. & S. 174. cf. *Cartwright v MacCormack* [1963] 1 W.L.R. 18 ("15 days from ...").
- [174.](#) Under s.29(3) of the Landlord and Tenant Act 1954 (in its original form).
- [175.](#) *Dodds v Walker* [1981] 1 W.L.R. 1027.
- [176.](#) [1981] 1 W.L.R. 1027. If the relevant calendar month in which a period expires is too short to provide a corresponding date, the period expires on the last day of that month: *Migotti v Colvill* (1879) 4 C.P.D. 233.
- [177.](#) *E.J. Riley Investments Ltd v Eurostile Holdings Ltd* [1985] 1 W.L.R. 1139.
- [178.](#) [1985] 1 W.L.R. 1139, 1141.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 7 - Performance and Discharge
Chapter 21 - Performance
Section 3. - Partial Performance of an Entire Obligation ¹⁷⁹

Entire and divisible obligations

21-028

! A contract is said to be “entire” when complete performance by one party is a condition precedent to the liability of the other ¹⁸⁰; in such a contract the consideration is usually a lump sum which is payable only upon complete performance by the other party (hence, the reference is sometimes to a “lump sum contract”). The opposite of an “entire contract” is a “divisible contract”, which is separable into parts, so that different parts of the consideration may be assigned to severable parts of the performance, e.g. an agreement for payment pro rata. ¹⁸¹

“Entire contract” or “entire obligation”?

21-029

Yet the phrase “entire contract” is a misleading one in that the real issue in the cases is whether the “obligation” of the party in default is “entire”, not whether the contract itself is entire. Of course, the contract may state that one party can only recover on the contract when it has completed its performance under the contract. In such a case it can be said that, from the perspective of such a party, there is no real point of distinction between an entire contract and an entire obligation because the contract may be said to be “entire” from its point of view. But in other cases the distinction may be clear. Where a contract makes provision for payment upon the completion of distinct stages of a construction contract, the completion of each stage being a condition precedent to the obligation to make a stage payment, the obligation to complete each stage may be said to be entire, even though the contract itself is clearly not entire. It is for this reason that the phrase “entire obligation” will be used in preference to “entire contract” in the following paragraphs.

A matter of construction

21-030

It is a question of construction whether the obligation is entire or divisible, ¹⁸² but in the reported cases the courts have tended to the view that in every lump-sum contract there is an implied term that no part of the price is to be recovered without complete performance. ¹⁸³ In most modern contracts of any size, however, payments by instalments are specified, so that the law on entire obligations is not relevant to any obligation which has been completely performed.

Partial performance of entire obligations

21-031

⚠ Where a party has performed only part of an entire obligation ¹⁸⁴ it can normally ¹⁸⁵ recover nothing, neither the agreed price, since it is not due under the terms of the contract, nor any smaller sum for the value of its partial performance, since the court has no power to apportion the consideration. ¹⁸⁶ The refusal of pro rata payment is based on the inability of the court, as a matter of construction, to add such a provision to the contract, and also upon the rule that the mere acceptance of acts of part performance under an express contract cannot, taken alone, justify the imposition of a restitutionary obligation to pay on a quantum meruit basis. ¹⁸⁷ Thus where an employee is engaged for a fixed period for a lump sum, but fails to complete the term for a reason other than breach of contract by the employer, e.g. frustration, ¹⁸⁸ the common law rule is that he can recover nothing. ¹⁸⁹ In the famous case of *Cutter v Powell* ¹⁹⁰ a seaman was to be paid a lump sum when he completed the voyage; he died before completion of the voyage and it was held that his executor could not recover pro tanto wages because it was an “entire contract”. ¹⁹¹ This was a case of non-feasance, but in a case of misfeasance, as where an employee completes a period of service but does bad work, the employee may recover his wages, subject to a deduction in respect of the bad work. ¹⁹² In contracts where wages or salaries are payable, however, the Apportionment Act 1870 has altered the common law rule, for by s.2:

“... all rents, annuities, dividends, and other periodical payments in the nature of income ... shall ... be considered as accruing from day to day, ¹⁹³ ⚠ and shall be apportionable in respect of time accordingly.”

By s.5, “annuities” include salaries and pensions, and it has been held that it also includes wages. ¹⁹⁴

Application to building contracts

21-032

Although nowadays building contracts of any size normally provide for payments by instalments, ¹⁹⁵ the common law rule on entire obligations was developed in cases concerning building contracts, or contracts for work and materials. Where the builder under a lump-sum contract fails to perform some of the agreed work, then, subject to the so-called doctrine of substantial performance, ¹⁹⁶ the builder can recover nothing for the work which was actually completed, ¹⁹⁷ despite the fact that the other party may have received substantial benefit therefrom. The building cases take the distinction between substantial non-feasance where recovery is denied, and misfeasance, ¹⁹⁸ where recovery is permitted subject to a cross-action for damages. ¹⁹⁹ If, however, under such a lump-sum contract the builder is guilty of a serious misfeasance, so that the work is substantially deficient, he can recover nothing. ²⁰⁰

Substantial performance. ²⁰¹

21-033

⚠ Considerable difficulty arises in the case where the part performer has substantially performed or substantially completed an entire obligation but has not completed full performance. In such a case there is some authority for the proposition that a doctrine of “substantial performance” can be applied so that the part performer is entitled to bring an action to recover the price, subject to a counterclaim for damages which will go in diminution of the price. ²⁰² This “doctrine of substantial performance” has, however, been criticised on the ground that:

“... it is based on the error that *contracts*, as opposed to particular *obligations*, can be entire ... To say that an obligation is entire *means* that it must be completely performed before payment becomes due ... In relation to ‘entire’ obligations, there is no scope for any doctrine of ‘substantial performance.’” ²⁰³ ⚠

On the latter view a court is required to identify with some care the obligation which is alleged to be entire; for example, in *Hoenig v Isaac* ²⁰⁴ the obligation of the contractor to complete performance of the contract was entire, but the obligation to do so in a workmanlike manner was not, so that the presence of defects in his work did not act as a barrier to a claim under the contract. The obligation to do the work in a workmanlike manner not being entire, there was therefore no need to employ any doctrine of substantial performance. The same analysis can be applied to *Cutter v Powell* ²⁰⁵ because it has been pointed out that the court:

“... did not decide that if [the seaman] had completed the main purpose of the contract, namely, serving as mate for the whole voyage, the defendant could have repudiated his liability by establishing that in the course of the voyage the sailor had, possibly through inadvertence, failed on some occasion in his duty as mate whereby some damage had been caused.” ²⁰⁶

Once again there is no need to resort to any notion of substantial performance because, only the obligation to complete performance being entire, the fact that a minor breach of contract had occurred would not have been sufficient to discharge the defendant from his obligation to pay.

The effects of substantial performance

21-034

On the other hand, it must be conceded that there is some authority which supports the existence of a doctrine of substantial performance in relation to entire contracts. ²⁰⁷ On this view, upon completion of substantial performance, the part performer will be entitled to claim the price, subject to a counterclaim for damages. This so-called doctrine of substantial performance may be excluded by an express provision of the contract ²⁰⁸; “each case turns on the construction of the contract”, ²⁰⁹ and “it is always open to the parties by express words to make entire performance a condition precedent” (to payment). ²¹⁰ The onus of proof is upon the party claiming that it has substantially performed its obligations under the contract to prove that it has done so. ²¹¹ What is “substantial performance” will depend upon the nature of the contract and all the circumstances; if the contractor abandons performance, or does work entirely different in kind from that contracted for, it is clearly a case of substantial non-feasance and the contractor may recover nothing. ²¹² Similarly, a builder who abandons work under a lump-sum contract can recover nothing ²¹³; but if the work is substantially completed, and it is only in some minor details that the workmanship falls below the contractual specifications, the builder may recover the agreed price, less a deduction based on the cost of making good the defects or omissions ²¹⁴.

“In considering whether there was substantial performance ... it is relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price.” ²¹⁵

The rule applies to unimportant matters of non-feasance as well as to unimportant matters of misfeasance. ²¹⁶ Notwithstanding these dicta it is suggested that there ought to be no room in English law for a doctrine of substantial performance: rather the court should inquire whether the particular obligation which is the subject matter of the litigation is entire. If it is not, non-performance of a part of that obligation should not, of itself, be a bar to an action to recover the price; but if it is, and the obligation has not been completely performed, it should not be possible for the part performer to bring an action on the contract to recover the price.

Application to carriage of goods by sea

21-035

A shipowner normally cannot recover freight unless the goods are carried to the agreed destination. If the goods are carried there, the fact that some breach of the shipowner's contract has caused damage to the goods in transit does not prevent recovery of the freight, subject to a cross-action for the damage. ²¹⁷ In one case ²¹⁸ a charterparty provided for payment of lump-sum freight; two-thirds of the cargo was delivered by the shipowner to its destination, despite the loss of the ship outside the port of discharge, and the House of Lords permitted recovery of the whole of the freight, on the ground (inter alia) that "a substantial part of the cargo" ²¹⁹ had been delivered. ²²⁰

Acceptance of partial performance

21-036

If the circumstances justify the inference that the parties have made a fresh contract, under which the original promisee agrees to accept and pay for partial performance of the original promise, or the requirements of a restitutionary claim have been made out, the recipient will be liable upon a quantum meruit ²²¹ to pay a reasonable price for the work actually done, or the goods actually supplied. ²²² The mere receipt of a benefit under the original contract is, however, insufficient to justify the inference of such a promise or to establish a restitutionary claim, unless the party receiving the benefit had an opportunity to accept or reject it. ²²³ Sale of goods is an example where the buyer need not accept goods which are defective or insufficient in quantity; if, however, the buyer does accept delivery, it must pay for them at the agreed rate. ²²⁴ Where a builder has abandoned a partially completed erection on the defendant's land, the mere fact that the defendant completes the building does not create a restitutionary obligation to pay for the value of the work already done by the builder under an "entire contract" ²²⁵; the defendant is in possession of its own land, and it cannot be expected to abandon it or to keep the building unfinished. ²²⁶ Similarly, where repairs were agreed to be made to the defendant's chattel, the mere fact that it accepted the return of the chattel and used it does not of itself raise the implication that it agreed to pay for the actual repairs done to it despite the fact that the contractual obligation of the repairer had been only partially completed. ²²⁷ However, where a builder abandoned work under an "entire contract", but left materials on the site, it was held that the builder could recover a reasonable sum for the value of these materials when the owner used them to complete the building. ²²⁸ The owner had a choice whether or not to use the materials, which could have been returned to the builder.

Defendant preventing complete performance

21-037

If the other party to the contract wrongfully prevents the claimant from completing its performance, the claimant may either recover damages for breach of contract, or alternatively sue upon a quantum meruit to recover a reasonable remuneration for its partial performance. ²²⁹

Divisible (or severable) obligations

21-038

The question whether an obligation is entire or divisible depends on its construction in the light of all the circumstances. ²³⁰ In a divisible or severable obligation there is an express or implied agreement that payment will be made in proportion to the extent of performance. If the obligation is held to be divisible (as in the case of a contract to deliver goods by instalments at stated intervals, the price being fixed per item), the obligation to pay for a divisible part of the performance ²³¹ is independent of the performance of other parts of the contract. ²³² Blackburn J., speaking of a contract to work other materials into the defendant's property, said ²³³:

"Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part

of the coat or the ship; and therefore, generally and in the absence of something to show a contrary intention, the bricklayer, or tailor or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work ...”²³⁴

Independent promises

21-039

Analogous to “divisible obligations” are the “independent promises” to be found mainly in the law of landlord and tenant, e.g. the rule that the tenant’s promise to pay rent is independent of the landlord’s promise to repair, so that at law the tenant cannot rely on the landlord’s failure to repair as a justification for refusing to pay the rent.²³⁵ However, under a bona fide crossclaim for damages against its landlord, the lessee may be entitled to an equitable set-off against its liability for the rent, provided the cross-claim has a sufficiently close connection with the claim for the rent.²³⁶

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- ^{179.} The law on “entire contracts” or, more accurately, entire obligations is reviewed in the Law Commission’s Report (No.121 (1983)), paras 2.1–2.88 and Note of Dissent (pp.36–37). (This report is not to be implemented: see the 19th Annual Report of the Commission, para.2.11.) See also Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 17–031–17–048; Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012), Ch.15, Carter’s Breach of Contract (2012), paras 6-84–6-93; Williams (1941) 57 L.Q.R. 373, 490. (The enactment of the Law Reform (Frustrated Contracts) Act 1943 (below, para.23-074) has rendered obsolete some of the common law discussed in this article.)
- ^{180.} *Hoenig v Isaacs* [1952] 2 All E.R. 176, 180–181. See also the authorities cited in n.181, below.
- ^{181.} See below, paras 21-038, 23-091. cf. ss.28 and 31 of the Sale of Goods Act 1979 (sale of goods to be delivered by instalments) and, in the case of consumer buyers, s.26 of the Consumer Rights Act 2015: see below, Vol.II, para.38-488.
- ^{182.} *Appleby v Myers* (1867) L.R. 2 C.P. 651, 658; *Hoenig v Isaacs* [1952] 2 All E.R. 176, 178, 180; *Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street Ltd* [1981] 3 All E.R. 327, 333–334; *Smales v Lea* [2011] EWCA Civ 1325, 140 Con. L.R. 70. See below, para.21-038.
- ^{183.} *Appleby v Myers* (1867) L.R. 2 C.P. 651, 660–661 (where the court relied on *Cutter v Powell* (1795) 6 T.R. 320; *Jesse v Roy* (1834) 1 Cr. M. & R. 316; *Munroe v Butt* (1858) 8 E. & B. 738; *Sinclair v Bowles* (1829) 9 B. & C. 92, which were cases where particular terms in the contract supported such a conclusion: see the criticism in Williams (1941) 57 L.Q.R. 373, 389 et seq.); *The Madras* [1898] P. 90; *Sumpter v Hedges* [1898] 1 Q.B. 673; *Forman & Co Proprietary Ltd v Liddesdale* [1900] A.C. 190; *Small & Sons Ltd v Middlesex Real Estates Ltd* [1921] W.N. 245; *Heywood v Wellers* [1976] 1 Q.B. 446, 458.
- ^{184.} The failure to complete need not be a breach of contract: *Cutter v Powell* (1795) 6 T.R. 320. The contract in effect provides that the risk of non-completion is to be borne by the party undertaking the relevant obligation.
- ^{185.} For exceptions, see the doctrines of frustration (below, paras 23-085–23-087), acceptance of partial performance (below, para.21-036) and where the defendant prevents complete performance (below, para.21-037).
- ^{186.} *Cutter v Powell* (1795) 6 T.R. 320; *Bates v Hudson* (1825) 6 Dow. & Ry.K.B. 3; *Sinclair v Bowles* (1829) 9 B. & C. 92; *Adlard v Booth* (1835) 7 C. & P. 108; *Chanter v Leese* (1839) 5 M.

& W. 698; *Appleby v Myers* (1867) L.R. 2 C.P. 651, 660; *The Madras* [1898] P. 90; *Sumpter v Hedges* [1898] 1 Q.B. 673; *Vigers v Cook* [1919] 2 K.B. 475; *Eshelby v Federated European Bank Ltd* [1932] 1 K.B. 423; *Bolton v Mahadeva* [1972] 1 W.L.R. 1009.

187. See below, para.21-036.


188. See below, paras 23-037—23-039.

189. *Spain v Arnott* (1817) 2 Stark. M.P.C. 256; *Huttman v Boulnois* (1826) 2 C. & P. 510; *Turner v Robinson* (1833) 5 B. & Ad. 789; *Lowndes v Stamford* (1852) 18 Q.B. 425; *Ridgway v Hungerford Market Co* (1853) 3 A. & E. 171; *Lilley v Elwin* (1848) 11 Q.B. 742; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch. D. 339, 360, 364–365.

190. (1795) 6 T.R. 320. cf. Merchant Shipping Act 1995 s.38.

191. On the facts, however, the decision could be based on a specific provision in the contract whereby complete performance was a condition precedent to recovery of any wages at all: similarly in *Appleby v Dods* (1807) 8 East 300 and *Jesse v Roy* (1834) 1 Cr. M. & R. 316. Particular terms of the contract affected the decisions in *Mapleson v Sears* (1911) 105 L.T. 639 and *Moriarty v Regent's Garage Co Ltd* [1921] 2 K.B. 766.

192. *Sagar v H. Ridehalgh & Son Ltd* [1931] 1 Ch. 310, 324–326.

193.  A “day” in this context means a calendar day and not a working day: *Hartley v King Edward VI College* [2017] UKSC 39, [2017] 1 W.L.R. 2110 at [31]; *Re B.C.C.I. SA* [1994] I.R.L.R. 282 and *Thames Water Utilities v Reynolds* [1996] I.R.L.R. 186. See more generally above para.21-023.

194. *Moriarty v Regent's Garage Co Ltd* [1921] 1 K.B. 423 (held, Act applies to wages); reversed on another point: [1921] 2 K.B. 766; *Re William Porter & Co Ltd* [1937] 2 All E.R. 361, 363; *Williams* (1941) 57 L.Q.R. 373, 382–383; *Matthews* (1982) 2 L.S. 302. However, in *Item Software (UK) Ltd v Fassihi* [2003] EWHC 3116 (Ch), [2003] 2 B.C.L.C. 1 at [104] it was held, in this respect following *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch. D. 339, that an employee was not entitled to recover a proportionate part of the unpaid salary where, on a proper construction of the contract, nothing was due until a date after the date of dismissal. The Court of Appeal in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2004] I.R.L.R. 928 held that the effect of s.2 of the Act is that, unless the parties agree otherwise, the salary of an employee whose employment terminates part way through a pay period shall be apportioned and paid in respect of the period actually worked (with payment only becoming due and payable at the end of the relevant pay period). The decision of the Court of Appeal in *Boston Deep Sea Fishing and Ice Co Ltd v Ansell* (1888) 39 Ch. D. 339 was held not to stand in the way of this conclusion because the Act was not mentioned at any point in the case: it is therefore not an authority on the construction, scope or effect of the Apportionment Act.

195. *Smales v Lea* [2011] EWCA Civ 1325, 140 Con. L.R. 70 at [43].


196. See below, para.21-033.

197. *Sumpter v Hedges* [1898] 1 Q.B. 673; *Forman & Co Proprietary v Liddesdale* [1900] A.C. 190; cf. *Sinclair v Bowles* (1829) 9 B. & C. 92; *Munro v Butt* (1858) 8 E. & B. 738; *Appleby v Myers* (1867) L.R. 2 C.P. 651 (the actual decision would probably be the same under the Law Reform (Frustrated Contracts) Act 1943: see below, para.23-086 n.391); *Bolton v Mahadeva* [1972] 1 W.L.R. 1009.

198. Some small non-feasance would also fall within the so-called doctrine of substantial performance (below, para.21-033): see *H. Dakin & Co Ltd v Lee* [1916] 1 K.B. 566, 578–579, 580.

199. Below, para.21-034 n.212.

200. *Eshelby v Federated European Bank Ltd* [1932] 1 K.B. 423; *Bolton v Mahadeva* [1972] 1 W.L.R.

1009. See also the cases cited in n.195, above. cf. *Vigers v Cook* [1919] 2 K.B. 475 (serious misfeasance by undertaker, who was held to be entitled to no remuneration at all under the contract).
- [201.](#) See generally Beck (1975) 38 M.L.R. 413.
- [202.](#) *Dakin v Oxley* (1864) 15 C.B.(N.S.) 646, 664–665; *Dakin v Lee* [1916] 1 K.B. 566; *Bolton v Mahadeva* [1972] 1 W.L.R. 1009; *Sim v Rotherham MBC* [1987] Ch. 216, 253; *Wiluszynski v Tower Hamlets LBC* [1989] I.C.R. 493, 499; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 8–10, 17.
- [203.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.17–040.
- [204.](#) *Hoenig v Isaacs* [1952] 2 All E.R. 176.
- [205.](#) (1795) 6 T.R. 320 (see above, para.21-031).
- [206.](#) *Hoenig v Isaacs* [1952] 2 All E.R. 176, 178.
- [207.](#) See the authorities cited at n.200, above.
- [208.](#) *Cutter v Powell* (1795) 6 T.R. 320; *Appleby v Myers* (1867) L.R. 2 C.P. 651, 660; *Hoenig v Isaacs* [1952] 2 All E.R. 176, 180–181.
- [209.](#) *Hoenig v Isaacs* [1952] 2 All E.R. 176, 178.
- [210.](#) [1952] 2 All E.R. 176, 181.
- [211.](#) *Close Invoice Finance Ltd v Belmont Bleaching and Dyeing Co Ltd* [2003] All E.R. (D) 304 (Apr) .
- [212.](#) See the cases cited in nn.195 and 206, above.
- [213.](#) *Sumpter v Hedges* [1898] 1 Q.B. 673. (Although the builder had in fact been paid part of the price, the Court of Appeal dealt with the case as a lump-sum contract.) See further McFarlane and Stevens (2002) 118 L.Q.R. 569.
- [214.](#) *H. Dakin & Co Ltd v Lee* [1916] 1 K.B. 566; *Hoenig v Isaacs* [1952] 2 All E.R. 176; *Kiely & Sons v Medcraft* (1965) 109 S.J. 829; *Bolton v Mahadeva* [1972] 1 W.L.R. 1009. See also *Boone v Eyre* (1779) 1 Hy. Bl. 273n; *Broom v Davis* (1794) 7 East 480n; *Basten v Butter* (1806) 7 East 479; *Mondel v Steel* (1841) 8 M. & W. 858, 870–871.
- [215.](#) *Bolton v Mahadeva* [1972] 1 W.L.R. 1009, 1013.
- [216.](#) *Boone v Eyre* (1779) 1 Hy. Bl. 273n; *H. Dakin & Co Ltd v Lee* [1916] 1 K.B. 566.
- [217.](#) *Dakin v Oxley* (1864) 15 C.B.(N.S.) 646; *Henriksens Rederi A/S v T. H. Z. Rolimpex* [1974] Q.B. 233.
- [218.](#) *William Thomas & Sons v Harrowing S.S. Co* [1915] A.C. 58.
- [219.](#) [1915] A.C. 58, 66. cf. in the Court of Appeal [1913] 2 K.B. 171, 192; *Leiston Gas Co v Leiston U.C.* [1916] K.B. 428.
- [220.](#) On the effect of an “expected peril” in the charterparty, which excused delivery of the balance of the cargo, see Williams (1941) 57 L.Q.R. 490, 500–501.
- [221.](#) On quantum meruit, see below, paras 29-071 et seq.

- [222.](#) *Christy v Row* (1808) 1 Taunt. 300; *Sumpter v Hedges* [1898] 1 Q.B. 673, 674. See also, in addition to the cases cited in n.221, below, *Wheeler v Stratton* (1911) 105 L.T. 786; *Small & Sons Ltd v Middlesex Real Estates Ltd* [1921] W.N. 245.
- [223.](#) *Munro v Butt* (1858) 8 E. & B. 738; *Sumpter v Hedges* [1898] 1 Q.B. 673; *Forman & Co Proprietary Ltd v Liddesdale* [1900] A.C. 190; cf. *Shipton v Casson* (1826) 5 B. & C. 378.
- [224.](#) s.30(1) of the Sale of Goods Act 1979 (see Vol.II, para.44-256). cf. *Hoenig v Isaacs* [1952] 2 All E.R. 176, 179–180, 181 (defendant used defective furniture made by plaintiff), although, under the Consumer Rights Act 2015 s.30 does not apply to a contract to which Ch.2 of Pt 1 of the Act applies (on which see Vol.II, paras 38-487 et seq., and see also s.25 of the Act which makes provision for rules about delivery of the wrong quantity of goods in such contracts). The Consumer Rights Act 2015 applies to consumer contracts made on or after October 1, 2015; see below, Vol.II, para.38-431.
- [225.](#) *Sumpter v Hedges* [1898] 1 Q.B. 673.
- [226.](#) [1898] 1 Q.B. 673, 676.
- [227.](#) *Forman & Co Proprietary Ltd v Liddesdale* [1900] A.C. 190.
- [228.](#) *Sumpter v Hedges* [1898] 1 Q.B. 673.
- [229.](#) *Planché v Colburn* (1831) 8 Bing. 14 (discussed below, para.29-072, where other authorities are cited).
- [230.](#) See above, paras 21-001, 21-028; below, paras 23-091, 24-045—24-046.
- [231.](#) The “entire obligation” rule applies to each part viz the payment for each part is due only from completed performance of that part of the payee’s obligations.
- [232.](#) *Roberts v Havelock* (1832) 3 B. & Ad. 404; *Taylor v Laird* (1856) 1 H. & N. 266. cf. *Rosenthal & Sons Ltd v Esmail* [1965] 1 W.L.R. 1117; Vol.II, paras 44-263 et seq. See also Smith, *Leading Cases*, 13th edn (1929), pp.1, 9 et seq.
- [233.](#) *Appleby v Myers* (1867) L.R. 2 C.P. 651, 660–661.
- [234.](#) Citing *Roberts v Havelock* (1832) 3 B. & Ad. 404.
- [235.](#) *Taylor v Webb* [1937] 2 K.B. 283 (this decision was questioned, but on different grounds, by the House of Lords in *Regis Property Co Ltd v Dudley* [1959] A.C. 370). On the remedies of the tenant who has expended money on the repairs, see *Taylor v Beal* (1591) Cro. Eliz. 222; *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* [1959] Ch. 592; *Lee-Parker v Izzet* [1971] 1 W.L.R. 1688.
- [236.](#) *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] Q.B. 137. See also *Melville v Grapelodge Developments Ltd* (1978) 39 P. & C.R. 179; *B.I.C.C. Plc v Burndy Corp* [1985] Ch. 232.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 21 - Performance

Section 4. - Payment

(a) - In General

Payment

21-040

All questions relating to payment of a sum of money in pursuance of a contract depend on the construction of the terms of the contract. ²³⁷ The creditor is entitled to require the payment to be made in legal currency. ²³⁸ The parties, however, may by subsequent variation, ²³⁹ waiver ²⁴⁰ or novation ²⁴¹ substitute a different obligation from that originally undertaken, so that the original obligation of the debtor to make payment is varied or discharged. An illustration of such a discharge is a settlement of accounts, by which items on one side are agreed to be set off against items on the other side: if the two sides then balance, this is equivalent to payment on both sides ²⁴²; if there is a balance on one side, which is paid in cash, this is likewise equivalent to payment of all sums on both sides. ²⁴³ Similarly, payment of a debt may be satisfied by the creditor agreeing to take goods in lieu of cash, ²⁴⁴ or to accept the method of charging the debt to a third party through the debtor's credit card, ²⁴⁵ or by both parties agreeing that a transfer in a banker's books from the debtor's account to the creditor's account shall amount to payment. ²⁴⁶ Payment of wages to a workman, however, must either be in current coin of the realm, or comply with statutory provisions. ²⁴⁷ An obligation to pay money can be frustrated. ²⁴⁸ Payment by negotiable instrument is examined below. ²⁴⁹

Distinction between claims for payment of a debt and claims for damages. ²⁵⁰

21-041

There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition ²⁵¹; whereas, damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt. (It is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay the debt at the due date.) ²⁵² The relevance of this distinction is that rules on damages do not apply to a claim for a debt, ²⁵³ e.g. the claimant who claims payment of a debt need not prove anything more than its performance or the occurrence of the event or condition; there is no need for it to prove any actual loss suffered by it ²⁵⁴ as a result ²⁵⁵ of the defendant's failure to pay; the whole concept of the remoteness of damage ²⁵⁶ is therefore irrelevant; the law on penalties does not apply to the agreed sum ²⁵⁷; and the claimant's duty to mitigate its loss does not generally apply. ²⁵⁸

Payment by agent or third party

21-042

Where payment of a debt is made by a third person who is not jointly ²⁵⁹ liable (e.g. as co-contractor), the debt is not discharged unless the payment is made by the third person as agent for and on account of the debtor, and with his prior authority or subsequent ratification. ²⁶⁰ Even after the creditor has sued for the debt, the debtor can ratify such a payment by pleading payment. ²⁶¹ Where payment is made by a third person on behalf of the debtor but without his authority, the creditor and the person who made the payment may together rescind the transaction at any time before the debtor has ratified the payment; the creditor may repay the money to the third person and thereupon the payment is at an end, so that the debtor cannot later purport to ratify the payment; the debtor therefore becomes again responsible. ²⁶² The payment of a debt by one of a number of joint (or joint and several) debtors discharges all the debtors. ²⁶³

Payment to a third party

21-043

If the creditor requests the debtor to pay the debt to a third party, such a payment is equivalent to payment direct to the creditor, and is a good discharge of the debt. ²⁶⁴

Payment to agent

21-044

If payment is made to an agent of the creditor, this discharges the debt if it is made in the ordinary course of business, before the creditor demands payment to himself, ²⁶⁵ and while the agent has actual or ostensible authority from the creditor to receive the payment. ²⁶⁶ Payment to an ostensible agent, who is in fact without actual authority to receive the payment, is a valid discharge of the debt, e.g. where money is paid to a person apparently entrusted with the conduct of the creditor's business. ²⁶⁷ There is no general rule that an agent who is authorised to sell on behalf of his principal is also authorised to receive the purchase-money. ²⁶⁸ A solicitor has implied authority to receive payment of a debt for which he is instructed to sue ²⁶⁹; he also has authority to receive the consideration money for a deed when he produces it, if it contains a receipt for such money and is duly executed by the person entitled to give a receipt for the money. ²⁷⁰

Payment to agent otherwise than in cash

21-045

The creditor's right to payment is not affected by a set-off which his debtor may have against the creditor's agent ²⁷¹ unless this mode of dealing is sanctioned by a usage known to the creditor, ²⁷² or the creditor allowed his agent to sell as apparent principal. ²⁷³ Nor can the debtor discharge his debt to the creditor by writing off a debt due to the debtor from the creditor's agent. ²⁷⁴ Prima facie, an agent who is authorised to receive payment (e.g. an auctioneer) has authority only to receive it in cash ²⁷⁵; such an agent cannot bind his principal by accepting a bill of exchange without the express authority of the principal. ²⁷⁶ If such an agent in fact accepts a cheque and cashes it, or the proceeds are collected by his bank, that amounts to a payment in cash. ²⁷⁷ On the other hand, a principal who desires to authorise an agent to receive payment by cheque only and not in cash must plainly notify third parties dealing with his agent of the exact extent of the agent's authority; thus a notification that cheques drawn in payment must be drawn in a particular form does not exclude the presumption that payment may lawfully be made to the agent in cash and not by cheque at all. ²⁷⁸

Payment or transfer into a bank account. ²⁷⁹

21-046

Where the creditor instructs the debtor to pay a sum due to him by making a payment to the credit of a specified bank account, the creditor has made the bank his agent to receive the payment, which is

made as soon as the bank receives payment in cash, or by means of a banker's cheque, ²⁸⁰ draft, payment order or transfer which is treated by banks as equivalent to cash. ²⁸¹ When the contract requires "payment in cash" to be made into the payee's bank account, but the parties obviously do not expect the payment to be literally in cash (i.e. in pounds sterling, dollar bills or other legal tender), the payment or credit to the payee's account must be "the equivalent of cash, or as good as cash", ²⁸² that is, by:

"... any commercially recognised method of transferring funds the result of which is to give the transferee the [unfettered or unrestricted] right to the immediate use of the funds transferred." ²⁸³

Thus, where a Telex credit transfer was made to the payee's bank account, and was treated as irrevocable under an Italian inter-bank scheme, but interest on the funds credited would not begin to run in favour of the payee until four days later, the House of Lords held ²⁸⁴ that "payment in cash" had not been made by the book entry of the receiving bank. "Payment in cash" meant that the payee whose account was credited must be able to use it immediately, e.g. by immediate transfer to a deposit account where it would earn interest; the fact that the receiving bank would allow the payee immediately to draw on the credit, but subject to his paying interest during the four days, did not make it equivalent to cash, since that arrangement was merely the equivalent of an overdraft facility. ²⁸⁵

Payment "in cash"

21-047

The point of time at which a transfer or credit payment into a bank account is "made" has been discussed, but not finally decided, in another House of Lords case, ²⁸⁶ where "payment in cash" was required by the contract. The payment was made by a payment order from another bank, under the provisions of an inter-bank settlement scheme, where the system of processing might have taken 24 hours before the payee's account was credited. Lord Salmon, without deciding the point:

"... inclined to think that ... there is no real difference between a payment in dollar bills and a payment by payment orders which in the banking world are generally regarded and accepted as cash" ²⁸⁷

(which view Lord Russell was also inclined to accept ²⁸⁸); but Lord Fraser thought that the payment must be made "in sufficient time to allow for the period of processing normally required for the method of payment they had chosen". ²⁸⁹

Payment by "in-house" transfer

21-048

In the case of "in-house" payments (viz, a transfer from one customer's account to another's within the same bank), the payment is made as soon as the bank accepts the payer's instructions and credits the payee's account; in other words, the payment is "made" as soon as the bank has set in motion the bank's internal process for crediting the payee's account (e.g. by preparing the instructions for the bank's computer) and before the payee receives any notice that this has been done. ²⁹⁰ Thus, where a bank received a Telex instruction (or "transfer order") from a customer to debit his account and to credit another customer's account, the payment was made when the staff of the bank accepted the instruction and marked the appropriate documents in the bank. ²⁹¹

Payment in "freely transferable funds"

21-049

In the case where payment must be made “in freely transferable funds” the payment will normally be made when the funds are freely available in the hands of the recipient and this will not normally be the case until the funds have been credited to the account specified for receiving payment so that the payee has control over the money following payment. ²⁹²

Where payment must be to an agent

21-050

There may be cases where payment must be made to the agent, and cannot validly be made to the principal, e.g. where an auctioneer has an unsatisfied lien on the proceeds of goods sold by him, it is no defence to an action by him for the price ²⁹³ that the buyer had paid the principal, unless the contract of sale permitted payment direct to the principal. ²⁹⁴ The same rule applies where the auctioneer has acted on the faith of an agreement between himself and the principal that the proceeds of the sale shall be disposed of in a particular way. ²⁹⁵ The buyer may rely upon any defence or set-off that he may have against the principal in respect of that part of the amount claimed by the auctioneer which, if recovered, he would be bound to hand over to the principal. ²⁹⁶

Payment to joint creditors, partners, trustees, etc

21-051

The payment of a debt to one of a number of joint creditors discharges a debt owed to them jointly. ²⁹⁷ Similarly, as partnership is founded on agency, payment to one of a number of partners to whom a debt is jointly owed binds them all, even after a dissolution of the partnership: this position holds even where the debtor had notice before payment that the partners had appointed a third person to collect the debts due to the firm, unless there is something in the notice which expressly takes away the right of the one partner to receive the money. ²⁹⁸ Payment of a debt to one of two trustees is a good discharge as to both. ²⁹⁹ But where bankers pay to one of several trustees money which should be held in their joint account, the bankers are not discharged as against the other trustees unless they authorised such payment ³⁰⁰; for where money is paid into a bank on the joint account of persons who are not partners, the bankers are not discharged by payment to one of those persons without the authority of the others. ³⁰¹ Payment of a debt to one of several executors or administrators is a good discharge ³⁰²; and by the Administration of Estates Act 1925 s.27(2), where a representation ³⁰³ is revoked all payments and dispositions made in good faith to a personal representative ³⁰⁴ before the revocation are a valid discharge to the person making the same. ³⁰⁵

Bankruptcy

21-052

Payments made to a bankrupt before the date of the bankruptcy order are considered in Ch.20. ³⁰⁶ The trustee in bankruptcy is empowered to give receipts for any money received by him, which receipts “effectually discharge the person paying the money from all responsibility in respect of its application”. ³⁰⁷

Payment under a third party debt order. ³⁰⁸

21-053

Under CPR Pt 72, the court may, upon the application of a judgment creditor make an order (known as a “final third party debt order”) which requires a third party to pay to the judgment creditor the amount of any debt due or accruing to the judgment debtor from the third party or so much of that

debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application. However, a court cannot make a final third party debt order without first making an "interim third party debt order". ³⁰⁹ A final third party debt order is enforceable as an order to pay money. ³¹⁰ If the third party pays money to the judgment creditor in compliance with a third party debt order or the order is enforced against the third party, the third party shall, to the extent of the amount paid by it or realised by enforcement against it, be discharged from its debt to the third party ³¹¹ and this is so even if the third party order, or the original judgment or order against the judgment debtor, is later set aside. ³¹²

Amount to be paid

21-054

Apart from subsequent variation by agreement, ³¹³ accord and satisfaction ³¹⁴ or the operation of promissory estoppel, ³¹⁵ the payment of part of a liquidated sum of money due to the creditor is not a discharge of the whole debt, ³¹⁶ even though the creditor purports to release the remaining obligation, since there is no consideration for the release. ³¹⁷ If there is no liquidated sum due, and the amount is uncertain or disputed, payment of any sum subsequently agreed upon by the parties will constitute an accord and satisfaction. ³¹⁸

Time of payment

21-055

The time when payment is due to be made is a question of construction of the contractual terms. ³¹⁹ Sometimes the time for payment must be implied from the circumstances of the contract: thus, where the claimant contracts to work upon the defendant's materials, and no time is fixed for payment of the agreed cost, the defendant must pay as soon as the claimant has completed the work and given the defendant a reasonable opportunity of seeing that the work has been properly done. ³²⁰ Money which is repayable on demand must be ready to be handed over to the creditor as soon as the creditor demands it from the debtor: the only time which the creditor needs to give the debtor is time to get the money from some convenient place, ³²¹ not time in which to negotiate a deal or a loan which he hopes will produce the money. ³²² The rules discussed above ³²³ as to exact compliance with the time fixed for performance of the contract apply to the time fixed for payment. It is therefore only in three cases recognised by equity ³²⁴ that a failure to make the payment on the fixed date amounts to a repudiatory breach of contract entitling the other party to terminate the contract. By s.10(1) of the Sale of Goods Act 1979, it is expressly enacted that unless a different intention appears from the terms of a contract for the sale of goods, stipulations as to time of payment are not of the essence of the contract. ³²⁵

Place of payment

21-056

⚠ Where the place of payment is specified by the contract, the debtor must tender payment at that place in order to discharge his obligation. ³²⁶ Where no place of payment is expressly or impliedly specified by the contract, the general rule is that it is the debtor's duty to seek the creditor in order to pay the creditor at the creditor's place of business or residence, if it is in England ³²⁷ ⚠; but the rule is not applicable to large employers of labour who maintain a regular pay-day and pay office. ³²⁸ Unless there is evidence of a contrary intention, the place for payment of a debt is the business place or residence of the creditor at the date when the debt was contracted. ³²⁹ If the contract specifies alternative places for payment, it is the duty of the party entitled to select the place to notify the other party; if it is for the creditor to select, there is no default in payment until the creditor notifies the debtor which place of payment the creditor selects. ³³⁰

Mode of payment

21-057

Except where the creditor has expressly or impliedly agreed to do so, the creditor is under no obligation to accept a negotiable instrument (such as a bill, note or cheque) in payment of the debt. ³³¹ If the creditor does accept payment in this way, the effect upon the existence of the debt depends on the circumstances, and is discussed in detail in a separate section. ³³²

Loss in post

21-058

Where a banknote, a cheque or other negotiable instrument is sent to the creditor by post, this does not normally amount to payment if it is lost in the post. ³³³ Where, however, a creditor expressly or impliedly authorises its debtor to transmit the amount of the debt by cheque through the post, the debtor is discharged if it complies with the authority by sending the cheque in a letter properly addressed to the creditor, even though it does not reach the creditor. ³³⁴ The necessary authority is not to be implied from the mere fact that the previous course of dealing between the parties has been to send cheques by post, ³³⁵ though very little evidence of authority is required in addition to evidence of such a course of dealing. A request for a remittance by post amounts to an authority to send the sum in question by post in such a form as is appropriate to its amount. To send (in 1916) a sum as large as £48 in banknotes, even in a registered letter, was held to be unusual and inappropriate ³³⁶ and so was the sending by post of an uncrossed bearer cheque. ³³⁷

Expressly or impliedly authorised mode

21-059

A particular mode of payment may be expressly or impliedly authorised by the contract ³³⁸: thus where there is an automatic slot gas meter, payment is effectively made when coins are placed in the meter, as this is the mode of payment authorised by the supplier of the gas; if the money is subsequently stolen without the negligence of the payer, he is not liable. ³³⁹ A court may be willing to draw an inference that payment can be made by cheque and this inference may be drawn on the basis of the previous course of dealing between the parties ³⁴⁰ or even from the fact that the parties live at a distance from each other. ³⁴¹ Similarly, payment by credit or charge card may be a method of payment accepted by the creditor. ³⁴² In a contract for the self-service supply of petrol, the garage undertakes to accept a particular charge card in payment if it displays a notice of its willingness to do so. ³⁴³

Proof of payment: receipts

21-060

A payment may be proved by any evidence ³⁴⁴ but the usual method of proof is the production of a receipt ³⁴⁵ signed by the creditor or the creditor's agent. A receipt is not conclusive but only prima facie evidence that the money has been paid. ³⁴⁶ Evidence may be given of the intention with which it was handed over ³⁴⁷ and of the circumstances generally ³⁴⁸: thus a receipt given "in full discharge" does not exclude an implied agreement to pay interest not covered by the receipt. ³⁴⁹ Again, the effect of a receipt may be destroyed by proof that it was obtained by fraud or under a mistake of fact, ³⁵⁰ or that it formed part of a transaction which was merely colourable, because no money had in fact been paid. ³⁵¹ Where, however, a document containing a receipt clause is relied on by third parties, different considerations prevail, and the person signing the document may be estopped, as against third parties, from denying receipt of the money. ³⁵² A receipt may be in any form so long as the words are express. ³⁵³ A receipt for consideration money or securities in the body of a deed is a sufficient discharge for the same, without any further receipt being indorsed on the deed. ³⁵⁴ It is no longer necessary for a receipt to be stamped. ³⁵⁵


- [237.](#) *Re Charge Card Services Ltd* [1989] Ch. 497; *Kaupthing Singer & Friedlander Ltd v UBS AG* [2014] EWHC 2450 (Comm) at [64]. See Charles Proctor, *Goode on Payment Obligations in Commercial and Financial Transactions* 2nd edn (2009). On questions of payment due in a foreign currency, see below, paras 30-332, 30-371—30-381.
- [238.](#) See below, para.21-088.
- [239.](#) See below, paras 22-032 et seq.
- [240.](#) See below, paras 22-040 et seq.
- [241.](#) See below, para.22-031.
- [242.](#) *Re Harmony and Montague Tin and Copper Mining Co* (1873) L.R. 8 Ch. App. 407, 414. See also *Livingstone v Whiting* (1850) 15 Q.B. 722.
- [243.](#) *Callander v Howard* (1850) 10 C.B. 290; *Re Harmony and Montague Tin and Copper Mining Co* (1873) L.R. 8 Ch. App. 407; *Larocque v Beauchemin* [1897] A.C. 358; *North Sydney Investment and Tramway Co Ltd v Higgins* [1899] A.C. 263. Where items are on one side only there is no such settlement of accounts: *Perry v Attwood* (1856) 6 E. & B. 691.
- [244.](#) *Hands v Burton* (1808) 9 East 349; *Saxty v Wilkin* (1843) 11 M. & W. 622; *Smith v Battams* (1857) 26 L.J. Ex. 232.
- [245.](#) See below, para.21-084.
- [246.](#) *Bodenham v Purchas* (1818) 2 B. & Ald. 39. See the discussion, below, para.21-046.
- [247.](#) See Vol.II, paras 40-095—40-096.
- [248.](#) *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728, 749 but note the criticisms levelled against this proposition by Mann, *The Legal Aspect of Money*, 5th edn, pp.68 and 418. The current edition of Mann, 7th edn (2012), para.3.05 n.9, notes that it is “not quite an accurate statement” to suggest that a monetary obligation cannot be frustrated, and suggests that monetary obligations are capable of frustration.
- [249.](#) See below, paras 21-075 et seq.
- [250.](#) See below, para.26-008; *Jervis v Harris* [1996] Ch. 195, 206–207. Payment in full of a debt extinguishes the creditor’s cause of action: *Edmunds v Lloyd’s Italic, etc. SpA* [1986] 1 W.L.R. 492, 495. (On interest, see below, paras 26-227—26-246.)
- [251.](#) See below, para.26-008 n.49.
- [252.](#) See *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 Q.B. 297; *Wadsworth v Lydall* [1981] 1 W.L.R. 598; see generally, below, paras 26-175—26-193.
- [253.](#) See below, para.26-008, for a fuller discussion of these and other distinctions.
- [254.](#) See below, paras 26-001, 26-009.
- [255.](#) On causation, see below, paras 26-058 et seq.
- [256.](#) See below, paras 26-107 et seq.
- [257.](#) See below, para.26-178.
- [258.](#) See below, para.26-079.

- [259.](#) Or jointly and severally liable. On joint liability, see above, paras 17-001 et seq.
- [260.](#) *James v Isaacs* (1852) 12 C.B. 791; *Simpson v Eggington* (1855) 10 Exch. 845, 847; *Lucas v Wilkinson* (1856) 1 H. & N. 420; *Walter v James* (1871) L.R. 6 Ex. 124; *Purcell v Henderson* (1885) 16 L.R.Ir. 213, 223, 224; *Keighley, Maxsted & Co v Durant* [1901] A.C. 240; *Re Rowe* [1904] 2 K.B. 483; *Smith v Cox* [1940] 2 K.B. 558; *Owen v Tate* [1976] 1 Q.B. 402. *Pacific Associates Inc v Baxter* [1990] 1 Q.B. 993, 1033–1034; *Pacific and General Insurance Co Ltd v Hazell* [1997] L.R.L.R. 65, 79–80; *Ibrahim v Barclays Bank Plc* [2012] EWCA Civ 640, [2013] Ch. 400. See below, para. 29-121, and Vol.II, paras 31-027–31-034, especially para.31-034; *Birks and Beatson* (1976) 92 L.Q.R. 188. cf. *Burrows, The Law of Restitution*, 3rd edn (2011), pp.460–468 and *Friedmann* (1983) 99 L.Q.R. 534. The authority of the debtor will often be presumed: see *Bennett v Griffin Finance* [1967] 2 QB 46 (Vol.II, para.39-329) and below, paras 29-119–29-125.
- [261.](#) *Belshaw v Bush* (1851) 11 C.B. 191.
- [262.](#) *Walter v James* (1871) L.R. 6 Ex. 124, 128.
- [263.](#) See above, para.17-014.
- [264.](#) *Roper v Bunford* (1810) 3 Taunt. 76; *Page v Meek* (1862) 32 L.J.Q.B. 4; cf. *Commercial Bank of Australia Ltd v Wilson & Co's Estate* [1893] A.C. 181. On payment into the creditor's bank account, see below, para.21-046; on payment by credit or charge card, see below, para.21-084.
- [265.](#) *Sanderson v Bell* (1834) 2 C. & M. 304.
- [266.](#) See Vol.II, paras 31-043–31-050.
- [267.](#) *Barrett v Deere* (1828) Moo. & M. 200; *Wilmott v Smith* (1828) Moo. & M. 238; *Bocking Garage v Mazurk* [1954] C.L.Y. 14. The claimant's wife may be so authorised: *Offley v Clay* (1840) 2 M. & G. 172. cf. *Galbraith and Grant Ltd v Block* [1922] 2 K.B. 155 (delivery of goods at buyer's premises to a person having ostensible authority to receive them).
- [268.](#) *Drakeford v Piercy* (1866) 7 B. & S. 515; *International Sponge Importers Ltd v Andrew Watt & Sons* [1911] A.C. 279; *Linck, Moeller & Co v Jameson & Co* (1885) 2 T.L.R. 206; *Butwick v Grant* [1924] 2 K.B. 483. Custom, however, may affect the agent's authority: *Catterall v Hindle* (1867) L.R. 2 C.P. 368 (broker).
- [269.](#) *Yates v Freckleton* (1781) 2 Dougl. 623; *Weary v Alderson* (1837) 2 M. & Rob. 127 (implied authority to receive payment extends to solicitor's London agent who issues the writ).
- [270.](#) Law of Property Act 1925 s.69; *King v Smith* [1900] 2 Ch. 425.
- [271.](#) *Bartlett v Pentland* (1830) 10 B. & C. 760; *Barker v Greenwood* (1837) 2 Y. & C. Ex. 414; *Pearson v Scott* (1878) 9 Ch. D. 198; *Anderson v Sutherland* (1897) 2 Com. Cas. 65; *Matvieff v Crossfield* (1903) 8 Com. Cas. 120.
- [272.](#) *Scott v Irving* (1830) 1 B. & Ad. 605; *Stewart v Aberdein* (1838) 4 M. & W. 211; *Sweeting v Pearce* (1861) 9 C.B.(N.S.) 534; *Catterall v Hindle* (1867) L.R. 2 C.P. 368.
- [273.](#) *Cooke & Sons v Eshelby* (1887) 12 App. Cas. 271; *Ex p. Dixon* (1876) 4 Ch. D. 133 (factor selling in his own name); *Borries v Imperial Ottoman Bank* (1873) L.R. 9 C.P. 38; see Vol.II, para.31-069; cf. *Greer v Downs Supply Co* [1927] 2 K.B. 28.
- [274.](#) *Underwood v Nicholls* (1855) 17 C.B. 239; *Pearson v Scott* (1878) 9 Ch. D. 198.
- [275.](#) *Sweeting v Pearce* (1861) 9 C.B.(N.S.) 534, 540; *Blumberg v Life Interests and Reversionary Securities Corp* [1897] 1 Ch. 171. [1898] 1 Ch. 27. Such an agent has no authority to receive payment in other goods: *Howard v Chapman* (1831) 4 C. & P. 508; nor is a credit to the agent payment to his principal: *Crossley v Magnac* [1893] 1 Ch. 594. See also Vol.II, para.31-051.

- [276.](#) *Sykes v Giles* (1839) 5 M. & W. 645; *Williams v Evans* (1866) L.R. 1 Q.B. 352; *Hogarth v Wherley* (1875) L.R. 10 C.P. 630.
- [277.](#) *Bridges v Garrett* (1870) L.R. 5 C.P. 451; *Charles v Blackwell* (1877) 2 C.P.D. 151; *Walker v Barker* (1900) 16 T.L.R. 393; *Robinson v Marsh* [1921] 2 K.B. 640, 644; *Clay Hill Brick & Tile Co Ltd v Rawlings* [1938] 4 All E.R. 100; cf. *Pape v Westacott* [1894] 1 Q.B. 272 (cheque dishonoured).
- [278.](#) *International Sponge Importers Ltd v Watt & Sons* [1911] A.C. 279; cf. *Bradford & Sons v Price Bros* (1923) 92 L.J.K.B. 871.
- [279.](#) Charles Proctor, *Goode on Payment Obligations in Commercial and Financial Transactions*, 2nd edn (2009), paras 4–09 et seq. See also King (1982) 45 M.L.R. 369; and below, Vol.II, paras 34–425 et seq.
- [280.](#) On receipt of the debtor's own cheque, or other negotiable instrument, as conditional payment, see below, para.21-076.
- [281.](#) *A/S Awilco of Oslo v Fulvia SpA Di Navigazione of Cagliari (The Chikuma)* [1981] 1 W.L.R. 314 (see Vol.II, para.34-430); *The Brimnes (Tenax S.S. Co Ltd v The Brimnes (Owners))* [1975] Q.B. 929, 948, 964–965, 968–969; *Razcom CI v Barry Callebaut Sourcing AG* [2010] EWHC 2598 (QB) at [21]–[25].
- [282.](#) *The Chikuma* [1981] 1 W.L.R. 314, 320.
- [283.](#) *The Brimnes* [1973] 1 W.L.R. 386, 400 (approved by the House of Lords in *The Chikuma* [1981] 1 W.L.R. 314, 318–320, with the substitution of “unfettered or unrestricted” for “unconditional” as the adjective before “right”). The decision of the Court of Appeal in *The Brimnes* is reported at [1975] Q.B. 929.
- [284.](#) *The Chikuma* [1981] 1 W.L.R. 314.
- [285.](#) [1981] 1 W.L.R. 314. (But see the criticism by Mann (1981) 97 L.Q.R. 379.)
- [286.](#) *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* [1977] A.C. 850.
- [287.](#) [1977] A.C. 850, 880.
- [288.](#) [1977] A.C. 850, 889.
- [289.](#) [1977] A.C. 850, 885. (The other Lords did not deal with this point.) See also *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan* [1983] 1 W.L.R. 195, 202, 204.
- [290.](#) *Momm v Barclays Bank International Ltd* [1977] Q.B. 790 (following *The Brimnes* [1973] 1 W.L.R. 386; and *Eyles v Ellis* (1827) 4 Bing. 112); *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Rep. 194.
- [291.](#) *The Brimnes* [1975] Q.B. 929, 948–951, 963–966, 969. (The mere receipt of the Telex message does not constitute payment, since it is not a negotiable instrument: 949, 965, 969.)
- [292.](#) *Kaupthing Singer & Friedlander Ltd v UBS AG* [2014] EWHC 2450 (Comm) at [68].
- [293.](#) An auctioneer's special property in the goods entrusted to him entitles him to sue in his own name for the price of the goods: *Williams v Millington* (1788) 1 H.Bl. 81; *Benton v Campbell, Parker & Co Ltd* [1925] 2 K.B. 410, 416.
- [294.](#) *Robinson v Rutter* (1855) 4 E. & B. 954. See Harvey and Meisel, *Auctions Law and Practice*, 3rd edn (2006), paras 4.50–4.61.
- [295.](#) *Manley & Sons Ltd v Berkett* [1912] 2 K.B. 329.

- [296.](#) *Grice v Kenrick* (1870) L.R. 5 Q.B. 340; *Manley Sons Ltd v Berkett* [1912] 2 K.B. 329.
- [297.](#) *Wallace v Kelsall* (1840) 7 M. & W. 264; *Husband v Davis* (1851) 10 C.B. 645; *Powell v Brodhurst* [1901] 2 Ch. 160; *Barrett v Universal Island Records Ltd* [2006] EWHC 1009 (Ch), [2006] E.M.L.R. 21 at [214].
- [298.](#) *Porter & Bristow v Taylor* (1817) 6 M. & S. 156. But payment to the firm of a separate debt due to one partner is not payment of the debt unless the firm was authorised to receive it: *Powell v Brodhurst* [1901] 2 Ch. 160. See further Lindley and Banks on Partnership, 19th edn (2010), paras 12-53—12-54.
- [299.](#) *Husband v Davis* (1851) 10 C.B. 645.
- [300.](#) *Stone v Marsh* (1826) Ry. & M. 364, 369.
- [301.](#) *Innes v Stephenson* (1831) 1 Moo. & Rob. 145. cf. the similar rule in the case of Bank of England stock: *Welch v The Bank of England* [1955] Ch. 508.
- [302.](#) *Can v Read* (1749) 3 Atk. 695; *Jacomb v Harwood* (1751) 2 Ves. Sen. 265, 267; *Charlton v Durham* (1869) L.R. 4 Ch. App. 433.
- [303.](#) “Personal representative” and “representation” mean probate or administration and executor or administrator: Administration of Estates Act 1925 s.55(1)(xi) and (xx).
- [304.](#) s.55(1)(xi) and (xx).
- [305.](#) cf. cases before statutory provision: *Allen v Dundas* (1789) 3 T.R. 125; *Prosser v Wagner* (1856) 1 C.B.(N.S.) 289.
- [306.](#) Above, paras 20-018 et seq.
- [307.](#) para.10 of Pt II of Sch.5 to the Insolvency Act 1986 (by virtue of s.314). Section 306 provides for the bankrupt’s estate to vest in the trustee.
- [308.](#) Previously known as a garnishee order. See further Blackstone’s Civil Practice 2015 (2015), paras 79.19–79.24 and N. Andrews, *English Civil Procedure* (2003), paras 39.26–39.38.
- [309.](#) CPR 72.2(2) and see further CPR 72.4–72.6 and PD 72 paras 1–3.
- [310.](#) CPR 72.9(1).
- [311.](#) CPR 72.9(2).
- [312.](#) CPR 72.9(3).
- [313.](#) Below, paras 22-032 et seq.
- [314.](#) Below, paras 22-012 et seq.
- [315.](#) Above, paras 4-086—4-103; cf. below, paras 22-040 et seq.
- [316.](#) Below, paras 22-016—22-018.
- [317.](#) Above, paras 4-117 et seq.
- [318.](#) Below, para.22-012; above, paras 4-047 et seq.
- [319.](#) See above, paras 13-041 et seq., 21-011 et seq.; below, para.21-091. In *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* [1977] A.C. 850 it was assumed that payment due to be made into a banking account on a date which turned out to be a non-banking day must be

made not later than the previous banking day. See also above, para.21-023 n.152.

- [320.](#) *Hughes v Lenny* (1839) 5 M. & W. 183. In the case of a divisible obligation (above, para.21-038) where no time for payment has been fixed, the person performing the work may be entitled to claim payment for parts of the work already completed: *Roberts v Havelock* (1832) 3 B. & Ad. 404; *The Tergeste* [1903] P. 26.
- [321.](#) *Toms v Wilson* (1862) 4 B. & S. 442, 453 (“[H]e must have a reasonable time to get it from some convenient place. For instance, he might require time to get it from his desk, or to go across the street or to his bankers for it”) (approved in *Moore v Shelley* (1883) 8 App. Cas. 285, 293). The reasonableness of the opportunity given to a debtor (who is required to pay on demand) may depend on the debtor’s knowledge (or means of knowledge) of the amount due, and on the information supplied by the creditor: *Bunbury Foods Pty Ltd v National Bank of Australia Ltd* (1984) 153 C.L.R. 491.
- [322.](#) *R.A. Cripps & Son Ltd v Wickenden* [1973] 1 W.L.R. 944, 955. See also *Brighty v Norton* (1862) 3 B. & S. 305, 312; *Toms v Wilson* (1862) 4 B. & S. 442.
- [323.](#) Above, paras 21-011 et seq.
- [324.](#) Above, paras 21-011—21-018.
- [325.](#) Contrast stipulations as to the time of delivery, above, para.21-013 n.80.
- [326.](#) Except where there is waiver or variation of the obligation to pay at the specified place: see below, paras 22-032—22-046; *Gyles v Hall* (1726) 2 P. Wms. 378 (debtor gave creditor notice of his intention to pay at a specified time and place; creditor made no objection, and therefore waived personal tender anywhere else).
- [327.](#)  *Robey & Co v Snaefell Mining Co Ltd* (1887) 20 Q.B.D. 152; *The Eider* [1893] P. 119, 128; *Thompson v Palmer* [1893] 2 Q.B. 80; *Charles Duval & Co Ltd v Gans* [1904] 2 K.B. 685; *Fowler v Midland Electric Corp for Power Distribution Ltd* [1917] 1 Ch. 656. The general rule applies to a tenant: *Haldane v Johnson* (1853) 8 Exch. 689; also where the creditor was out of England when the contract was made, but not where the creditor left England after the date: *Fessard v Mugnier* (1865) 18 C.B.(N.S.) 286. The presumption that the debtor must seek out the creditor at his place of business and pay him there is of long standing but it is readily displaced implicitly and not just expressly; in considering whether the presumption has been displaced the court can take account of modern ways of making commercial payment based on its daily experience: *Canyon Offshore Ltd v GDF Suez E&P Nederland BV* [2014] EWHC 3810 (Comm), [2015] Bus. L.R. 578 at [38].
- [328.](#) *Riley v William Holland & Sons Ltd* [1911] 1 K.B. 1029, 1031.
- [329.](#) *Rein v Stein* [1892] 1 Q.B. 753, 758; *Charles Duval & Co Ltd v Gans* [1904] 2 K.B. 685; *Drexel v Drexel* [1916] 1 Ch. 251, 259, 260.
- [330.](#) *Thorn v City Rice Mills* (1889) 40 Ch. D. 357; cf. *Re Escalera Silver Lead Mining Co* (1908) 25 T.L.R. 87; *Re Harris Calculating Machine Co* [1914] 1 Ch. 920.
- [331.](#) See below, para.21-089. On payment by bankers’ commercial credit, see Vol.II, paras 34-445 et seq., para.44-238. On payment into the creditor’s bank account, see above, para.21-046.
- [332.](#) Below, paras 21-075—21-083.
- [333.](#) *Luttges v Sherwood* (1895) 11 T.L.R. 233; *Pennington v Crossley & Son* (1897) 77 L.T. 43; *Baker v Lipton Ltd* (1899) 15 T.L.R. 435; *Warnborough Ltd v Garmite Ltd* [2006] EWHC 10 (Ch) at [84], [93]. The fact that payment is usually made through the post is insufficient of itself to show that the creditor has assumed the risk of loss in the post: *Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch), [2012] 1 E.G.L.R. 65 at [55].

- [334.](#) *Norman v Ricketts* (1886) 3 T.L.R. 182 (the cheque reached the hands of a third person who received payment); *Thairlwall v Great Northern Ry* [1910] 2 K.B. 509 (dividend warrant lost in the post; the stockholder would probably have been able to obtain another warrant under s.69 of the Bills of Exchange Act 1882 (see Vol.II, para.34-145) or to have brought an action on the warrant); but cf. *Tankexpress A/S v Compagnie Financière Belges des Petroles SA* [1949] A.C. 76 (letter delayed in the post); *Zim Israel Navigation Co Ltd v Effy Shipping Corp* [1972] 1 Lloyd's Rep. 18 (affirmed [1972] 2 Lloyd's Rep. 91). cf. posting a letter giving notice of dishonour of a bill: *Walter v Haynes* (1824) Ry & M. 149; *Berridge v Fitzgerald* (1869) L.R. 4 Q.B. 639.
- [335.](#) *Pennington v Crossley & Son* (1897) 77 L.T. 43.
- [336.](#) *Mitchell-Henry v Norwich Union Life Insurance Society* [1918] 2 K.B. 67.
- [337.](#) *Robb v Gow* (1905) 8 F. 90.
- [338.](#) See above, para.21-046.
- [339.](#) *Edmundson v Longton Corp* (1902) 19 T.L.R. 15.
- [340.](#) *Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch), [2012] 1 E.G.L.R. 65; *Beevers v Mason* (1978) 37 P. & C.R. 452.
- [341.](#) *Homes v Smith* [2000] Lloyd's Rep. Bank. 139 at [23].
- [342.](#) See below, para.21-084.
- [343.](#) *Re Charge Card Services Ltd* [1989] Ch. 497.
- [344.](#) *Eyles v Ellis* (1827) 4 Bing. 112; *Mountford v Harper* (1847) 16 L.J. Ex. 184 (proceeds of cheque drawn by debtor received by creditor); *Gadderer v Dawes* (1847) 10 L.T.(O.S.) 109; *Douglas v Lloyds Bank Ltd* (1929) 34 Com. Cas. 263 (payment presumed from lapse of time where no explanation given for the delay: cf. *Cooper v Turner* (1819) 2 Stark. 497).
- [345.](#) The practice of giving receipts for ordinary debts paid by cheque has been largely discontinued since the enactment of s.3 of the Cheques Act 1957 which provides: "An undorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque".
- [346.](#) *Straton v Rastall* (1788) 2 T.R. 366; *Hawkins v Gardiner* (1854) 2 Sm. & G. 441; *Wilson v Keating* (1859) 27 Beav. 121.
- [347.](#) e.g. in full satisfaction of all claims: *Lee v Lancashire & Yorkshire Ry* (1871) L.R. 6 Ch. App. 527; *Ellen v G. N. Ry* (1901) 17 T.L.R. 453; cf. *Oliver v Nautilus Steam Shipping Co Ltd* [1903] 2 K.B. 639.
- [348.](#) e.g. *Graves v Key* (1832) 3 B. & Ad. 313.
- [349.](#) *Re W.W. Duncan & Co* [1905] 1 Ch. 307; cf. *Nathan v Ogdens Ltd* (1905) 94 L.T. 126.
- [350.](#) *Skaife v Jackson* (1824) 3 B. & C. 421; *Farrar v Hutchinson* (1839) 9 A. & E. 641; *Cesarini v Ronzani* (1858) 1 F. & F. 339; *Ward & Co v Wallis* [1900] 1 Q.B. 675.
- [351.](#) *Bowes v Foster* (1858) 2 H. & N. 779.
- [352.](#) *Rimmer v Webster* [1902] 2 Ch. 163; *Powell v Browne* [1907] W.N. 228; *Tsang Chuen v Li Po Kwai* [1932] A.C. 715.
- [353.](#) Sometimes the form is statutory as in the Bills of Sale Act (1878) Amendment Act 1882 s.9. See *Burchell v Thompson* [1920] 2 K.B. 80.

- [354.](#) Law of Property Act 1925 s.67.
- [355.](#) As from February 1, 1971, the former stamp duty of 2d on a receipt for £2 or more was abolished by the Finance Act 1970 s.32 and Sch.7 para.2.

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(b) - Appropriation of Payments

Rights to appropriate payments

21-061

⚠ Where several separate debts are due from the debtor to the creditor, the debtor may, when making a payment, appropriate the money paid to a particular debt or debts, and if the creditor accepts the payment so appropriated, he must apply it in the manner directed by the debtor ³⁵⁶, if, however, the debtor makes no appropriation when making the payment, the creditor may do so. ³⁵⁷



Debtor's right to appropriate

21-062

It is essential that an appropriation by the debtor should take the form of a communication, express or implied, to the creditor of the debtor's intention to appropriate the payment to a specified debt (or debts), so that the creditor may know that his rights of appropriation as creditor cannot arise. ³⁵⁸ It is not essential that the debtor should expressly specify at the time of the payment, which debt or account he intended the payment to be applied to. His intention may be collected from other circumstances showing that he intended at the time of the payment to appropriate it to a specific debt or account. ³⁵⁹ Thus, where at the date of the payment some of his debts are statutebarred and others are not, it will be inferred (in the absence of evidence to the contrary) that the debtor appropriated the payment to the debts that were not so barred. ³⁶⁰

Creditor's right to appropriate. ³⁶¹

21-063

Where the debtor has not exercised his option, and the right to appropriate has therefore devolved upon the creditor, ³⁶² he may exercise it at any time "up to the very last moment" ³⁶³ or until something happens which makes it inequitable for him to exercise it. ³⁶⁴ The appropriation may be made by a computer system which has been set up by the creditor as where, for example, a lender's computerised payment system appropriates payment by a debtor to the discharge of a particular debt. ³⁶⁵ What is "the very last moment" depends on the circumstances of each case. In one instance the creditor was held entitled, in the witness-box during the course of his action, to exercise his right to appropriate a payment by his debtor, as nothing had previously happened to determine his right of election. ³⁶⁶ The creditor need not make his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. ³⁶⁷ An entry in the creditor's books applying a payment to a particular debt does not constitute an election which will preclude the creditor from afterwards applying it to another debt, unless the entry has been communicated to the

debtor. ³⁶⁸ Once, however, the election is made and communicated ³⁶⁹, it is irrevocable. ³⁷⁰

Creditor may not appropriate to an illegal or irrecoverable demand

21-064

The doctrine of appropriation does not entitle a creditor who receives money on account from his debtor to apply it towards the satisfaction of a debt due under an illegal contract, or to a claim which does not constitute any legal or equitable demand against the debtor. Thus where the creditor makes two demands on his debtor, one arising out of a lawful contract, and the other out of an illegal contract, any payment by the debtor which is not specifically appropriated by the debtor must be applied to the lawful demand. ³⁷¹

Appropriation to statute-barred debt

21-065

A creditor may appropriate a payment to a debt barred by the Limitation Act 1980, ³⁷² or to a debt which is unenforceable because of some formal defect in the contract. ³⁷³ But a creditor cannot appropriate a payment to a statute-barred debt after a judgment is given directing the ascertainment of the amount due from the debtor, excluding items which are statute-barred. ³⁷⁴

Guaranteed debt

21-066

Where one of the debts is guaranteed by a surety, but the other is not, the ordinary rules as to appropriation apply; hence a payment by the debtor will not be appropriated to the guaranteed debt ³⁷⁵ unless there is evidence to show that the debtor (or failing him, the creditor) so appropriated it. ³⁷⁶ Thus a creditor receiving payments on account by the debtor is at liberty to appropriate them to a debt not covered by the guarantee; he is not bound by any implied contract with the surety to apply such payments in reduction of the guaranteed debt. ³⁷⁷

Instalments paid under a composition

21-067

Where a debtor has made a composition with his creditors, and a creditor receives dividends upon a debt partly guaranteed by a third person, the dividends must not be appropriated to the excess of the debt above the sum guaranteed, but must be applied rateably to the whole debt, so that the surety is relieved from liability by the amount of the dividend on the part which is guaranteed. ³⁷⁸ Similarly, where the debtor has made a composition with his creditors, under which instalments are payable in discharge of several debts, an instalment must be appropriated to all the debts rateably. ³⁷⁹ Where the creditor receives from the estate of the principal debtor a dividend on the whole of a debt payable by instalments, the surety is not entitled to have the whole of the dividend applied in discharge of any one instalment, but only rateably in part payment of each instalment as it becomes due. ³⁸⁰

Current account: Clayton's Case

21-068

In the case of a current account, the normal presumption is that the creditor has not appropriated payments to particular items. In a current account there is "one blended fund" ³⁸¹ into which all receipts and payments are carried in order of their respective dates:

“In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other.”³⁸²

This presumption may be rebutted if a different intention can be inferred from the circumstances, e.g. by a particular mode of dealing, such as keeping separate accounts or the creation of a common fund, or by a stipulation between the parties.³⁸³ It has also been stated that the rule is one of convenience rather than presumed intent so that it might not be applied when to do so would result in injustice or otherwise produce a solution which would be impracticable.³⁸⁴

Appropriation as between principal and interest

21-069

⚠ Where there is no appropriation by either debtor or creditor in the case of a debt bearing interest, the law will (unless a contrary intention appears) apply the payment to discharge any interest due before applying it to the earliest items of principal.³⁸⁵ ⚠

^{356.} It is not open to a creditor to defeat a debtor's appropriation by challenging it, or disagreeing with it, before or after the payment is made, if he has not refused the payment or returned it within a reasonable time: *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] Bus. L.R. 429 at [21], [22], [28].

^{357.} ⚠ *Peters v Anderson* (1814) 5 Taunt. 596; *Simson v Ingham* (1823) 2 B. & C. 65; *Cory Bros & Co Ltd v Owners of Turkish S.S. "Mecca"* [1897] A.C. 286; *West Bromwich Building Society v Crammer* [2002] EWHC 2618 (Ch), [2003] B.P.I.R. 783; *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] Bus. L.R. 429 at [19]; *Lomas v Burlington Loan Management Ltd* [2015] EWHC 2269 (Ch), [2016] B.C.C. 239 at [40].

^{358.} *Leeson v Leeson* [1936] 2 K.B. 156, 161; *Stepney Corp v Osofsky* [1937] 3 All E.R. 289; *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] Bus. L.R. 429 at [19].

^{359.} *Newmarch v Clay* (1811) 14 East 239, 244; *Shaw v Picton* (1825) 4 B. & C. 715; *Young v English* (1843) 7 Beav. 10; *Nash v Hodgson* (1855) 6 De G.M. & G. 474; *R. v Miskin Lower Justices* [1953] 1 Q.B. 533.

^{360.} *Nash v Hodgson* (1855) 6 De G.M. & G. 474; cf. a balance owing on a current account: *Re Footman Bower & Co Ltd* [1961] Ch. 443 (and see below, para.21-068).

^{361.} On the right of a secured creditor to appropriate the proceeds of sale of the security, see *Re William Hall (Contractors) Ltd* [1967] 1 W.L.R. 948.

^{362.} *Lowther v Heaver* (1889) 41 Ch. D. 248; *Potomek Construction Ltd v Zurich Securities Ltd* [2003] EWHC 2827 (Ch), [2004] 1 All E.R. (Comm) 672 at [69]. In the case of hire-purchase payments, see n.355, above.

^{363.} *Cory Bros & Co v Owners of Turkish S.S. "Mecca"* [1897] A.C. 286, 294.

^{364.} *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] Bus. L.R. 429 at [19].


- [365.](#) *Capital Home Loans Ltd v Countrywide Surveyors Ltd* [2011] 1 E.G.L.R. 153, [72].
- [366.](#) *Seymour v Pickett* [1905] 1 K.B. 715. See also *Smith v Betty* [1903] 2 K.B. 317.
- [367.](#) *Cory Bros & Co Ltd v Owners of Turkish S.S. "Mecca"* [1897] A.C. 286, 294. *Simson v Ingham* (1823) 2 B. & C. 65; cf. *Deeley v Lloyds Bank Ltd* [1912] A.C. 756, 783, 784.
- [368.](#) *Simson v Ingham* (1823) 2 B. & C. 65; cf. *Deeley v Lloyds Bank Ltd* [1912] A.C. 756, 783, 784.
- [369.](#) The existence and extent of the creditor's obligation to communicate the appropriation requires further clarification. It may be that there is no obligation to communicate but only a requirement that there be some "overt act" by the creditor from which it can be sufficiently inferred that he has in fact made the election to appropriate (*Capital Home Loans Ltd v Countrywide Surveyors Ltd* [2011] 1 E.G.L.R. 153, [86]) but, on the other hand, there are cases such as *Simson v Ingham* (1823) 2 B. & C. 65 which appear to suggest that there is an obligation to communicate imposed upon the creditor. If there is an obligation to communicate, a further question arises, namely to whom must the communication be made? Must it be to the debtor himself or can it be to any person who has in interest in how the payments were appropriated? In *Capital Home Loans Ltd v Countrywide Surveyors Ltd* H.H. Judge Hazel Marshall QC inclined at [87]–[88]) to the latter view but that was a case in which the debtor had no obvious interest in the appropriation.
- [370.](#) *Smith v Betty* [1903] 2 K.B. 317; *Seymour v Pickett* [1905] 1 K.B. 715; *Albermarle Supply Co Ltd v Hind & Co* [1928] 1 K.B. 307.
- [371.](#) *Wright v Laing* (1824) 3 B. & C. 165; *Keeping v Broom* (1895) 11 T.L.R. 595; *A. Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 Q.B. 319 (instalments paid to builder where part of the work was illegal because no licence had been granted); cf. *Lamprell v Billericay Union* (1849) 3 Exch. 283.
- [372.](#) *Mills v Fowkes* (1839) 5 Bing. N.C. 455; *Stepney Corp v Osofsky* [1937] 3 All E.R. 289. See below, para.28-129.
- [373.](#) *Cruikshanks v Rose* (1831) 1 Moo. & Rob. 100; *Philpott v Jones* (1834) 2 A. & E. 41; *Arnold v Poole Corp* (1842) 4 M. & G. 860; *Seymour v Pickett* [1905] 1 K.B. 715; *West Bromwich Building Society v Crammer* [2002] EWHC 2618 (Ch), [2003] B.P.I.R. 783.
- [374.](#) *Smith v Betty* [1903] 2 K.B. 317.
- [375.](#) *Kirby v Duke of Marlborough* (1813) 2 M. & S. 18; *Plomer v Long* (1816) 1 Stark. 153; *Williams v Rawlinson* (1825) 3 Bing. 71; *Re Sherry* (1884) 25 Ch. D. 692.
- [376.](#) *Kinnaird v Webster* (1878) 10 Ch. D. 139; *Browning v Baldwin* (1879) 40 L.T. 248; cf. *Marryatts v White* (1817) 2 Stark. 101; *Pearl v Deacon* (1857) 1 De G. & J. 461.
- [377.](#) *Re Sherry* (1884) 25 Ch. D. 692.
- [378.](#) *Raikes v Todd* (1838) 8 A. & E. 846. See also *Bardwell v Lydall* (1831) 7 Bing. 489; cf. *Ellis v Emmanuel* (1876) 1 Ex. D. 157. cf. also the position in bankruptcy where the surety guarantees the whole debt, but the creditor received some payments: *Re Houlder* [1929] 1 Ch. 205 (following *Midland Banking Co v Chambers* (1869) L.R. 4 Ch. App. 398; *Re Sass* [1896] 2 Q.B. 12).
- [379.](#) *Thompson v Hudson* (1871) L.R. 6 Ch. App. 320.
- [380.](#) *Martin v Brecknell* (1813) 2 M. & S. 39.
- [381.](#) *Clayton's Case* (1816) 1 Mer. 572, 608. See also *Bodenham v Purchas* (1818) 2 B. & Ald. 39; *Simson v Ingham* (1823) 2 B. & C. 65; *Field v Carr* (1828) 5 Bing. 13; *Hooper v Keay* (1875) 1 Q.B.D. 178; *London and County Banking Co Ltd v Ratcliffe* (1881) 6 App. Cas. 722; *Re Sherry*

(1884) 25 Ch. D. 692, 702; *Egg v Craig* (1903) 89 L.T. 41; *Deeley v Lloyds Bank Ltd* [1912] A.C. 756; *Re Primrose (Builders) Ltd* [1950] Ch. 561; *Re Footman Bower & Co Ltd* [1961] Ch. 443; *Re Yeovil Glove Co Ltd* [1965] Ch. 148; *Re James R. Rutherford & Sons Ltd* [1964] 1 W.L.R. 1211; *Blue Monkey Gaming Ltd v Hudson* [2014] All E.R. (D) 222 (Jun) at [357]–[359].

382. *Clayton's Case* (1816) 1 Mer. 572, 608.

383. *Henniker v Wigg* (1843) 4 Q.B. 792; *City Discount Co v McLean* (1874) L.R. 9 C.P. 692; *Browning v Baldwin* (1879) 40 L.T. 248; *Cory Bros & Co Ltd v Owners of Turkish S.S. "Mecca"* [1897] A.C. 286; *Re British Red Cross Balkan Fund* [1914] 2 Ch. 419; *Bradford Old Bank v Sutcliffe* [1918] 2 K.B. 833 (current account and loan account kept separate); *Re Hodgson's Trusts* [1919] 2 Ch. 189; *Barlow Clowes International Ltd v Vaughan* [1992] 4 All E.R. 22.

384. *Barlow Clowes International Ltd v Vaughan* [1992] 4 All E.R. 22, 42; *Commerzbank Aktiengesellschaft v IMB Morgan Plc* [2004] EWHC 2771 (Ch), [2005] 1 Lloyd's Rep. 298 at [42]–[48].

385.  *Income Tax Commissioner v Maharajadhiraja of Darbhanga* (1933) L.R. 60 I.A. 146, 157; cf. *Smith v Law Guarantee and Trust Society Ltd* [1904] 2 Ch. 569; *West Bromwich Building Society v Crammer* [2002] EWHC 2618 (Ch), [2003] B.P.I.R. 783; *Potomek Construction Ltd v Zurich Securities Ltd* [2003] EWHC 2827 (Ch), [2004] 1 All E.R. (Comm) 672 at [69]; *Lomas v Burlington Loan Management Ltd* [2015] EWHC 2269 (Ch), [2016] B.C.C. 239 at [41]; *CBRE Loan Servicing Ltd v Gemini (Eclipse 2006-3) Plc* [2015] EWHC 2769 (Ch) at [48]. The presumption is based on what is normally the commercially sensible course that a creditor would take, but it will be displaced if unusually the circumstances indicate otherwise: see *Smith v Law Guarantee & Trust Society Ltd* [1904] 2 Ch. 569.

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(c) - Revalorisation: Gold Clauses and Index-linking ³⁸⁶

The nominalistic principle

21-070

It has been a principle of English law since the seventeenth century that a debt payable at a future time involves an obligation to pay the nominal amount of the debt at the date of payment in whatever is legal tender for that currency at that date, irrespective of any fluctuations in the currency in which the debt is expressed between the date of the contract and the date of payment. ³⁸⁷ Thus, where English law is the law applicable to the contract, ³⁸⁸ a debt expressed in "pounds" may be discharged in whatever are "pounds" according to English law at the date fixed for payment, ³⁸⁹ and a debt expressed in a foreign currency, e.g. dollars, may be discharged by the same nominal amount of dollars at the date of payment, despite changes in the real value of the dollars. ³⁹⁰ The creditor runs the risk of depreciation of the currency, while the debtor runs the risk of its appreciation. If the law applicable to the contract is foreign, that law governs the obligations arising under the contract, ³⁹¹ but such a foreign law will invariably adopt the nominalistic principle ³⁹²; hence, it is for the law of the country in whose currency the debt is expressed to define what is legal tender for the purpose of discharging that debt. ³⁹³

Gold clauses

21-071

In an attempt to avoid the operation of the nominalistic principle (above), creditors have adopted various clauses to protect themselves against the risk of depreciation of the currency. ³⁹⁴ The most popular device used by creditors today is a cost-of-living or other index. ³⁹⁵ But in the earlier part of the twentieth century and the post-war years the most usual type of protective clause was a so-called "gold clause" ³⁹⁶; the validity, meaning, and effect of such a clause are determined by the law applicable to the contract. ³⁹⁷ In an ordinary domestic English case, or a conflicts case where English law is the law applicable to the contract, a clause referring to payment in gold of a specified standard of weight and fineness is presumed to be a gold value clause: it does not impose an obligation to pay gold or gold coins, but is used to ascertain or measure the amount of the debt, so that the debtor is obliged to pay in legal tender of the chosen currency the amount necessary at the date of payment to purchase gold or gold coins to the nominal amount of the debt. ³⁹⁸ This construction imports a special standard or measure of value which may be described sufficiently, though not with precise accuracy, as being the value which the specified unit of account would have if the currency were on a gold basis. ³⁹⁹

The Feist construction

21-072

The construction of a gold clause as a gold value clause is known as the *Feist* construction, following the decision of the House of Lords in *Feist v Société Intercommunale Belge d'Electricité*.⁴⁰⁰ In this case a bond for £100 was issued in 1928 by a Belgian company bearing interest payable on March 1 and September 1 each year at 5212 per cent. and repayable in 1963 or earlier:

“... in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928.”

The company claimed the right to pay the sum due on an interest coupon in whatever might be legal tender in England at the date of payment.⁴⁰¹ The House of Lords held that the proper law of the contract was that of England and that the holder was entitled to receive such a sum in sterling (i.e. English legal tender) as should represent the gold value of the nominal amount of each respective payment, such gold value to be ascertained in accordance with the standard of weight and fineness existing on September 1, 1928. Therefore, after the devaluation of the pound in 1931, the clause imposed an obligation to pay in depreciated pounds the amount necessary to purchase 100 gold pounds. Lord Russell of Killowen said⁴⁰²:

“The parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness not as the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of the indebtedness is to be measured and ascertained.”

The *Feist* construction has been followed in conflict of laws cases where the applicable law was foreign⁴⁰³ and when interpreting international conventions⁴⁰⁴ but it has not yet been applied to any reported case dealing with a domestic English contract.⁴⁰⁵ Although the statutes of many foreign countries have declared gold clauses to be illegal, some have now been repealed.⁴⁰⁶

Other possible constructions of gold clauses

21-073

Other constructions than the *Feist* construction are possible of particular gold clauses, since each clause depends on its own wording and context. First, the clause may show that the parties intended a sale of actual gold or bullion as a commodity, so that no monetary obligation was undertaken.⁴⁰⁷ Secondly, the clause may refer to the actual medium in which the debt is to be discharged, e.g. a “gold coin” clause whereby the debtor agrees to pay actual gold coins. Thirdly, it may be a descriptive clause, which merely repeats the statutory definition of the legal unit of currency.⁴⁰⁸ This third construction was adopted by a majority of the Court of Appeal in 1956⁴⁰⁹ where the lessee under a domestic English lease covenanted to pay a rent of £1,900 “yearly during the said term either in gold sterling or in Bank of England notes to the equivalent value in gold sterling”; it was held that this clause merely imposed an obligation to pay £1,900 in current legal tender, i.e. pound notes, since a gold sovereign was worth no more than a pound note for the purposes of legal tender. It may be that this decision should have been based on the uncertainty of the intention of the parties, in that the words they used did not definitely indicate that the amount of indebtedness was to be fixed by the current value of gold.⁴¹⁰ The words were obviously chosen by the parties for some purpose, yet the majority of the Court of Appeal treated them as a surplusage; the decision can only be reconciled with that of the House of Lords in *Feist* if the absence of any reference to the weight and fineness of the gold in the former case is treated as crucial.⁴¹¹

Index-linking clauses in domestic contracts

21-074

In modern times, contracting parties (particularly lenders) have sought other methods to safeguard

themselves against a decline in the purchasing power of the pound sterling.⁴¹² In 1977, a court of first instance⁴¹³ upheld the validity of an English mortgage (made between businessmen who received separate legal advice) under which both the principal debt and interest were “index-related” to a foreign currency; although payments were due in pounds sterling, their amounts were to vary proportionately to the variation in the rate of exchange between the pound and the Swiss franc.⁴¹⁴ The lender had advanced £36,000 as the capital loan in 1966, and under “the Swiss franc uplift” he became entitled to capital repayments of £87,588 by 1976.⁴¹⁵ It has been pointed out,⁴¹⁶ however, that protection against decline in the domestic purchasing power of sterling would come from index-linking to a domestic index, such as the retail price index⁴¹⁷; whereas the linking of a domestic debt to a foreign currency is less justifiable, since it could lead to drastic revalorisation as a result of international fluctuations which bear little relation to domestic events.

^{386.} See, in general, Charles Proctor, *Mann on the Legal Aspect of Money*, 7th edn (2012), Chs 9–13; Downes (1985) 101 L.Q.R. 98; on American law, with discussion of English authorities, see Nussbaum, *Money in the Law, National and International* (1950).

^{387.} *Gilbert v Brett (le case de Mixt Moneys)* (1604) Davis 18; *British Bank for Foreign Trade v Russian Commercial and Industrial Bank (No.2)* (1921) 38 T.L.R. 65; *Ottoman Bank v Chakarian (No.2)* [1938] A.C. 260; *Sforza v Ottoman Bank of Nicosia* [1938] A.C. 282; *Pymont Ltd v Schott* [1939] A.C. 145; *Marrache v Ashton* [1943] A.C. 311; *Bonython v Commonwealth of Australia* [1951] A.C. 201; *Treseder-Griffin v Co-operative Insurance Ltd* [1956] 2 Q.B. 127. The rule is similar in all foreign systems of law: see Dicey, Morris and Collins, 15th edn (2012), paras 37–005 et seq.; Mann at paras 9–05 et seq.; Nussbaum at pp.171 et seq., 348 et seq.; Hauser (1959) 33 Tulane L. Rev. 307; Report on Foreign Money Liabilities, Law Commission Report No.124 (1983).

^{388.} On the law applicable to the contract, see below, paras 30-004, 30-046 et seq., 30-070 et seq., 30-169 et seq. and 30-185 et seq.

^{389.} *Treseder-Griffin v Co-operative Insurance Ltd* [1956] 2 Q.B. 127, 144. cf. *Bonython v Commonwealth of Australia* [1951] A.C. 201, 222. (On the problems which arise where the currency expression chosen may refer to two or more different currencies (e.g. “pound” or “dollar” or “franc”) see Dicey, Morris and Collins at paras 37R–017 et seq.)

^{390.} *Re Chesterman’s Trusts* [1923] 2 Ch. 466; *Pymont Ltd v Schott* [1939] A.C. 145; cf. *Addison v Brown* [1954] 1 W.L.R. 779, 785. In an action in England, the court may give a judgment in a foreign currency: see below, para.30-378.

^{391.} See Ch.30, below.

^{392.} Dicey, Morris and Collins at paras 37–008 et seq. See also above, n.385.

^{393.} See n.385, above, and for illustrations, *R. v International Trustee* [1937] A.C. 500; *Pymont Ltd v Schott* [1939] A.C. 145; *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443. The law applicable to the contract also determines whether the debtor is liable to make an additional payment by way of “revalorisation” where the currency has depreciated: Dicey, Morris and Collins at paras 37R–0353 et seq. (English domestic law knows no such principle.)

^{394.} A “gold value” clause, below, will also protect a debtor against appreciation of the currency.

^{395.} See below, para.21-074.

^{396.} No legislation in the UK has invalidated such a clause (cf. the Joint Resolution of the United States Congress of June 5, 1933, and the Canadian Gold Clauses Act 1937, applied respectively in *R. v International Trustee* [1937] A.C. 500 and *New Brunswick Ry v British and French Corp Ltd* [1939] A.C. 1. Both provisions have now been repealed: Dicey, Morris and Collins at para.37–048, n.167).

- [397.](#) Dicey, Morris and Collins at para.37R–040 et seq. arts 10(1), 12(1)(a) and (b) of the Regulation 593/2008 on the law applicable to contractual obligations (Rome I) (on which see SI 2009/3064); *R. v International Trustee* [1937] A.C. 500.
- [398.](#) Dicey, Morris and Collins at para.37–046. *Feist v Société Intercommunale Belge d'Electricité* [1934] A.C. 161.
- [399.](#) *Syndic in Bankruptcy of Khoury v Khayat* [1943] A.C. 507, 511, 512; *Feist v Société Intercommunale Belge d'Electricité* [1934] A.C. 161, 172. Another formulation of the principle is that the debtor has to provide at the time of payment such an amount of currency as will buy the same amount of gold as could have been bought with the sum promised at the time of making the contract.
- [400.](#) Above. See Mann at paras 11.19 et seq.
- [401.](#) On legal tender, see below, para.21-088.
- [402.](#) [1934] A.C. 161, 172 et seq.
- [403.](#) *New Brunswick Ry v British and French Trust Corp Ltd* [1939] A.C. 1; *Syndic in Bankruptcy of Khoury v Khayat* [1943] A.C. 507 (the law of Palestine was the same as English law on this point). cf. *R. v International Trustee* [1937] A.C. 500 (reversing the decision of the Court of Appeal [1936] 3 All E.R. 407, but approving the Court of Appeal's view that the clause was a gold value clause).
- [404.](#) *The Rosa S.* [1989] Q.B. 419; *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co (The Nadezhda Krupskaya)* [1989] 1 Lloyd's Rep. 518 New South Wales Court of Appeal; *The "Tasman Discoverer"* [2001] 2 Lloyd's Rep. 665 (New Zealand High Court, reversed on appeal on the ground that the issue before the court was one which related to the construction of a contract term and not an international convention or over-riding national legislation: [2002] 2 Lloyd's Rep. 528).
- [405.](#) In *New Brunswick Ry v British and French Trust Corp Ltd* [1939] A.C. 1, the law of New Brunswick was probably the applicable law, though the point was left open; in *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 Q.B. 127 (discussed below, para.21-073) and in *Campos v Kentucky & Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep. 459 (decisions on domestic English law), the *Feist* case [1934] A.C. 161 was distinguished. See now below, para.21-074.
- [406.](#) Dicey, Morris and Collins at paras 37R–040—37–050 Nussbaum, *Money in the Law*, pp.280 et seq.
- [407.](#) *British and French Trust Corp v New Brunswick Ry* [1936] 1 All E.R. 13, 16. But the courts will lean against this construction unless this meaning is clearly expressed, since payment in gold, or export in gold, has been made subject to controls in many countries.
- [408.](#) e.g. *St Pierre v South American Stores (Gath and Chaves) Ltd* [1937] 3 All E.R. 349 (Chilean law); *Treseder-Griffin v Co-operative Insurance Ltd* [1956] 2 Q.B. 127 (discussed below); *Campos v Kentucky & Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep. 459 (see Mann (1963) 12 I.C.L.Q. 1005); cf. *Modiano Bros & Sons v Bailey & Sons* (1933) 47 Ll.L. Rep. 134, 141.
- [409.](#) *Treseder-Griffin v Co-operative Insurance Ltd* [1956] 2 Q.B. 127.
- [410.](#) Nor did the clause fix any exact gold standard, such as the selling or buying price of gold coins, or of the content of gold coins, or of bullion. On this, see *Campos v Kentucky & Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep. 459, 469. See also *The Rosa S.* [1989] Q.B. 419, 426.
- [411.](#) See the criticisms of the decision in Dicey and Morris on the Conflict of Laws, 13th edn (2000),

36–025—36–027 (the relevant passages have been omitted from subsequent editions); Mann (1957) 73 L.Q.R. 181; Yale [1956] C.L.J. 169; Unger (1957) 20 M.L.R. 266. (Leave to appeal to the House of Lords was granted, but the appeal was compromised before hearing.)

- [412.](#) Rents under leases have, for centuries, been made dependent on the price of corn. See also Nussbaum, *Money in the Law* at pp.299 et seq.
- [413.](#) *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84. See Bishop and Hindley (1979) 42 M.L.R. 338. The High Court of Australia has upheld the index-linking of an obligation to a retail price index: *Stanwell Park Hotel Co Ltd v Leslie* (1952) 85 C.L.R. 189. The *Multiservice* decision has been followed in a case concerned with the interpretation of the Building Societies Act 1962: *Nationwide Building Society v Registry of Friendly Societies* [1983] 1 W.L.R. 1226. See also Downes (1985) 101 L.Q.R. 98.
- [414.](#) cf. *Howard Houlder and Partners Ltd v Union Marine Insurance Co* (1922) 10 L.L. Rep. 627.
- [415.](#) During the same period, however, the borrower's business in the new premises purchased with the loan had prospered considerably, and the value of the premises had also inflated substantially: [1979] Ch. 84, 102. The judge also held that the terms of the mortgage were not unfair, oppressive or morally reprehensible so as to entitle the court to relieve the borrower under equitable principles applicable to mortgages: 105–113.
- [416.](#) Bowles (1981) 131 New L.J. 4, 5.
- [417.](#) On “cost-of-living index” clauses, and other similar clauses, see Nussbaum, *Money in the Law* at pp.299 et seq. cf. Mann at paras 11.38–11.47. A cost-of-living index clause is of the same nature as a gold value clause, above, para.21-071.

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Volume I - General Principles
Part 7 - Performance and Discharge
Chapter 21 - Performance
Section 4. - Payment
(d) - Payment by Negotiable Instrument or Documentary Credit

Payment by negotiable instrument ⁴¹⁸

21-075

Apart from express agreement, ⁴¹⁹ a creditor is not bound to accept payment in any way except cash, i.e. legal tender. ⁴²⁰ If, however, the creditor accepts a negotiable instrument, ⁴²¹ such as a bill of exchange, promissory note or cheque, it is a question of fact ⁴²² depending on the intention of the parties, whether it is taken in absolute satisfaction of the debt, or only in conditional satisfaction. In either event, the acceptance of the instrument gives the debtor a good defence to an action for the debt, at least until the instrument matures. ⁴²³

Conditional payment

21-076

Normally where a creditor accepts a negotiable instrument for its debt it is presumed ⁴²⁴ to be taken by it as a qualified or conditional payment, and, accordingly, although the original debt is still due during the currency of the instrument, the creditor's remedy is suspended until it is due. ⁴²⁵ If it is then paid, this amounts to payment of the debt ⁴²⁶; if it is dishonoured when it is presented for payment in the ordinary way, ⁴²⁷ the right to sue upon the original debt revives as if no negotiable instrument had been taken. ⁴²⁸ Hence, if interest was due on the debt, it continues to accrue after the date of acceptance of a cheque which is subsequently dishonoured. ⁴²⁹ It has been held that a claimant who accepts a cheque for part of the debt cannot sign judgment in default of appearance for the full amount claimed unless the cheque is dishonoured. ⁴³⁰ Similarly, acceptance of an irrevocable documentary credit does not constitute absolute payment to the seller so as to release the buyer; if the credit is not honoured, the seller may sue the buyer. ⁴³¹

Bill or note from debtor's agent

21-077

A creditor does not lose its remedy against its debtor merely by taking for the debt a bill or note of the debtor's agent, even without the debtor's consent. ⁴³² The debtor will be discharged if the creditor has the opportunity of receiving payment in cash from the debtor's agent, but, for its own convenience, elects to take the agent's (or a third party's) bill or note. ⁴³³

Collateral security

21-078

A negotiable instrument may be given to the creditor as collateral security for the debt, so that the existing remedies for the debt are unaffected. ⁴³⁴ This was frequently held to be the intention of the parties when the debt was due under a deed, or another remedy (e.g. distress) was also available. ⁴³⁵ Thus, where a cheque was given for interest due on a debenture, there was not a conditional payment so as to release the security; where the cheque was not met and the company went into liquidation, the debentureholder could still claim to be a secured creditor in respect of the interest. ⁴³⁶ Even where the debt is secured, the acceptance of a negotiable instrument may, in the circumstances, be evidence of an agreement to suspend the remedy under the security. ⁴³⁷

Absolute payment

21-079

If the creditor accepts a negotiable instrument in absolute satisfaction of the original debt, agreeing expressly or impliedly to take upon itself the risk of the instrument not being paid, the effect is to extinguish its right of action for the debt and to leave it without remedy except upon the instrument. ⁴³⁸ It is a question of fact in each case whether the instrument was accepted as absolute payment or not. ⁴³⁹

Invalid or forged instrument

21-080

If the instrument given in payment is invalid ⁴⁴⁰ or forged, ⁴⁴¹ the creditor may treat it as a nullity and sue to recover the debt immediately. ⁴⁴²

Duties of creditor holding a negotiable instrument

21-081

Where a negotiable instrument, upon which the debtor is not primarily liable, is accepted by the creditor as conditional payment, the creditor is bound to do all that a holder of such an instrument may do in order to get payment ⁴⁴³; thus it is the creditor's duty to present a cheque within a reasonable time, and if it fails to do so, and the debtor is thereby prejudiced, the creditor is guilty of laches and makes the cheque its own, so that it amounts to payment of the debt. ⁴⁴⁴ Similarly, the creditor must give due notice of dishonour and take other necessary steps to preserve its remedy against the other parties secondarily liable. ⁴⁴⁵ It is necessary to give notice of dishonour to the debtor only where the debtor is a party to the negotiable instrument to whom such notice is required to be given. ⁴⁴⁶ The creditor, however, is not under such strict duties if it is the debtor who is primarily liable on the negotiable instrument given as conditional payment; in this case the onus is on the debtor to show a sufficient reason for failing to pay when it fell due. ⁴⁴⁷

Loss of instrument

21-082

If the creditor loses the bill or note, the creditor may rely on s.70 of the Bills of Exchange Act 1882: in any action or proceeding upon a bill the court may order that the loss of the instrument shall not be set up, provided an indemnity be given against the claims of any other person upon the instrument in question. ⁴⁴⁸

Alteration of instrument

21-083

If the creditor alters, in a material particular, a bill drawn upon a third party, the creditor makes the bill its own, and although it may be dishonoured, it operates as payment by the debtor if the debtor's rights are affected by the alteration. ⁴⁴⁹ If the creditor alters a bill accepted by the debtor, the creditor may, in the absence of fraud, still sue for the original debt where the debtor has not been prejudiced. ⁴⁵⁰

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- ^{418.} The previous restrictions on payment of wages by cheque have been repealed: see Vol.II, para.40-096.
- ^{419.} On payment by bankers' commercial credit, see Vol.II, paras 34-445 et seq., 44-238. On payment by credit or charge card, see below, para.21-084.
- ^{420.} e.g. where the debtor, in answer to a demand for payment, sent to the creditor a post office order which was in fact defective, but could easily have been rendered effective by the creditor, it was held that this was no evidence of payment as the debtor had no right to put his creditor to the trouble of either correcting the mistake or of returning the defective post office order: *Gordon v Strange* (1847) 1 Exch. 477.
- ^{421.} cf. *Plimley v Westley* (1835) 2 Bing. N.C. 249 (note endorsed by debtor to creditor, but it was not negotiable).
- ^{422.} *Goldshede v Cottrell* (1836) 2 M. & W. 20; *Re Boys* (1870) L.R. 10 Eq. 467; *Re Romer and Haslam* [1893] 2 Q.B. 286; *Palmer v Bramley* [1895] 2 Q.B. 405. cf. *Re Charge Card Services Ltd* [1989] Ch. 497.
- ^{423.} The same result follows: (i) where the bill or note for the debt is given to the creditor by a third party: *Allen v Royal Bank of Canada* (1925) 95 L.J.P.C. 17 (see also *Belshaw v Bush* (1851) 11 C.B. 191, and cf. on the need for consideration in such circumstances: *Oliver v Davis* [1949] 2 K.B. 727); (ii) where the bill or note is, at the creditor's request, payable to a third person: *Price v Price* (1847) 16 M. & W. 232, 241; *National Savings Bank Association Ltd v Tranah* (1867) L.R. 2 C.P. 556.
- ^{424.} This presumption is not displaced merely because the cheque was handed over with a bank card: *Re Charge Card Services Ltd* [1987] Ch. 150, 166. The Court of Appeal reserved its view on this point: [1989] Ch. 497, 517.
- ^{425.} *Sayer v Wagstaff* (1844) 5 Beav. 415; *Belshaw v Bush* (1851) 11 C.B. 191; *Currie v Misa* (1875) L.R. 10 Ex. 153; affirmed (1876) 1 App. Cas. 554; *Ex p. Matthew* (1884) 12 Q.B.D. 506; *Re Romer & Haslam* [1893] 2 Q.B. 286, 296; *Felix Hadley & Co Ltd v Hadley* [1893] 2 Ch. 680; *Allen v Royal Bank of Canada* (1925) 95 L.J.P.C. 17; *Re Charge Card Services Ltd* [1987] Ch. 150, 511; *Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd* [2005] EWHC 736 (Ch), [2005] 2 B.C.L.C. 571 at [91]. See also *Griffiths v Owen* (1844) 13 M. & W. 58, 64.
- ^{426.} *Thorne v Smith* (1851) 10 C.B. 659; *Felix Hadley & Co Ltd v Hadley* [1893] 2 Ch. 680; *Re Home* [1951] Ch. 85, 89. Payment in part is pro tanto discharge: *Bottomley v Nuttall* (1858) 5 C.B.(N.S.) 122.
- ^{427.} *Re Raatz* [1897] 2 Q.B. 80 (debtor's commission of an available act of bankruptcy amounts to dishonour of negotiable instrument given to creditor).
- ^{428.} *Gunn v Bolckow, Vaughan & Co* (1875) L.R. 10 Ch. App. 491; *Cohen v Hale* (1878) 3 Q.B.D. 371; *Re Romer & Haslam* [1893] 2 Q.B. 286, 296; *D.P.P. v Turner* [1974] A.C. 357, 367–368, 369. Where the bill has been negotiated and is outstanding in the hands of a third party, the creditor's remedy is still suspended: *Davis v Reilly* [1898] 1 Q.B. 1; *Re A Debtor* [1908] 1 K.B. 344 (except where the third party is a trustee for the claimant: *National Savings Bank Association Ltd v Tranah* (1867) L.R. 2 C.P. 556; or agent for the claimant: *Hadwen v*

- Mendisabal* (1825) 10 Moore C.P. 477). If, though the dishonoured bill has been negotiated, it has again been transferred to the creditor, the latter may sue on the original demand: *Tarleton v Allhusen* (1834) 2 A. & E. 32.
429. *D.P.P. v Turner* [1974] A.C. 357, 368.
430. *Bolt & Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd* [1964] 2 Q.B. 10.
431. *W.J. Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Q.B. 189, 209–212, 221; *Maran Road Saw Mill v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep. 156; *E.D. & F. Man Ltd v Nigerian Sweets and Confectionery Co Ltd* [1977] 2 Lloyd's Rep. 50; *Re Charge Card Services Ltd* [1989] Ch. 497, 511 (below, para.21-084). See Vol.II, paras 34-495—34-497.
432. *Robinson v Read* (1829) 9 B. & C. 449.
433. *Marsh v Pedder* (1815) 4 Camp. 257; *Smith v Ferrand* (1827) 7 B. & C. 19; *Strong v Hart* (1827) 6 B. & C. 160; *Robinson v Read* (1829) 9 B. & C. 449, 455; *Anderson v Hillies* (1852) 12 C.B. 499; *Litchfield Union v Greene* (1857) 1 H. & N. 884, 892. Other rules on agency may also apply to this situation: see Vol.II, paras 31-069—31-072. cf. *Everett v Collins* (1810) 2 Camp. 515 (cheque of debtor's "servants" rather than of his "agents").
434. *Drake v Mitchell* (1803) 3 East 251; *Pring v Clarkson* (1822) 1 B. & C. 14; *Peacock v Pursell* (1863) 14 C.B.(N.S.) 728; *Re London, Birmingham and South Staffordshire Bank* (1865) 34 L.J. Ch. 418; *Modern Light Cars Ltd v Seals* [1934] 1 K.B. 32 (following *Re Rankin and Shiliday* [1927] N.I. 162).
435. *Davis v Gyde* (1835) 2 A. & E. 623; *Worthington v Wigley* (1837) 3 Bing. N.C. 454; *Belshaw v Bush* (1851) 11 C.B. 191, 206; *Henderson v Arthur* [1907] 1 K.B. 10, 13–14; *Re J. Defries & Sons Ltd* [1909] 2 Ch. 423, 428 ("the mere giving of a cheque is not conditional payment of a secured debt so as to release the security"). cf. *Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 2 Q.B. 10.
436. *Re J. Defries & Sons Ltd* [1909] 2 Ch. 423.
437. *Baker v Walker* (1845) 14 M. & W. 465; *Palmer v Bramley* [1895] 2 Q.B. 405.
438. *Smith v Ferrand* (1827) 7 B. & C. 19; *Sard v Rhodes* (1836) 1 M. & W. 153; *Sayer v Wagstaff* (1844) 5 Beav. 415; *Sibree v Tripp* (1846) 15 M. & W. 23 (distinguished on another point: *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617 (above, para.4-118)); *Caine v Coulton* (1863) 1 H. & C. 764. It does not appear to be essential in such a case that the instrument should be negotiable: *Lewis v Lyster* (1835) 2 Cr. M. & R. 704, 706.
439. cf. the position with payment by credit or charge card: below, para.21-084. cf. also where the creditor of a partnership, upon its dissolution, takes the bill or note of the continuing partners for the debt: *Thompson v Percival* (1834) 5 B. & Ad. 925; *Lyth v Ault* (1852) 7 Exch. 669.
440. Older cases concern invalidity caused by an insufficient stamp: *Brown v Watts* (1808) 1 Taunt. 353; *Wilson v Vysar* (1812) 4 Taunt. 288; *Cundy v Marriott* (1831) 1 B. & Ad. 696. The stamp duty on bills of exchange and promissory notes was abolished as from February 1, 1971 (Finance Act 1970 s.32 and Sch.7 para.2).
441. *Camidge v Allenby* (1827) 6 B. & C. 373, 385. As to the forged renewal of an existing bill, see *Bell v Buckley* (1856) 11 Exch. 631.
442. Similarly where the debtor acted fraudulently: *Camidge v Allenby* (1827) 6 B. & C. 373, 382.
443. *Bridges v Berry* (1810) 3 Taunt. 130; *Soward v Palmer* (1818) 8 Taunt. 277; *Peacock v Pursell* (1863) 14 C.B.(N.S.) 728.
444. *Camidge v Allenby* (1827) 6 B. & C. 373; *Hopkins v Ware* (1869) L.R. 4 Ex. 268. cf. *Robson v*

Oliver (1847) 10 Q.B. 704.

- [445.](#) *Holbrow v Wilkins* (1822) 1 B. & C. 10; *Bridges v Berry* (1810) 3 Taunt. 130; cf. *Goodwin v Coates* (1832) 1 M. & Rob. 221, 222, n.(a).
- [446.](#) *Swinyard v Bowes* (1816) 5 M. & S. 62; cf. *Smith v Mercer* (1867) L.R. 3 Ex. 51 (notice of dishonour required to be given to the debtor in the particular circumstances).
- [447.](#) *National Savings Bank Association Ltd v Tranah* (1867) L.R. 2 C.P. 556.
- [448.](#) *King v Zimmerman* (1871) L.R. 6 C.P. 466. For the previous position at common law, see *Crowe v Clay* (1854) 9 Exch. 604; cf. also s.69 of the Bills of Exchange Act 1882, as to the holder's rights to a duplicate of a lost bill.
- [449.](#) *Alderson v Langdale* (1832) 3 B. & Ad. 660 (the alteration deprived the debtor of his remedy on the bill against the third party); cf. Bills of Exchange Act 1882 s.64. See also below, paras 25-020, 25-025; Byles on Bills of Exchange and Cheques, 29th edn (2013), paras 20-01—20-21.
- [450.](#) *Atkinson v Hawdon* (1835) 2 A. & E. 628; and see *M'Dowall v Boyd* (1848) 12 Jur. 980.

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Credit or charge card schemes

21-084

A finance company issuing credit or charge cards to approved cardholders sets up a scheme under which it agrees with various retailers in the scheme that the cardholders may charge purchases to the company, which undertakes (in its contract with each retailer) to pay the retailer the total amounts so charged. When a retailer agrees that a cardholder may pay for a purchase by having the price charged in this way, he accepts payment by this method as an unconditional, absolute payment of the price under the contract of sale between himself and the cardholder (unless that contract provides otherwise). ⁴⁵¹ The result is that if the finance company fails to pay the retailer the amount ⁴⁵² so charged, the seller has no recourse against the cardholder for payment of the price in cash. ⁴⁵³ In its decision on this situation the Court of Appeal held that there is no general presumption that whenever payment is agreed to be made through a third party, by a method which involved the risk that the third party may not pay, the acceptance by the seller of that method of payment is conditional upon the third party actually making the payment to the creditor. ⁴⁵⁴ When a new form of payment is introduced, the question whether it should be treated as absolute or conditional depends on its own circumstances. ⁴⁵⁵

^{451.} *Re Charge Card Services Ltd* [1989] Ch. 497.

^{452.} Less any discount agreed in the contract between the company and the retailer.

^{453.} *Re Charge Card Services Ltd* [1989] Ch. 497. (There are three contracts: one between the company and the cardholder (who undertakes to pay the company the amounts charged to his card); the second between the company and the retailer; and the third the contract of sale between the retailer and the cardholder.)

^{454.} [1989] Ch. 497, 511–512.

^{455.} [1989] Ch. 497.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 21 - Performance

Section 5. - Tender

The principle of tender

21-085

In many cases a party to a contract cannot complete its obligations without the concurrence of the other party, e.g. without its acceptance of goods when delivered, or its acceptance of money paid over. If the other party refuses to accept performance in such cases, it is preventing the promisor from fulfilling its contractual obligations, and the plea of tender is available to the promisor as a defence to a subsequent action against it for failure to perform. The plea is that the defendant has always been willing to complete its side of the contract, and has in fact done so as far as is possible without the concurrence of the other party. A plea of tender must be established by showing that the promisor made an unconditional offer to perform its promise in terms of the contract but that the promisee refused to accept performance.⁴⁵⁶ The authorities deal mainly with tender of money due under a contract, but the principle may extend to other cases, such as delivery of goods under a contract of sale⁴⁵⁷: if the buyer refuses to accept the goods, but has had a reasonable opportunity to examine the goods to see that they comply with the contract, the seller is, by its tender, relieved of liability to deliver under the contract.⁴⁵⁸

Tender of money

21-086

Where a debtor is obliged to pay a specific sum of money to a creditor a successful plea of tender does not discharge the debt,⁴⁵⁹ but if the creditor subsequently sues for the debt, the debtor may, by paying the money into court⁴⁶⁰ and by proving the tender and its continued willingness to pay the debt since the tender,⁴⁶¹ bar any claim for interest⁴⁶² or damages after the tender⁴⁶³; the creditor will also be liable to pay the debtor its costs of the action, on the ground that the action should not have been brought.⁴⁶⁴ A claim for unliquidated damages, not being a claim for a specific sum of money, cannot be met by a plea of tender.⁴⁶⁵

Amount to be tendered

21-087

The debtor must tender the full amount of the debt, since a creditor is not bound to accept less than the whole of its demand; hence, a tender of part of an entire demand is invalid.⁴⁶⁶ If there are separate items in a claim, the debtor may make a valid tender in respect of particular items, if it appropriates its tender to such items.⁴⁶⁷ A tender of more than is due is a valid tender of the amount due if the debtor does not require change⁴⁶⁸; but if the debtor does ask for change out of the larger sum, this is not a valid tender of the amount due, since a creditor is not obliged to give change.⁴⁶⁹ If, however, the creditor does not object to the tender on this ground, but makes some other objection, or demands a larger sum,⁴⁷⁰ the tender will be valid, because the creditor will be taken to have waived any objection as to change.⁴⁷¹

Tender must be in legal currency**21-088**

A payment or tender must be in legal currency ⁴⁷²; what amounts to legal tender is specified by s.2 of the Coinage Act 1971 (as amended ⁴⁷³). Coins made by the Mint are legal tender as follows: gold coins, for payment of any amount ⁴⁷⁴; coins of cupro-nickel or silver of denominations of more than 10 pence, for payment of any amount not exceeding £10; coins of cupro-nickel or silver of denominations of not more than 10 pence, for payment of any amount not exceeding £5; coins of bronze, for payment of any amount not exceeding 20 pence. There is power by proclamation to “call in” coins ⁴⁷⁵ (which then cease to be legal tender) or to make other coins legal tender. ⁴⁷⁶ By s.1(2) and (6) of the Currency and Bank Notes Act 1954, a tender of a note or notes of the Bank of England expressed to be payable to bearer on demand is legal tender for the payment of any amount. A tender of notes of a bank other than the Bank of England is not a legal tender, ⁴⁷⁷ but the creditor may waive his objection to the tender on that ground. ⁴⁷⁸

Tender by negotiable instrument**21-089**

A tender by negotiable instrument, such as a bill of exchange or cheque, is not a valid tender ⁴⁷⁹, but the creditor may waive an objection to the form of the tender, ⁴⁸⁰ e.g. if the creditor asks for payment by cheque ⁴⁸¹ or objects to the tender only on another ground, such as the amount of the tender. ⁴⁸² There is no custom obliging a vendor to accept a cheque for the payment of a deposit on a sale by auction. ⁴⁸³ Nor is a solicitor, who is authorised to accept a tender of money due on a mortgage, at liberty to accept a cheque: thus a tender of a cheque to him is insufficient. ⁴⁸⁴

Actual production of the money**21-090**

❗ To constitute a valid tender there must either be an actual production of the money, or its production must be expressly or impliedly dispensed with by the creditor. ⁴⁸⁵ ❗ Issues as to what constitutes actual production of the money ⁴⁸⁶ and to whether the creditor dispensed with actual production of the money will depend on all the circumstances. ⁴⁸⁷ In one case, ⁴⁸⁸ where the debtor was obliged to make “payment in cash”, the Court of Appeal held that such payment was not made until the creditor either received cash or what it was prepared to treat as the equivalent of cash, or had a credit available on which, in the normal course of business or banking practice, it could draw in the form of cash. ⁴⁸⁹

Time of tender**21-091**

Where by the terms of the contract the money is to be paid on a particular day, the tender to be valid must be made on that day. ⁴⁹⁰ Although a tender cannot be effectually made after the actual commencement of an action for the recovery of the debt, that is, after the issue of the writ, ⁴⁹¹ nevertheless, before the issue of a writ, a late tender of the amount due will normally have the same effect, in regard to interest and costs, ⁴⁹² as would a valid tender on the due day. ⁴⁹³ Where a charterparty gave the owner an express power to withdraw the vessel on default in payment of hire, late payment made before the owner exercised its right to withdraw was held not to deprive the owner of that right. ⁴⁹⁴

No valid tender after the due date

21-092

The acceptor of a bill payable at a future day cannot make a valid tender after the due day, although it pleads a tender of the amount of the bill with interest from the day it became due up to the day of the tender. ⁴⁹⁵ Where a bill or note is payable on demand, a valid tender may be made, at any time before an action has been brought, by tendering the amount due with interest up to the time of the tender. ⁴⁹⁶ In a contract for sale of goods an earlier invalid tender may be disregarded if the seller, within the time fixed for delivery, makes a subsequent valid tender. ⁴⁹⁷

Tender must be unconditional

21-093

A tender, to be valid, must not be made upon any condition to which the creditor has a right to object. ⁴⁹⁸ The debtor cannot force the creditor to make an admission by accepting the money tendered on terms which the creditor is unwilling to accept. Thus, although a debtor tendering money may exclude any presumption against itself that the sum tendered is only in part payment of the debt, its tender will be invalid if it is made on condition that the creditor acknowledges that nothing more is due from the debtor. ⁴⁹⁹ So tenders of money "in full of the plaintiff's claims", ⁵⁰⁰ as "all that is due", ⁵⁰¹ "as a settlement", ⁵⁰² or "in payment of the half-year's rent due at Lady Day last", ⁵⁰³ have all been held invalid.

Tender under protest, or subject to valid condition

21-094

A tender of a sum of money "under protest", ⁵⁰⁴ or where the debtor states that he considers the amount tendered to be all that is due, or where the debtor reserves the right to dispute the amount due, ⁵⁰⁵ is not a conditional tender and is therefore valid; no condition has been imposed that the creditor must make an admission when accepting the money. Where a tender of a mortgage debt is made upon the condition that the mortgagee should immediately execute a re-conveyance (previously seen and approved) of the mortgaged premises, the tender is valid, since the mortgagor is merely insisting on its contractual rights ⁵⁰⁶; the tender therefore stops interest running, and renders the mortgagee liable to pay the costs of an action to redeem. ⁵⁰⁷ The fact that the creditor disputes the amount due and refuses to receive the amount tendered by the debtor does not affect the validity of the tender or render it a conditional tender. ⁵⁰⁸

Request for receipt

21-095

Since the stamp duty on receipts has been abolished, ⁵⁰⁹ it is no longer an offence to refuse to give a stamped receipt. ⁵¹⁰ It is probably a conditional tender if the debtor demands a receipt as a condition of payment, ⁵¹¹ but not if he merely asks for a receipt without making it a condition of payment. ⁵¹²

Tender to an agent

21-096

A tender need not be made to the creditor personally, but may be made to an agent who has actual or ostensible authority from the creditor to receive the money. ⁵¹³ Thus, where a landlord authorises his bailiff to distrain for rent, he gives him implied authority to receive a tender of rent and expenses. ⁵¹⁴ After a solicitor has been instructed by the creditor to apply for payment of a debt and has written demanding payment to himself, a tender to the solicitor is valid. ⁵¹⁵ So, where the solicitor demands payment at his office, a tender to any person who is in the office carrying on the business is sufficient.

⁵¹⁶ The fact that the creditor has instructed its solicitor to commence proceedings to recover the debt does not affect the validity of a tender to the creditor's clerk, who was previously authorised to receive the money, and later told not to receive it because the matter was in the solicitor's hands. ⁵¹⁷ If an apparent agent of the creditor, at the time of the tender, disclaimed authority to receive the money, the tender is invalid if in fact the apparent agent had no such authority. ⁵¹⁸ If the money is due to a number of creditors jointly, a tender to any one of the joint creditors is valid, though the tender should be pleaded as a tender to the one on behalf of all the creditors. ⁵¹⁹

Tender by an agent

21-097

A tender need not be made by the debtor personally, but may be made on its behalf by its agent, ⁵²⁰ whether the agent is previously authorised by the debtor, or its unauthorised tender has been subsequently ratified by the debtor. So where an agent was authorised to tender part of a sum, but it tendered at its own risk the whole sum, the tender was held valid after it had been ratified by the debtor. ⁵²¹

Failure to comply with valid demand

21-098

Since the principle of the defence of tender is that the defendant has always been ready to perform the contract, ⁵²² if the claimant can show that performance of the contract was demanded ⁵²³ and refused at any time when by the terms of the contract the claimant had a right to make such a demand, the plea of tender will fail, whether such demand and refusal took place before or after the tender. ⁵²⁴ An application to and refusal by one of two joint debtors is sufficient for this purpose. ⁵²⁵

⁴⁵⁶. *Dixon v Clark* (1848) 5 C.B. 365, 377 et seq.

⁴⁵⁷. See Vol.II, paras 44-239 et seq., especially paras 44-275—44-292.

⁴⁵⁸. *Startup v Macdonald* (1843) 6 M. & G. 593, 610; *Isherwood v Whitmore* (1843) 11 M. & W. 347. See Vol.II, paras 44-275, 44-292.

⁴⁵⁹. *Canmer International Inc v UK Mutual S.S. Assurance Association (Bermuda) Ltd (The "Rays")* [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep. 479 at [53], citing R. Goode, *Payment Obligations in Commercial and Financial Transactions* (1983), pp.14–16.


⁴⁶⁰. CPR Pt 36. (There are similar provisions in the County Court Rules.) Payment into court is essential for a successful defence of tender of money: CPR Pt 37.2; *Kinnaird v Trollope* (1889) 42 Ch. D. 610.

⁴⁶¹. *Dixon v Clark* (1848) 5 C.B. 365, 377.

⁴⁶². But where a *borrower* of money tenders the amount due for principal and interest, the tender does not stop interest running after the date of the tender unless there is evidence that the sum has been set aside and is available for payment at any time: *Barratt v Gough-Thomas* [1951] 2 All E.R. 48 (following *Edmondson v Copland* [1911] 2 Ch. 301).

⁴⁶³. *Norton v Ellam* (1837) 2 M. & W. 461; *Graham v Seal* (1918) 88 L.J. Ch. 31. See also Vol.II, para.39-291. In an appropriate case a creditor may incur a liability to pay default interest: *North Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 (Ch), [2010] 2 Lloyd's Rep. 265 at [266].

- [464.](#) *Griffith v Ystradyfodwg School Board* (1890) 24 Q.B.D. 307. See also *Dixon v Clark* (1848) 5 C.B. 365, 377. cf. *Graham v Seal* (1918) 88 L.J. Ch. 31 (after valid tender by mortgagor the mortgagee will be liable to pay the costs of an action to redeem).
- [465.](#) *Greenwood v Sutcliffe* [1892] 1 Ch. 1, 10.
- [466.](#) *Dixon v Clark* (1848) 5 C.B. 365; *James v Vane* (1860) 29 L.J.Q.B. 169; *Read's Trustee in Bankruptcy v Smith* [1951] Ch. 439. A tender of part of a debt, after deduction of a set-off, is not strictly a legal tender: *Searles v Sadgrave* (1855) 5 E. & B. 639; *Phillpotts v Clifton* (1861) 10 W.R. 135; but such a tender may be relevant when the court exercises its discretion as to costs. A set-off accruing after the date of a tender of part does not validate the tender: *Cotton v Godwin* (1840) 7 M. & W. 147.
- [467.](#) *James v Vane* (1860) 29 L.J.Q.B. 169; cf. *Hardingham v Allen* (1848) 5 C.B. 793 (debtor failed to assign his tender of part to any particular item); *Strong v Harvey* (1825) 3 Bing. 304, 313. On appropriation, see above, paras 21-061 et seq.
- [468.](#) *Dean v James* (1833) 4 B. & Ad. 546. See also *Wade's Case* (1601) 5 Co. Rep. 114a; *Douglas v Patrick* (1790) 3 T.R. 683.
- [469.](#) *Betterbee v Davis* (1811) 3 Camp. 70; *Robinson v Cook* (1815) 6 Taunt. 336; cf. *Blow v Russell* (1824) 1 C. & P. 365.
- [470.](#) *Black v Smith* (1791) Peake 121.
- [471.](#) *Bevans v Rees* (1839) 5 M. & W. 306, 308. See also *Saunders v Graham* (1819) Gow 121; *Atkin v Acton* (1830) 4 C. & P. 208, 210.
- [472.](#) The common law requires that a tender shall be made in the current coin of the realm or in foreign money legally made current by proclamation. As to tender of foreign money in discharge of a debt due in that foreign currency, see *Société des Hôtels Le Touquet Paris-Plage v Cummings* [1922] 1 K.B. 451. See also below, paras 30-371—30-381).
- [473.](#) By s.1(3) of the Currency Act 1983.
- [474.](#) Provided their weight has not become less than that specified: Coinage Act 1971 s.2(1) (as amended).
- [475.](#) Coinage Act 1971 s.3(1)(e).
- [476.](#) ss.2(1B), 3(1)(ff) of the Coinage Act 1971 (as amended).
- [477.](#) Unless, of course, the contract provides that a sum of money expressed in a foreign currency is to be paid in England: see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 37R-051—37-060.
- [478.](#) *Polglass v Oliver* (1831) 2 C. & J. 15.
- [479.](#) *Re Steam Stoker Co* (1875) L.R. 19 Eq. 416; *Blumberg v Life Interests and Reversionary Securities Corp* [1897] 1 Ch. 171; [1898] 1 Ch. 27; *Johnson v Boyes* [1899] 2 Ch. 73.
- [480.](#) See *Re Quebrada Co Ltd* (1873) 42 L.J. Ch. 277; *Cohen v Roche* [1927] 1 K.B. 169.
- [481.](#) *Cubitt v Gamble* (1919) 35 T.L.R. 223.
- [482.](#) *Jones v Arthur* (1840) 8 Dowl. 442; see also *Lockyer v Jones* (1796) Peake 239n; *Cohen v Roche* [1927] 1 K.B. 169, 180.
- [483.](#) *Johnston v Boyes* [1899] 2 Ch. 73. See also *Pollway Ltd v Abdullah* [1974] 1 W.L.R. 493.

- [484.](#) *Blumberg v Life Interests and Reversionary Securities Corp* [1897] 1 Ch. 171.
- [485.](#)  *Finch v Brook* (1834) 1 Bing. N.C. 253, 257; *The Norway (Owners of) v Ashburner* (1865) 3 Moo. P.C.(N.S.) 245; *Farquharson v Pearl Assurance Co Ltd* [1937] 3 All E.R. 124. See also *Dickinson v Shee* (1801) 4 Esp. 67; *Thomas v Evans* (1808) 10 East 101; *Novoship (UK) Ltd v Mikhaylyuk* [2015] EWHC 992 (Comm) at [10]; *Marksans Pharma Ltd v Peter Beck & Partner VVW GmbH* [2015] EWHC 1608 (Comm).
- [486.](#) e.g. *Alexander v Brown* (1824) 1 C. & P. 288; *Leatherdale v Sweepstone* (1828) 3 C. & P. 342; *Liddiard v Skelton* (1843) 1 L.T.(O.S.) 143; *Bishop v Smedley* (1846) 2 C.B. 90; *Humphrey v Chapman* (1846) 6 L.T.(O.S.) 413.
- [487.](#) *Douglas v Patrick* (1790) 3 T.R. 683; *Read v Goldring* (1813) 2 M. & S. 86; *Harding v Davis* (1825) 2 C. & P. 77; *Re Farley* (1852) 2 De G.M. & G. 936; cf. *Ryder v Townsend* (1825) 7 D. & Ry 119; *Empresa Cubana De Fletes v Lagonisi Shipping Co Ltd* [1971] 1 Q.B. 488, 505 (tender of a banker's payment slip may be "treated in commercial circles as cash"): the case has been overruled on another point: see the *Mardorf Peach* case [1977] A.C. 850, and below, para.21-091.
- [488.](#) *The Brimnes (Tenax S.S. Co Ltd v The Brimnes (Owners))* [1975] Q.B. 929.
- [489.](#) [1975] Q.B. 929, 963. See further the discussion in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* [1977] A.C. 850, 880, 885, 889 (referred to above, para.21-047).
- [490.](#) *Dixon v Clark* (1848) 5 C.B. 365, 378–379.
- [491.](#) The defendant may of course pay the amount into court: CPR Pt 36.
- [492.](#) See above, para.21-086.
- [493.](#) *Briggs v Calverly* (1800) 8 T.R. 629; *Moffat v Parsons* (1814) 5 Taunt. 307 (tenders valid, though made after creditors had instructed their solicitors to act). See also *Johnson v Clay* (1817) 7 Taunt. 486, and the comment thereon in *Poole v Tumbridge* (1837) 2 M. & W. 223, 226; *Dixon v Clark* (1848) 5 C.B. 365, 378 (if creditor validly demands payment, and the debtor refuses, a subsequent tender is invalid); *Bennett v Parker* (1867) Ir. 2 C.L. 89, 95.
- [494.](#) *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* [1977] A.C. 850.
- [495.](#) *Dobie v Larkam* (1855) 10 Exch. 776 (following *Poole v Tumbridge* (1837) 2 M. & W. 223; *Hume v Peploe* (1807) 8 East 168). See also *Dixon v Clark* (1848) 5 C.B. 365, 379.
- [496.](#) *Norton v Ellam* (1837) 2 M. & W. 461, 463.
- [497.](#) *Borrowman Phillips & Co v Free & Hollis* (1878) 4 Q.B.D. 500. See Benjamin's Sale of Goods, 9th edn (2014), para.12–032 and Apps [1994] L.M.C.L.Q. 525.
- [498.](#) *Re Steam Stoker Co* (1875) L.R. 19 Eq. 416; *Bevans v Rees* (1839) 5 M. & W. 306, 309.
- [499.](#) See the cases cited in nn.498-501, below.
- [500.](#) *Strong v Harvey* (1825) 3 Bing. 304, 313. cf. *Evans v Judkins* (1815) 4 Camp. 156; *Cheminant v Thornton* (1825) 2 C. & P. 50; *Gordon v Cox* (1835) 7 C. & P. 172.
- [501.](#) *Sutton v Hawkins* (1838) 8 C. & P. 259; *Field v Newport, etc., Ry* (1858) 3 H. & N. 409.
- [502.](#) *Mitchell v King* (1833) 6 C. & P. 237; cf. *Hough v May* (1836) 4 A. & E. 954 ("balance account").
- [503.](#) *Marquis of Hastings v Thorley* (1838) 8 C. & P. 573. See also *Foord v Noll* (1842) 2 Dowl.(N.S.) 617; *Finch v Miller* (1848) 5 C.B. 428.

- [504.](#) *Manning v Lunn* (1845) 2 C. & K. 13; *Scott v Uxbridge and Rickmansworth Ry* (1866) L.R. 1 C.P. 596; *Greenwood v Sutcliffe* [1892] 1 Ch. 1.
- [505.](#) *Greenwood v Sutcliffe* [1892] 1 Ch. 1.
- [506.](#) *Graham v Seal* (1918) 88 L.J. Ch. 31.
- [507.](#) (1918) 88 L.J. Ch. 31.
- [508.](#) *Robinson v Ferreday* (1839) 8 C. & P. 752; *Henwood v Oliver* (1841) 1 Q.B. 409; *Bowen v Owen* (1847) 11 Q.B. 130.
- [509.](#) See above, para.21-060 n.353.
- [510.](#) As was provided by s.103 of the Stamp Act 1891 for payment of a sum of £2 or more.
- [511.](#) *Laing v Meader* (1824) 1 C. & P. 257; cf. *Richardson v Jackson* (1841) 8 M. & W. 298. If the creditor refuses to accept the tender on some other ground, he cannot later maintain that a demand for a receipt invalidated the tender: *Jones v Arthur* (1840) 8 Dowl. 442; *Richardson v Jackson*.
- [512.](#) *Jones v Arthur* (1840) 8 Dowl. 442.
- [513.](#) *Kirton v Braithwaite* (1836) 1 M. & W. 310, 313; *Finch v Boning* (1879) 4 C.P.D. 143. See also the cases cited below, and compare the cases on payment to an agent, above, paras 21-044—21-050.
- [514.](#) *Hatch v Hale* (1850) 15 Q.B. 10. cf. *Boulton v Reynolds* (1859) 29 L.J.Q.B. 11 (a man left in charge of premises by the bailiff has no authority to receive rent). But where no place for payment of the rent is fixed, mere readiness to pay the money on the land is insufficient: *Haldane v Johnson* (1853) 8 Exch. 689.
- [515.](#) *Watson v Hetherington* (1843) 1 C. & K. 36. See also *Crozer v Pilling* (1825) 4 B. & C. 26 (valid tender of judgment debt and costs to plaintiff's solicitor on the record).
- [516.](#) *Watson v Hetherington* (1843) 1 C. & K. 36. See also *Wilmott v Smith* (1828) Moo. & M. 238; *Kirton v Braithwaite* (1836) 1 M. & W. 310.
- [517.](#) *Moffat v Parsons* (1814) 5 Taunt. 307; *Caine v Coulton* (1863) 1 H. & C. 764; *Finch v Boning* (1879) 4 C.P.D. 143, 146; cf. *Smith v Goodwin* (1833) 4 B. & Ad. 413 (a tender to the landlord is valid even after his broker has distrained for rent).
- [518.](#) *Bingham v Allport* (1833) 1 Nev. & M. 398; *Finch v Boning* (1879) 4 C.P.D. 143.
- [519.](#) *Douglas v Patrick* (1790) 3 T.R. 683. cf. payment to a joint creditor: above, para.21-051.
- [520.](#) *Finch v Brook* (1834) 1 Bing. N.C. 253; *Farquharson v Pearl Assurance Co Ltd* [1937] 3 All E.R. 124 (mortgagee of insurance policy made valid tender of premium). See also *Cropp v Hambleton* (1586) Cro. Eliz. 48; and cf. payment by an agent: above, para.21-042.
- [521.](#) *Read v Goldring* (1813) 2 M. & S. 86.
- [522.](#) See above, para.21-085.
- [523.](#) The demand may be made by an authorised agent, but an unauthorised demand cannot be subsequently ratified: *Coore v Calloway* (1794) 1 Esp. 115.
- [524.](#) *Poole v Tumbridge* (1837) 2 M. & W. 223; *Cotton v Godwin* (1840) 7 M. & W. 147; *Brandon v Newington* (1842) 3 Q.B. 915; *Hesketh v Fawcett* (1843) 11 M. & W. 356; *Dixon v Clark* (1848) 5 C.B. 365, 378. Semble, that the effect of a tender cannot be defeated by the creditor showing

a demand for payment by letter, since a personal demand should be made on the debtor so as to give the debtor at the time of the demand an opportunity of paying the debt: *Edwards v Yeates* (1826) *Ry & M.* 360, 361.

[525.](#) *Peirse v Bowles and Spibey* (1816) 1 *Stark.* 323.

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