Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 1. - Introduction

Underlying principle

16-001

The enforcement of contractual claims is in certain circumstances against public policy. The effects of public policy differ considerably depending upon the circumstances; thus, in some instances, one or both parties are prevented from suing upon some particular undertaking contained in the contract (or even, where the doctrine of severance [1] can be applied, upon part of some particular undertaking), whereas in other cases one or both parties are prevented from suing upon the contract at all. The diversity of the fields with which public policy is concerned, and of the circumstances in which a contractual claim may be affected by it, combine to make this branch of the law of contract inevitably complex—a complexity which has been aggravated by lack of systemisation and by the confusing terminology which has often been adopted. Much difficulty would be avoided, if whenever a plea of illegality or public policy were raised as a defence to a contractual claim, the test were applied: does public policy require that this claimant, in the circumstances which have occurred, should be refused relief to which he would otherwise have been entitled with respect to all or part of his claim? [2] As a result of the recent decision of the Supreme Court in *Patel v Mirza* [3] this is now the question that the court poses in addressing the question of the effect of illegality in contractual claims. In addition, once the court finds that the contract is illegal and unenforceable, a second question should be posed which would also lead to greater clarity: do the facts justify the granting of some consequential relief (other than enforcement of the contract) to either of the parties to the contract. [4] Further, much confusion would be avoided if contracts were no longer themselves categorised as being void for illegality, or on grounds of public policy, in the same kind of way as contracts are categorised as being void on other grounds, as the effect of illegality on the contract may vary according to the circumstances. Moreover, there is a distinction between cases in which the contract is illegal in a narrow sense of being contrary to public policy because it somehow involves the commission of a legal wrong, [5] and cases in which the contract is illegal in the sense that it will not be enforced for reasons of public policy even though no otherwise unlawful act is involved.

A problematic topic

16-002

In relation to illegality in the narrow sense identified above, the courts have conceded that "[I]llegality and the law of contract is notoriously knotty territory" [6] and that it is "one of the least satisfactory parts of the laws of contract." [7] Speaking extra-judicially, Lord Sumption stated that "the law of illegality is an area in which there are few propositions, however contradictory or counter-intuitive, that cannot be supported by respectable authorities of the highest levels". [8] In a similar vein Lord Mance has characterised the law on illegality as "an unhappy mix of rigid rules and value judgments, and its application has unpredictable and haphazard consequences". [9] He considered that "by the end of the twentieth century it had become encrusted with an incoherent mass of inconsistent authority." [10] In *Jetivia SA v Bilta (UK) Ltd* (reported sub nom. *Bilta (UK) Ltd v Nazir (No.2)*) [11] Lord Neuberger considered that "the defence of illegality needs to be addressed by this

court (certainly with a panel of seven and conceivably with a panel of nine) as soon as appropriately possible …". This the Supreme Court did in *Patel v Mirza*. [12] In addition, the category of contracts that are illegal or contrary to public policy in the wider sense is also problematic, particularly as it is not always easy to determine whether or not a contract will be regarded as contrary to public policy. [13]

Plan of chapter

16-003

It is proposed in this chapter to deal first with the nature of the illegality defence preventing a party from enforcing a contract which they could otherwise be entitled to enforce; and to deal first with contracts that involve the commission of a legal wrong and secondly, with those that are contrary to public policy in some other way. The authorities make it necessary to treat the position at common law and by statute separately; the enforcement of collateral and proprietary rights is dealt with next; and thirdly the doctrine of severance, by which the court may reject the illegal part of an agreement and enforce what remains as unobjectionable, is considered.

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1. See below, paras 16-211 et seq.

2. cf. *Imperial Chemical Industries Ltd v Shatwell [1965] A.C. 656, 675, 678, 683, 693*. On the application of a "public conscience" test in determining whether or not contracts should be enforced, see *Tinsley v Milligan [1994] 1 A.C. 340*; below, para.16-198. See also Sumption, *Reflexions on the Law of Illegality* (Chancery Bar Association, April 23, 2012).

3. *[2016] UKSC 42, [2016] 1 W.L.R. 399*.

4. See, for example, the sophisticated approach as to remedies in The Illegality Defence In Tort (Law Comm. Consultation Paper No.160, 2001); Enonchong, *Illegal Transactions* (1998); *Daido Asia Japan Ltd v Rothen Unreported July 24, 2001*, at [21]; *Hewison v Meridian Shipping PTE [2002] EWCA 1821, [2002] All E.R. (D) 146*.

5. Which for this purpose should be taken to include contracts that have the purpose of the commission of a legal wrong, e.g. selling a knife to enable the buyer to murder someone with it. See below, para.16-018.

6. *ParkingEye Ltd v Somerfield Stores Ltd [2012] EWCA Civ 1338, [2013] Q.B. 840* at [28].

7. *[2012] EWCA Civ 1338, [2013] Q.B. 840* at [43].

8. Reflections on the Law of Illegality (Chancery Bar Association, April 23, 2012) [2012] 20 R.L. Rev 1 at p.1.

9. Ex turpi causa – when Latin avoids liability [2014] Edin. L.R. 175.

10. *Jetivia SA v Bilta (UK) Ltd [2015] UKSC 23* at [61].

11. *[2015] UKSC 23* at [15] (a panel of seven).

12. *[2016] UKSC 42, [2016] 1 W.L.R. 399*.

13. See further below, paras 16-064 et seq.

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Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 2. - The Position at Common Law

(a) - Generally

Public policy

16-004

The seriousness and turpitude of the illegality which renders a contract unenforceable varies considerably. [14] The illegality can arise either from statute or the common law and, particularly where the latter is involved, the courts are faced squarely with the issue of whether public policy requires that a contract (otherwise valid and enforceable) should not be enforced because it is tainted with illegality. Obviously a doctrine of public policy is somewhat open-textured and flexible, and this flexibility has been the cause of judicial censure of the doctrine. [15] On occasions it has been seen by the courts as being vague and unsatisfactory, "a treacherous ground for legal decision", "a very unstable and dangerous foundation on which to build until made safe by decision". [16] It is in the context of this doctrine that the unruly horse metaphor rode into the litany of the English lawyer. [17] However, the doctrine has had its defenders. For Winfield, the "variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it". [18] Lord Denning M.R. also viewed the doctrine with favour [19]: "[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". In many respects the discussions on the nature of the doctrine of public policy is a matter of temperament, and it often appears to be nothing more than a verbal dispute. Although it is not something about which one can be dogmatic, the following seems reasonably clear. First, it is inevitable that some doctrine of public policy would evolve with respect to the validity of contracts. As was stated by Sir William Holdsworth [20]:

> "In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."

16-005

Secondly, public policy is not immutable:

> "Rules which rest on the foundation of public policy, not being rules which belong to the fixed customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce." [21]

And vice versa, a practice which was once permissible may be proscribed. [22] Thirdly, there is some doubt as to whether the courts can create new heads of public policy rather than merely apply

existing doctrines to new situations. This is an area where the precedents hunt in packs of two. Broadly speaking, there are two conflicting positions, that have been referred to as the “narrow view” and “the broad view”. [23] According to the former, the courts cannot create new heads of public policy, [24] whereas the latter countenances judicial law-making in this area. [25] To a large extent this debate is verbal. There is a general agreement that the courts may extend existing public policy to new situations [26] and rules founded on public policy “not being rules which belong to fixed or customary law, are capable … of expansion and modification”. [27] The difference between extending an existing principle as opposed to creating a new one will often be wafer thin. There will, however, be an understandable reluctance on the part of the courts to create completely new heads of public policy because of the existence of governmental bodies charged with the specific task of law reform and a more activist legislature. However, where Parliament has clearly articulated a principle of public policy then the courts may be willing to extend it by analogy into the field of contract. [28] Lastly, and most importantly, there is a public policy in favour of upholding contracts freely entered into, a policy which of course the doctrine of illegality completely undermines. The point was made forcefully by Jessel M.R. in *Printing and Numerical Registering Co v Sampson* [29]:

> “It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not likely to interfere with freedom of contract.”

Scope of public policy

16-006

Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation [30]; secondly, objects injurious to good government either in the field of domestic [31] or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest. This classification is adopted primarily for ease of exposition. Certain cases do not fit clearly into any of these five categories. For example, an agreement was held unenforceable by reason of the undertaking contained in it on the part of one of the parties, a newspaper, not to publish any comment on the activities of a company with which the other party was connected (although this was also held to be injurious to trade and commerce as in restraint of trade). [32] Any undertaking not to disclose matters of legitimate public interest may be insufficient consideration to support a contract, [33] and, if the matters are such that in the public interest they ought to be disclosed, an undertaking not to disclose them certainly will not be enforced. [34] Although a contract may be associated with a particular illegality, the public policy underlying the illegality may be such that it results in the contract being enforceable. In *Hill v Secretary of State for the Environment, Food and Rural Affairs* [35] the defendant argued that the contract that it had entered into with the claimant was illegal as the director, who had acted for the claimant, had been declared a bankrupt and had therefore committed an offence under s.11 of the Company Directors Disqualification Act 1986 which prohibits an undischarged bankrupt from taking part in the management of a company. As the court pointed out, this proscription had been introduced to protect persons dealing with companies and, were the argument of the defendant to prevail, it would have the effect of prejudicing creditors since it would prevent the company from enforcing the contract. Accordingly, public policy favoured the claimant’s rights of enforcement and the defendant’s defence of illegality failed. [36]

16-007

It is against public policy to enforce an agreement which would deprive a party to the contract of his

sole means of support. [37] And an agreement by which a moneylender imposed restrictions on the liberty of a borrower, reducing him to a position little better than that of a slave, was held void as contrary to public policy. [38] But where a father and son entered into an agreement for the payment of an annuity to the son upon conditions fettering the son's liberty, the father's object being to save him from moral and financial ruin, the agreement was held good. [39] Again, a contract to use undue influence, e.g. to procure a legacy, will be set aside in equity as contrary to public policy [40]; but a contract between expectant legatees to divide benefits after the death of a testator and meanwhile to abstain from using influence is good. [41]

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14. See generally "Illegal Transactions: The Effect of Illegality On Contracts And Torts" (Law Com. Consultation Paper No.154, 1999).

15. See generally Bell, *Policy Arguments in Judicial Decisions* (1983), particularly Ch.VI dealing with restraint of trade.

16. *Janson v Driefontein Consolidated Mines Ltd [1902] A.C. 484, 500*, per Lord Davey; and see 507.

17. "It is a very unruly horse, and when once you get astride it you never know where it will carry you": *Richardson v Mellish (1824) 2 Bing. 229, 252*, per Burrough J. See also *Money Markets International Stockbrokers Ltd v London Stock Exchange [2002] 1 W.L.R. 1150* at [80].

18. (1928–29) 42 Harv. L. Rev. 76, 94.

19. *Enderby Town Football Club Ltd v The Football Association Ltd [1971] Ch. 591, 606*.

20. History of English Law, Vol.III, p.55.

21. *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt [1893] 1 Ch. 630, 666*. See also *Nagle v Feilden [1966] 2 Q.B. 633, 650*; *Shaw v Groom [1970] 2 Q.B. 504, 523*; *Multiservice Bookbinding Ltd v Mardon [1979] Ch.D. 84* where the court had to determine whether an index-linked money obligation was contrary to public policy and decided it was not.

22. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 322–324, 333*.

23. Lloyd, *Public Policy* (1953), pp.112–117.

24. *Egerton v Earl Brownlow (1853) 4 H.L.C. 1, 106–107, 122–124*; *Janson v Driefontein Consolidated Mines Ltd [1902] A.C. 484, 491, 500, 507*.

25. *Egerton v Earl Brownlow (1853) 4 H.L.C. 1, 149–151*; *Wilson v Carnley [1908] 1 K.B. 729, 737–738*. See also *Initial Services Ltd v Putterill [1968] 1 Q.B. 396*; *McLoughlin v O'Brian [1983] 1 A.C. 410, 426–428, 441–443*.

26. *Egerton v Earl Brownlow (1853) 4 H.L.C. 1, 149*; *Montefiore v Menday Motor Components Co [1918] 2 K.B. 241, 246*.

27. *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt [1893] 1 Ch. 630, 661*.

28. See, e.g. *Nagle v Feilden [1966] 2 Q.B. 633*; cf. *Newland v Simons & Willer (Hairdressers) Ltd [1981] I.C.R. 521*.

29. *(1875) L.R. 19 Eq. 462, 465*.

30. Amongst statutory restrictions should now be included those articles of the Treaties of the European Community and those regulations and directives made thereunder which, either by virtue of the Treaties themselves or of the case-law of the European Court, are directly

applicable to the United Kingdom: European Communities Act 1972 ss.2 and 3. On the concept of direct applicability of Community law, see Hartley, *The Foundations of European Union Law*, 7th edn (2010), Ch.7.

31. For an unusual example under this head, see *Amalgamated Society of Ry Servants v Osborne [1910] A.C. 87*.

32. *Neville v Dominion of Canada News Co [1915] 3 K.B. 556*.

33. *Brown v Brine (1875) 1 Ex. D. 5*; such an undertaking would seem not to render unenforceable an otherwise good contract: see *Jennings v Brown (1842) 9 M. & W. 496*.

34. *Initial Services Ltd v Putterill [1968] 1 Q.B. 396*.

35. *[2005] EWHC 696 (Ch), [2006] 1 B.C.L.C. 601*.

36. See also para.16-184. The company could probably have enforced the contract without relying on any illegality: *Hounga v Allen [2014] UKSC 47, [2014] 1 W.L.R. 2889*.

37. *King v Michael Faraday & Partners [1939] 2 K.B. 753*.

38. *Horwood v Millar's Timber and Trading Co Ltd [1917] 1 K.B. 305*; cf. *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308*.

39. *Denny's Trustee v Denny [1916] 1 K.B. 583*.

40. *Debenham v Ox (1749) 1 Ves.Sen. 276*; *Higgins v Hill (1887) 56 L.T. 426*.

41. *Higgins v Hill (1887) 56 L.T. 426*; and so is a contract to sell an expected devise: *Cook v Field (1850) 15 Q.B. 460*.

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(b) - Contracts involving the commission of a legal wrong

Contracts involving the commission of a legal wrong

16-008

In this section we deal with contracts that are illegal in the in the narrow sense of involving the commission of a legal wrong or being made with the purpose of the commission of such a wrong. [42]

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42. See above, para.16-001.

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(b) - Contracts involving the commission of a legal wrong

(i) - Introduction

Nature of the public policy when contracts involve commission of a legal wrong

16-009

Lord Mance has considered that the policy underlying the illegality doctrine in this narrow sense at least is one of "judicial abstention", by which he meant the "judicial power of the state is withheld where its exercise would give effect to advantages derived from an illegal act". [43] Lord Sumption, in a somewhat similar vein, has stated that "the illegality defence is based on the subordination of private rights and liabilities to certain interests belonging to the public sphere". [44] Requirements of consistency have also been considered to underlie the illegality principle. The law "cannot give away with one hand what it takes away with another". [45] The courts have also considered that "the underlying principle or policy is one of deterrence; that the courts will not encourage illegal acts by allowing claims based upon them." [46] In applying the principle of illegality the court has to identify in the specific context the specific rule that is applicable, there is not "one single rule with blanket effect across all areas of the law", rather the court has to identify the rule which is "tailored to the particular context in which the illegality principle is said to apply." [47]

The nature of the illegality defence

16-010

Where the illegality defence is raised, it involves three questions: "(i) What are the illegal or immoral acts which give rise to the defence? (ii) What relationship must those acts have to the claim? (iii) On what principles should the illegal or immoral acts of an agent be attributed to his principal, especially when the principal is a company?" [48] It is the third of these questions that raises the most acute difficulties; but we shall see that it also often difficult to be certain of the effect if the contract is found to be illegal.

How illegality may affect a contract

16-011

Illegality may affect a contract in a number of ways [49] but it is traditional to distinguish between: (1) illegality as to formation; and (2) illegality as to performance. Broadly speaking the first refers to the situation where the contract itself is illegal at the time it is formed, whereas the latter involves a contract which on its face is legal but which is performed in a manner which is illegal. In this latter situation it is possible for either both or only one of the parties to intend illegal performance. Where a

contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract. The benefit of the public, and not the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract. “The principle of public policy”, said Lord Mansfield:

> “… is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, potior est conditio defendentis.” [50]

The rules on illegality have been criticised as being unprincipled but a better way of viewing them, as the previous dictum from *Holman v Johnson* illustrates, is as “being indiscriminate in their effect and are capable therefore of producing injustice”. [51] It has been recognised that the case law on illegality is in a “disordered state” and this has been caused by the distaste of the courts for the consequence of applying their own rules, [52] as was recognised by Lord Mansfield in *Holman v Johnson*. However many of these criticisms are no longer valid in the light of the Supreme Court decision in *Patel v Mirza* . [53] The doctrine can operate harshly as it bars claims that may otherwise have succeeded and accordingly “it is in the nature of things bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits legal or otherwise”. [54]

Developments before Patel v Mirza

16-012

In the light of the judgment in *Patel v Mirza* [55] the text in paras 16-612—16-614 is mainly of historical interest. A number of cases in the 1980s and 1990s had rejected the application of “rules of illegality” and had applied instead a general principle that the court would only refuse to assist the claimant where to do so would be “an affront to the public conscience”. [56] This approach was rejected unanimously by the House of Lords in *Tinsley v Milligan*. [57] However, their Lordships disagreed as to what principle should apply in that case [58] and Lord Goff suggested that, if there was to be any change of approach it should only be attempted by legislation after a review by the Law Commission. A reference was duly made to the Law Commission, which published a series of consultation papers and reports. Initially the Law Commission’s provisional proposals were that, where the formation, purpose or performance of a contract involves the commission of a legal wrong (other than a mere breach of the contract in question), the court should be given a statutory discretion to decide whether or not illegality should operate as a defence to enforcement of the contract. [59] However, although there was considerable support for this approach, the Law Commission ultimately concluded that it should not recommend a statutory discretion except for claims under trusts. In a second consultation paper on illegality, [60] the Law Commission explained that this change of approach was partly because of the difficulty of drafting a statutory discretion that would be sufficiently certain and would not involve the courts in considering illegality in large numbers of cases where it would not arise under the common law rules, and partly because the Law Commission considered that, in dealing with of illegality, it was open to the courts to adopt a more flexible approach which took account of the policies underlying the doctrine. [61] The Law Commission said:

> “We provisionally recommend that the courts should consider in each case whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system.

> Against those policies must be weighed the legitimate expectation of the claimant that his or her legal rights will be protected." [62]

It distinguished this approach from the "public conscience test", which was "vague", because its suggested approach required the court to base their decision on the underlying policies. [63] The Law Commission confirmed this approach in its final Report, and it argued that since publication of its second consultation paper, Lord Hoffmann's observations in *Gray v Thames Trains Ltd* [64] had demonstrated that this "incremental change" was already taking place. [65] Lord Hoffmann had said:

> "… the maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, the policy is not based on a single justification but on a group of reasons, which vary in different situations."

Subsequent authority in the Court of Appeal seemed also to adopt a flexible approach. In *Les Laboratoires Servier v Apotex Inc* [66] Etherton L.J., after referring to the rejection of the public conscience test, said (in a passage with which the other members of the court agreed):

> "It is clear … that the illegality defence is not aimed at achieving a just result between the parties. On the other hand, the court is able to take into account a wide range of considerations in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it." [67]

For Etherton L.J. at least, the application of these policy rationales was different to exercising a general discretion based on notions of public conscience. [68] In *ParkingEye v Somerfield Stores Ltd* [69] Sir Robin Jacob, with whose reasoning Laws L.J. agreed, applied a test of where it would be disproportionate to deny the claimant a remedy, which "involves something rather different" to the public conscience test:

> "It involves the assessment of how far refusal of the remedy furthers one or more of the specific policies underlying the defence of illegality." [70]

He referred with apparent approval to Etherton L.J's approach in the *Apotex* case. Toulson L.J. said that in applying the public policy considerations in relation to illegality, "[i]t is wise to be wary of extracting statements from the case law which appear to lay down universal propositions and applying them in different circumstances". [71] The court, instead, should "look openly at the underlying policy factors and reach a balanced judgment in each case for reasons articulated by it" [72] and in this regard he commended the approach of the Law Commission. [73]

16-013

It is possible to interpret the Supreme Court decision in *Hounga v Allen* [74] as also adopting a flexible approach. In that case, in deciding that the fact that the claimant was working in the UK illegally did not prevent from claiming against her employer for discrimination, Lord Wilson, with whom Baroness Hale and Lord Kerr had agreed, had said:

> "… it is necessary, first, to ask 'What is the aspect of public policy which founds the defence?' and, second, to ask 'But is there another aspect of public policy to which application of the defence would run counter?'"

In the case before him he identified the relevant policy as that of consistency, referring to the

judgment of McLachlin J. in the Canadian Supreme Court case of *Hall v Hebert*, [75] and continued:

> "Concern to preserve the integrity of the legal system is a helpful rationale of the aspect of policy which founds the defence even if the instance given by McLachlin J of where that concern is in issue may best be taken as an example of it rather than as the only conceivable instance of it. I therefore pose and answer the following questions: (a) Did the tribunal's award of compensation to Miss Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent on her dismissal, in particular the abusive nature of it. (b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Miss Hounga has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed on her, it would not represent evasion of it. (c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Miss Hounga to enter into illegal contracts of employment? No, the idea is fanciful. (d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity." [76]

On the facts of this case, these considerations were not overridden by any counter-policy. [77]

Disagreement in the Supreme Court

16-014

When the *Apotex* case [78] reached the Supreme Court, [79] the flexible approach was adopted by Lord Toulson, who relied on *Gray v Thames Trains* [80] and *Hounga v Allen* [81] in support of it: in considering where public policy considerations merited applying the doctrine of illegality, the Court of Appeal was taking a similar approach to the majority in *Hounga v Allen*. [82] Lord Sumption, however, speaking for the majority, while reaching the same conclusion that the ex turpi causa defence should not bar the claim, rejected Lord Toulson's argument. Lord Hoffmann was considered not to have intended to confer a discretion on the court to make a value judgment about "the seriousness of the illegality and the impact on the parties of allowing the defence". [83] The Law Commission's approach, Lord Sumption said, was

> "… difficult to justify as an approach to authority or the proper development of the law. It is directly inconsistent with the decision of the House of Lords in *Tinsley v Milligan* and the whole of the reasoning which underlies it." [84]

Lord Sumption did not refer to *Hounga v Allen*. There was thus a significant disagreement between judges at the highest level as to the correct approach to take in cases of illegality: a "rules-based" approach, or one that considers the underlying the policies in deciding whether it would be disproportionate to deny the claimant a remedy. In *Jetivia SA v Bilta (UK) Ltd* (reported sub nom. *Bilta (UK) Ltd v Nazir (No.2)*), [85] Lords Toulson and Hodge [86] spoke in favour of a flexible approach, and quoted a passage from the judgment of Lord Wilson (speaking for the majority) in *Hounga v Allen*, [87] in which Lord Wilson had said:

> "So it is necessary, first, to ask 'What is the aspect of public policy which founds the defence?' and, second, to ask 'But is there another aspect of public policy to which application of the defence would run counter?'"

This approach was not precluded by the decision in *Tinsley v Milligan*; Lord Wilson had referred to

this in his review of the authorities. His statement formed part of the ratio of the case and no member of the court in the *Apotex* case had suggested that *Hounga v Allen* was incorrect. [88] There was a pressing need for both consideration of the Law Commission's report and a review of *Tinsley v Milligan*. [89] In contrast, Lord Sumption took a narrower interpretation of *Hounga v Allen*. He said:

> "Courts normally examine the policy rationale of a rule of law in order to discover what the rule is, not in order to decide whether they approve of its application in a particular case. The scope for conflict between competing public policies is therefore limited. It is, however, implicit in the reasoning in *Les Laboratoires Servier* that there is one situation in which an examination of competing policies may be required, and that is where a competing public policy (as opposed to a competing legal interest) requires the imposition of civil liability notwithstanding that the claim is founded on illegal acts." [90]

Hounga v Allen was such a case. [91] The conflict between these two approaches was not resolved in the *Bilta (UK) Ltd* case, however. Lord Neuberger (with whom Lords Carnwarth and Clarke agreed) said that:

> "… the proper approach which should be adopted to a defence of illegality … is a difficult and important topic on which, as the two main judgments in this case show, there can be strongly held differing views, and it is probably accurate to describe the debate on the topic as involving something of a spectrum of views. The debate can be seen as epitomising the familiar tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case."

Lord Neuberger went on to say that Lord Sumption "considers that the law is sated in the judgments of the House of Lords in *Tinsley v Milligan*", while Lord Toulson and Lord Hodge "favour the approach taken by the Court of Appeal" in that case. [92] However,

> "… Lord Sumption JSC is right to say that, unless and until this court refuses to follow Tinsley, it is at the very least difficult to say that the law is as flexible as Lords Toulson and Hodge JJSC suggest in their judgment, but (i) in the light of what the majority said in *Hounga* at paras 42–43, there is room for argument that this court has refused to follow Tinsley, and (ii) in the light of the Law Commission report The Illegality Defence (2010) (Law Com No 320), the subsequent decisions of the Court of Appeal, and decisions of other common law courts, it appears to me to be appropriate for this court to address this difficult and controversial issue—but only after having heard and read full argument on the topic." [93]

Therefore after the *Bilta (UK) Ltd* case it had to be assumed that the flexible approach advocated by the Law Commission and adopted by the Court of Appeal [94] did not represent the law, though the issue remained open for review by the Supreme Court. However, the narrower interpretation of *Hounga v Allen*, that though the court may not exercise a discretion, the ex turpi causa principle may be overridden by a countervailing public policy, seems to have been accepted. This approach had been applied, before the judgment in *Bilta (UK) Ltd*, [95] by the Court of Appeal in *R. (on the application of Best) v Chief Land Registrar*. [96] In that case it was held that squatter could rely on adverse possession of possession of land, and could claim title to the land, although the occupation constituted a criminal offence. [97] Sales L.J. said:

> "… Although in each case a rule is to be identified, rather than just taking a discretionary approach of a kind disapproved in *Tinsley v Milligan*, Hounga and Les Laboratoires Servier, there is not one single rule with blanket effect across all areas of the law.

> Instead, there are a number of rules which may be identified, each tailored to the particular context in which the illegality principle is said to apply: see *Gray v Thames Trains Ltd* (the ex turpi causa policy is based "on a group of reasons, which vary in different situations" [98] and as between rules applicable in different contexts, "the questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation)." [99]

The court must take into account countervailing policy considerations; thus in *Hounga v Allen* Lord Wilson had concluded that the countervailing policy considerations underlying the Race Relations Act outweighed the policy considerations in favour of applying the illegality defence. [100] There may be exceptional cases when even criminal acts should not attract the defence; and in particular the defence should not apply where the consequences of an illegal act are merely collateral to the claim. [101]

A new approach

16-014A

In *Patel v Mirza* [102] the Supreme Court fundamentally recast the doctrine of illegality in contract. The law remains that the court will not order performance or grant damages for breach of a contract if the claim should not be enforced because of illegality, but the question is to be decided on a "factorsbased approach". However, the court will normally order restitution of any money or property transferred under it. [103] The result is that much of the previous law on judicial remedies with respect to illegal contracts is mainly of historical interest. [104]

Patel v Mirza

16-014B

In *Patel v Mirza* [105] P transferred £620,000 to M for the purchase of shares in a listed company on the basis of information from contacts in the listed company. The information from the company contacts was an anticipated government announcement which would affect the price of the shares. The agreement between P and M constituted the criminal offence of insider trading under s.52 of the Criminal Justice Act 1993. The government announcement did not materialise and P brought an action against M to recover the £620,000 he had transferred to M. The claim was put on various grounds, one of which was unjust enrichment; as the money had been transferred for a consideration that failed, P claimed to be entitled to recover it. In order to show such failure P had to disclose the illegality involving the insider trading. The Supreme Court held that the doctrine of illegality (ex turpi causa) applied to unjust enrichment actions [106] but on the facts P was entitled to rescind the contract and recover his money. Both the first instance judge and the Court of Appeal [107] considered that the claim for unjust enrichment was precluded by the decision in *Tinsley v Milligan* [108] as the claimant had to rely on his illegality. However, the Court of Appeal, disagreeing with the court at first instance, held that the claimant could rely on the locus poenitentiae principle. [109] In *Patel v Mirza* [110] the Supreme Court considered that the reasoning in *Tinsley* "should no longer be followed" [111] but the result was considered correct as it would "have been disproportionate to have prevented her from enforcing her equitable interest in the property and conversely to have left Miss Tinsley unjustly enriched." [112]

A "factors-based" approach

16-014C

Lord Toulson gave the majority judgment of the court in *Patel v Mirza*, [113] which upheld the Court of Appeal's judgment in favour of recovery by the claimant but on a different basis than that of the court. The action in *Patel v Mirza* was not an action to enforce an illegal contract but to obtain restitution and recover money transferred under an illegal contract. [114] However, the Court laid down a fundamentally different approach to the effect of illegality with respect to contract, tort, restitutionary and property claims. The issue before the court was "whether the policy underlying the rule which made the contract … illegal would be stultified" [115] if the claim (on the facts, a claim for unjustified enrichment) were to succeed. In answering the question of whether allowing recovery for a claim tainted with illegality would be harmful to the integrity of the legal system, the court could not do so without [116]

> "a) considering the underlying purpose of the prohibition that has been transgressed, b) considering conversely other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality."

Thus the law in illegality in contract is no longer a prescriptive, mechanical rule but rather involves a determination of whether the policy underlying a particular rule would be advanced or frustrated by the application of the rule. The court granted restitutionary recovery to prevent the unjust enrichment of the defendant.

Rule-based approach vs range of factors approach

16-014D

In *Patel v Mirza* [117] Lord Toulson set out two alternative approaches in analysing the law of illegality in contract developed by Professor Burrows—the "rule-based approach" and the "range of factors approach". [118]

Rule-based approach

16-014E

A possible example of a rule-based approach given by Burrows would be a single master rule involving reliance:

> "If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), a party cannot enforce the contract if he has to rely on that conduct to establish its claim." [119]

Burrows then sets out a more extended analysis of the rule-based approach which goes beyond the reliance rule. This approach involved two core rules: Rule 1 refers to "illegality in formation", that is, the contract is illegal as made, and Rule 2 referring to "illegality in performance". [120] Burrows considers that the rule-based approach is fatally flawed because it will simply be too complex, it fails to distinguish between serious and trivial illegalities, in practice it does not give rise to greater certainty, and it is well nigh impossible to formulate comprehensive rules with appropriate exceptions

to cover all eventualities. [121] The law of illegality needs to have a greater degree of flexibility than that allowed by a rule-based approach.

Range of factors approach

16-014F

A possible formulation of range of factors approach is set out by Burrows as follows [122]:

> "If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct, taking into account where relevant–
>
> (a) how seriously illegal or contrary to public policy the conduct was;
>
> (b) whether the party seeking enforcement knew of, or intended, the conduct;
>
> (c) how central to the contract or its performance the conduct was;
>
> (d) how serious a sanction the denial of enforcement is for the party seeking enforcement;
>
> (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed;
>
> (f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
>
> (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct;
>
> (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system." [123]

Lord Toulson found the Burrows list "helpful" but that he "would not attempt to lay down a prescriptive or definitive list because of the infinite variety of cases". [124]

Lord Neuberger's view

16-014G

Lord Neuberger saw the issue in *Patel v Mirza* [125] as involving:

> "a claim for the return of money paid by the claimant to the defendant pursuant to a contract to carry out an illegal activity, and the illegal activity is not in the event proceeded with owing to matters beyond the control of either party."

He considered that in such a case "the general rule should … be that the claimant is entitled to the return of the money which he has paid". [126] He referred to this as "the Rule". [127] The Rule should apply in appropriate cases "even where the contemplated illegal activity has been performed in part or in whole". [128] The Rule required a determination of what constitutes an illegal contract. Lord Neuberger considered that this would involve "a contract where the illegality would result in the court (if it could otherwise do so) not being able to award specific performance of the contract or damages for its breach", [129] this would obviously apply to a contract whose whole purpose or essential ingredient was the commission of a crime. [130] The application of the Rule was subject to possible exceptions, two of which were identified by Lord Neuberger. The first was where the criminal legislation was designed to protect one of the parties to the contract. [131] The second was where the defendant was "unaware of the facts which gave rise to the illegality" [132] particularly where "he had received money and had altered his position so that it might be oppressive to expect him to repay it". [133] This second exception, ignorance of the facts and alteration of position, adds considerable flexibility to the illegality principle. Lord Neuberger also addressed the criticism that the Rule would come close to enforcing the contract. He conceded that this was indeed the case and that "application of the Rule would sometimes involve the court making an order whose effect in practice is similar to performance of the illegal contract". [134] An example, not given by Lord Neuberger, would be an illegal lending contract where the borrower had to repay the money. He considered that there was nothing to this point that the Rule could produce an outcome equivalent to performance; if a "particular outcome is correct, then the mere fact that the same outcome could have been arrived at on a wrong basis does not make it a wrong outcome". [135] This view was questioned by Lord Sumption. As Lord Sumption pointed out "an order for restitution would be functionally indistinguishable from an order for enforcement, as in the case of an illegal loan or a foreign exchange contract". [136] Citing *Boissevain v Weil* [137] for the principle that "if the law will not enforce an agreement it will not give the same financial relief under a different label", [138] he was "inclined to think that the principle is sound" [139] but preferred not to express a concluded view.

16-014H

In relation to contract claims generally, Lord Neuberger favoured the approach of Lord Toulson, [140]

He preferred this to the “multi-factorial” approach of Burrows as the approach of Lord Toulson was a “structured approach” and not “akin in practice to a discretion … ”. [142]

The minority approach: Lord Mance

16-014I

Lord Mance, agreeing with Lord Sumption, [143] considered that the right of a party to recover property or money transferred under an illegal transaction was a consequence of the exercise of the right of rescission and this “right should be restored to its former significance and generalised”. [144] The principle of rescission should not be restricted, “the logic of the principle is that the illegal transaction should be disregarded, and the parties restored to the position in which they would have been, had they never entered into it”. [145] There should be no objection to permitting rescission after part performance “by making, where possible appropriate adjustments for benefits received … ”. [146] He specifically dissented from the decision of Lord Neuberger on certain points. [147] He could not see how “an imbalance or lack of parity of delict between the parties could act as a necessary or even probable bar to rescission”. [148] More generally, Lord Mance considered that Lord Toulson and the majority had attempted to rewrite the law of illegality on the basis of the reasoning of the Canadian Supreme Court in *Hall v Hebert* [149]; which is set out in Lord Toulson’s judgment. [150] Lord Mance was critical of such an approach as it would “introduce not only a new era but entirely novel dimensions into an issue of illegality”. [151] Under such an approach the [152] :

> “Courts would be required to make a value judgment, by reference to a widely spread, mélange of ingredients, about the overall ‘merits’ or strengths, in a highly unspecific non-legal sense, of the prospective claims of the public interest and of each of the parties.”

The minority: Lord Sumption

16-014J

Lord Sumption considered that as regards the enforcement of a claim founded on an illegal act the underlying principle is that for reasons of consistency the court will not give effect, at the suit of a person who committed the illegal act (or someone claiming through him), to a right derived from that act. By “consistency”, citing extensively from the judgment of McLachlin J. in *Hall v Hebert*, [153] he meant that the law should not “allow a person to profit from illegal or wrongful conduct or would permit an evasion or rebate of a penalty prescribed by the criminal laws”. [154] The law “cannot give with one hand what it takes away with the other”. [155]

16-014K

Lord Sumption considered that the test for determining the effect of illegality was whether a party was relying on the illegality, the “reliance test”. [156] The reliance test was the “narrowest test of connection” between the illegality and the contract, all alternative tests would widen the application of

the defence of illegality and render its application more uncertain. [157] The strength of the test was that (a) it gave "effect to the basic principle that a person may not derive a legal right from his own illegal act", [158] (b) it established a direct causal link between the illegality and the claim and distinguished between collateral or background facts, [159] and (c) it ensured that the illegality principle would not be applied more widely than was needed to prevent legal rights from being derived from illegal acts. [160] In opting for the reliance test, Lord Sumption rejected the test that the facts relied on should be "inextricably linked" with the illegal act on the grounds that it is "far from clear what the test means". [161]

16-014L

Lord Sumption also dealt with the "range of factors" approach [162] put forward by Burrows [163] which he considered was derived from the Law Commission Consultative Report [164] on illegality. [165] As regards the range of factors identified by the Law Commission and Professor Burrows the important issue for Lord Sumption was whether these factors are to be regarded [166]:

> "(i) as part of the policy rationale of a legal rule and the various exceptions to that rule, or (ii) as matters to be taken into account by a judge deciding in each case whether to apply the legal rule at all."

Lord Sumption considered that the former approach represents the law. The latter would require the courts to "weigh or balance, the adverse consequences of respectively granting or refusing relief on a case by case basis" [167] an approach that had been rejected in *Tinsley v Milligan*. [168] He considered that as the principle of illegality was based on public policy, the "operation of the principle cannot depend on the evaluation of the equities as between the parties or the proportionality of its impact upon the claimant". [169] The range of factors approach would largely devalue the principle of consistency because it resulted in the court making an evaluative judgment as to the weights to be attributed to the various factors. [170] He considered that factor (g) of the Burrows schema ("whether denying enforcement will ensure that the party seeking enforcement does not profit from his conduct") was "fundamental to the principle of consistency, and not just a factor to be weighed against others". [171]

Lord Sumption also strongly objected to factor (a) ("how seriously illegal or contrary to public policy the conduct was") as it was "difficult to reconcile with any kind of principle the notion that there may be degrees of illegality as Professor Burrows' factor (a) seems to envisage". [172] Such a rule would depend "on the court's view of how illegal the illegality was or how much it matters" [173] and there would be "no principle whatever to guide the evaluation other than the judge's gut instinct". [174] The adoption of the range of factors approach would discard "any requirement for an analytical connection between the illegality and the claim" [175] by making it one factor in a broad evaluation of the case without offering "guidance as to what sort of connection might be relevant". [176] Lord Sumption dissented from the conclusion of Lord Toulson [177] that the illegality principle should depend on the "policy factors involved and … and the circumstances of the illegal conduct". [178] Lord Sumption considered that this was:

> "… far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights. … it converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of 'complexity, uncertainty, arbitrariness and lack of transparency'." [179]

He considered that the remedy of restitution would not give effect to the illegal act but "return the parties to the status quo ante where they should always have been … This was Gloster LJ's main reason for upholding Mr Patel's right to recover the money". [180]

Lord Clarke gave a brief judgment agreeing with Lord Sumption's reasons [181] for rejecting the "range of factors" approach. [182]

Illegal contract unenforceable

16-015

The "effect of illegality is not substantive but procedural", it prevents the plaintiff from enforcing the illegal transaction. [183] The "ex turpi causa defence", as was stated by Kerr L.J. in *Euro-Diam Ltd v Bathurst* [184]:

> "… rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts."

As will be seen later, illegal contracts are not devoid of legal effect, [185] but the ex turpi causa maxim entails that no action on the contract can be maintained. The Law Commission has stated that:

> "Generally, it seems that the commission of a legal wrong, or acting otherwise contrary to public policy, in the course of performing a contract does not, at common law, affect enforcement." [186]

Illegality will only preclude the enforcement of the contract where it has been:

> "… entered into with the purpose of doing [an] … unlawful or immoral act or the contract itself (as opposed to the mode of … performance) is prohibited by law." [187]

If the parties' unlawful conduct is part of a scheme involving a number of contracts, it is not necessary to establish that each contract is unlawful as each will be unenforceable by virtue of being part of the unlawful scheme. [188]

Illegality as to formation

16-016

reflect “a rules based approach” to illegality as this was the basis on which the cases were decided.

However, *Patel v Mirza* [190] has adopted “a range of factors approach”, [191] although even if this had been applicable it is questionable whether the cases would have been differently decided. Contracts may be illegal when entered into because they cannot be performed in accordance with their terms without the commission of an illegal act. Thus the contract may involve a breach of the criminal law, statutory or otherwise, or alternatively it may be a statutory requirement that the parties to the transaction possess a licence and where they do not the contract will be illegal as formed. An example of a contract which was illegal as formed is provided by *Levy v Yates*, [192] a case concerned with the former statutory rule that no play could be lawfully acted within 20 miles of London without a royal licence, which might be given only in certain circumstances. In that case the contract, between a theatre owner and an impresario, was itself for the performance of a theatrical production prohibited by the statute. The contract was unenforceable since [193] “the agreement could not be carried into effect without a contravention of the law”: the parties had contracted to do the very thing forbidden by the statute and the contract was therefore unenforceable. A contract which is illegal as to formation is “unenforceable” rather than “void” where void means “that the agreement was never made”. The reason for this is that “property can pass under an illegal contract” and the court in certain circumstances will “enforce a contract which contains an element of illegality”. [194] Although this results in an illegal contract having some legal consequences, this in no way constitutes enforcement.

Illegality as to performance

16-017

The illegality may arise because both or one of the parties may intend to perform the contract in an illegal manner. The court will deny its assistance where both or one [195] of the parties intended to perform the contract in an illegal manner or to effect some illegal purpose. In this situation it is customary to distinguish between the situation where the legally objectionable features were known to both parties and the situation where they are known only to one. For the illegality as to performance rule to apply there is no requirement that the illegal performance be intended from the time the contract is entered into; the formation of the intention after the execution of the contract can bring the rule into play. [196]

Illegal purpose

16-018

An otherwise innocent contract may also be illegal if it was entered into for an objectionable purpose. [197] Thus in *Pearce v Brooks* [198] the plaintiff sued the defendant, a prostitute, for the hire of a brougham which he knew was to be used by her in her calling. It was held that he could not recover and Pollock C.B. said:

> “I have always considered it was settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied … Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is ex turpi causa non oritur actio.”

Both parties aware of legally objectionable features

16-019

Neither party can sue upon a contract if:

(a)

both knew that its performance necessarily involved the commission of an act which, to their knowledge, [199] is legally objectionable, that it is illegal or otherwise against public policy; or

(b)

both knew that the contract is intended to be performed in a manner which, to their knowledge [200] is legally objectionable in that sense; or

(c)

the purpose of the contract is legally objectionable and that purpose is shared by both parties [201] ; or

(d)

both participate in performing the contract in a manner which they know to be legally objectionable. [202]

Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [203] provides a good example of a contract which was illegal as to performance so as to bar either party from maintaining an action with respect to it. The defendants agreed to transport two boilers belonging to the plaintiffs and did so by carrying the boilers on lorries which could not lawfully carry the loads in question. The goods were damaged in the course of transit but the claim of the owner for damages was rejected; the owner of the goods not only knew that the goods were being transported in an illegal manner but had actually "participated" in the illegality in the sense of assisting the defendant carrier to perform the contract in an illegal manner. However, that a party commits some illegality in the course of performance does not result in his being unable to enforce the contract. [204]

> "The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of … performance) is prohibited by law."

Thus in *St John Shipping Corp v Joseph Rank Ltd* [205] the carrier was able to enforce its claim for freight even though it had illegally overloaded its vessel. However, the plaintiff company would not have been entitled to recover freight had it intended from the beginning to perform the contract in an illegal manner.

Legally objectionable features unknown to one party

16-020

It follows from what has been said that, if the performance of a contract necessarily and to the knowledge [206] of the plaintiff involves or has as its object the commission by one or both parties of an act known to be legally objectionable, the plaintiff cannot sue on the contract [207] and this is so irrespective of the state of knowledge of the defendant. But when the contract does not necessarily involve the commission of a legally objectionable act and the legally objectionable intention or purpose of one party is unknown to the other, the latter is not precluded from enforcing the contract. [208] Thus in *Archbolds (Freightage) Ltd v S. Spanglett Ltd*, [209] the A Co agreed with the B Co to carry goods in a van which, unknown to the B Co, was not licensed for the purpose. The contract, which was not expressly or impliedly prohibited by statute, involved the commission of a criminal offence by the A Co in using the van for this purpose. But since the B Co was unaware of this fact, it was not prevented from suing the A Co for failure to deliver the goods. And in *Bank für Gemeinwirtschaft*

Aktiengesellschaft v City of London Garages Ltd [210] the A Co had accepted a bill of exchange drawn upon itself by B Co who later discounted the bill to C Co, a company resident in Germany. When sued by C Co for dishonour of the bill, A Co contended that the discounting of the bill to C Co amounted to the export of a bill of exchange which was unlawful under Exchange Control regulations without the permission of the Treasury. The Court of Appeal held that, as C Co did not know of B Co's failure to obtain Treasury permission and was entitled to assume that B Co had complied with the requirement, it was not precluded from suing upon the bill. [211] The justification for this result is that it would be inequitable for a person who enters into an apparently unobjectionable contract to be deprived of his rights thereunder merely because the other party had an unlawful object in mind in entering into the contract. To deprive the innocent party of his rights would merely "injure the innocent, benefit the guilty and put a premium on deceit". [212] But upon learning of the illegal object of the other, the innocent party must refuse to assist him by carrying the contract into effect; the innocent party in such circumstances has a quantum meruit for what he has already lawfully done. [213] Similarly in a case where the contract appears legally unobjectionable but the other party later elects to perform the contract in an illegal manner: the innocent party is not thereby deprived of his rights but where he learns of the illegal mode of performance he must not participate in it but should do all reasonably within his power to avoid or prevent such performance. [214] If he goes on with the contract with knowledge of what is objectionable he cannot recover, except where the illegality is merely the breach of a by-law which is subsequently waived by the authority which made it, so that the other party lawfully enjoys benefits under the contract, and can modify the work done so as to comply with the by-law. [215] However, where a party to a contract knows that the other party may have an illegal purpose in mind this does not preclude recovery provided there is no participation in carrying out the illegal purpose; there is a difference between:

> "… the supply of an ordinary vehicle by a motor dealer in the ordinary course of business to a customer known to be a drug dealer, and the supply of a vehicle with special compartments for the concealment of drugs." [216]

Parties' ignorance of the law

16-021

> "Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not." [217]

Thus, in *Miller v Karlinski*, [218] an employee, whose mode of payment amounted to a fraud on the Revenue, was held unable to recover arrears of salary, whether or not the parties knew that what they were doing was illegal. Equally, where a statute makes the contract itself illegal, the parties' ignorance of the law does not make it the less so. [219] Even where the contract is capable of lawful performance, if the express purpose for which it was made was to do something unlawful, failure by the parties, through ignorance of the law, to appreciate that the purpose was unlawful is irrelevant. [220] But where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced [221] on the ground that there was never a "fixed intention" to do that which was later discovered to be lawful and that while the parties "contemplated" such unlawful act, they did not "intend" to do it. [222] In other words, knowledge of the law is of evidential significance with respect to the parties' intended mode of performance. It is important in this situation that at least the party seeking to enforce the contract can carry it out in a legal manner. Where the parties do not intend to enter into an illegal transaction but make a mistake as to the characterisation of the contract, for example treating a contract of service as a contract for services for tax purposes so that it is illegal, the contract has been held to be enforceable. [223]

Compromises of illegal contracts

16-022

There is a manifestly obvious public policy in favour of encouragement and enforcement of compromises of disputes which the parties themselves have agreed to. Compromises result in a saving of public resources and probably produce an optimum result from the disputants' point of view in that they have agreed to one, and that this has not been imposed by a third-party mediator. However, to enforce compromises of illegal contracts would have the effect of undermining the public policy underlying the illegality doctrine: it would be paradoxical, to say the least, to permit a party to enforce the compromise of an illegal contract but not the illegal contract itself. Whether the compromise of an illegal transaction is itself enforceable depends on the question of whether the courts must give effect to the broad social policy underlying the illegality despite any private arrangement between the parties. [224] Normally this will mean that the compromise, like the illegal contract, is not enforceable. An interesting problem on the compromise of an allegedly illegal contract arose in *Binder v Alachouzos*. [225] A lent a sum of money to B which B refused to repay on the grounds that the transaction was one of moneylending and A was not a registered moneylender. A sued B, and after taking legal advice B compromised the action on the terms that he would repay the loan and not contend that the contract was one of moneylending. B then repudiated the compromise arguing that it, like the illegal contract, was unenforceable. The Court of Appeal upheld the compromise, but it did so on the grounds that the compromise was of a dispute of fact whether the contract was in actual fact an illegal moneylending contract. [226] This was not a case where a clearly illegal contract was compromised, assuming arguendo that such a contract could be compromised. [227] It has also been held that an arbitration agreement was to be treated "as a distinct and separable agreement from the contract of which if forms part". [228] It follows from this that the unenforceability of the contract, for example, because of illegality will not result in the unenforceability of the arbitration agreement.

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43. *Bilta (UK) Ltd v Nazir (No.2) [2015] 2 W.L.R. 1168*.

44. *[2015] UKSC 23* at [100].

45. ❗*Hounga v Allen [2014] 1 W.L.R. 2889* at [55]. See also *Patel v Mirza [2016] UKSC 42*.

46. *K/S Lincoln v CB Richard Ellis Hotels Ltd [2009] EWHC 2344* at [22].

47. ❗*R. (on the application of Best) v Chief Land Registrar [2015] EWCA 17* at [52]. See also *Gray v Thames Trains Ltd [2009] UKHL 33, [2009] A.C. 1339* at [30] (ex turpi causa based on a "group of reasons which vary in different situations"); and *Patel v Mirza [2016] UKSC 42*.

48. *Bilta (UK) Ltd v Nazir (No.2) [2015] 2 W.L.R. 1168*.

49. The principle that a man is not permitted, either directly or through his representatives, to found a contractual claim on the commission of a crime is discussed at paras 16-185—16-191, below.

50. *Holman v Johnson (1775) 1 Cowp. 341, 343*. The maxim is further explained in *Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B. 65, 72*; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2000] 1 Lloyd's Rep. 218, 227–228, 231–232*; *Vellino v Chief Constable of the Greater Manchester Police [2001] EWCA Civ 1249, [2002] 1 W.L.R. 218*.

51. *Tinsley v Milligan [1994] 1 A.C. 340, 362*.

52. *Les Laboratoires Servier v Apotex Inc [2014] UKSC 55, [2014] 3 W.L.R. 1257* at [14].

53. ❗*[2016] UKSC 42, [2016] 1 W.L.R. 399*; see below, para.16-014B.

54. *[2014] UKSC 55* at [13].

55. *[2016] UKSC 42, [2016] 1 W.L.R. 399*.

56. See, for example *Euro-Diam Ltd v Bathurst [1990] 1 Q.B. 1* and the decision of the Court of Appeal in *Tinsley v Milligan [1992] Ch. 310*.

57. *[1994] 1 A.C. 340*.

58. For the facts and decision, see below, para.16-198.

59. CP 154, para.9.4.

60. Law Commission, Consultative Report, Consultation Paper No.189, The Illegality Defence (2009); see paras 3.107–3.115.

61. Consultation Paper No.189, paras 3.136 (on enforcement of contract claims) and 4.42 (on restitution when a contract is unenforceable because of illegality).

62. Consultation Paper No.189, para.3.142.

63. Consultation Paper No.189, para.3.140.

64. *[2009] 1 A.C. 1339* at [30].

65. The Illegality Defence, The Law Commission (Law Com No 320), para.3.38.

66. *[2012] EWCA Civ 593*.

67. *[2012] EWCA Civ 593* at [66].

68. *[2012] EWCA Civ 593* at [70].

69. *[2012] EWCA Civ 1338, [2013] Q.B. 840*.

70. *[2012] EWCA Civ 1338* at [36]. He also said that it was not the occasion for a full review of the authorities: at [28].

71. *[2012] EWCA Civ 1338* at [46]. He also warned against "having over-complex rules which are indiscriminate in theory but less so in practice" (at [52]).

72. *[2012] EWCA 1338* at [52].

73. *[2012] EWCA 1338* at [51].

74. *[2014] UKSC 47, [2014] 1 W.L.R. 2889*: see particularly Lord Wilson (with whom Baroness Hale and Lord Kerr agreed) at [42]–[44].

75. *[1993] 2 S.C.R. 159*.

76. *[2014] UKSC 47* at [44].

77. *[2014] UKSC 47* at [46]–[52].

78. *Les Laboratoires Servier v Apotex Inc [2014] UKSC 55, [2015] A.C. 430*.

79. *[2014] UKSC 55*.

80. *[2009] 1 A.C. 1339* at [30].

81. *[2014] UKSC 47, [2014] 1 W.L.R. 2889*: see particularly Lord Wilson (with whom Baroness Hale

and Lord Kerr agreed) at [42]–[44].

82. *[2014] UKSC 55* at [60]–[62].

83. *[2014] UKSC 55* at [19].

84. *[2014] UKSC 55* at [20].

85. *[2015] 2 W.L.R. 1168*. For the facts and decision in this case, which involved the question of attribution, see below, para.16-175.

86. See in particular at [129] and [169]–[174].

87. *[2014] UKSC 47, [2014] 1 W.L.R. 2889* at [42].

88. *[2015] UKSC 23* at [173].

89. *[2015] UKSC 23* at [174].

90. *[2015] UKSC 23* at [101].

91. *[2015] UKSC 23* at [102].

92. *[2015] UKSC 23* at [14].

93. ❗*[2015] UKSC 23* at [17]. In *Top Brands Ltd v Sharma [2015] EWCA Civ 1140* the Court of Appeal pointed out the different approaches and considered "that the proper approach to the defence of illegality needs to be addressed by the Supreme Court (conceivably with a panel of nine Justices) as soon as appropriately possible … " at [38], a view identical to that of Lord Neuberger in *Bilta (UK) Ltd [2015] UKSC 23, [2016] A.C. 1* at [15], see Vol.I, para.16-002.

94. ❗See above, para.16-012.

95. *Bilta (UK) Ltd v Nazir (No.2) [2015] 2 W.L.R. 1168*.

96. ❗*[2015] EWCA Civ 17*, [2016] Q.B. 23, [2015] 4 All E.R. 495.

97. Under Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.144.

98. *[2009] UKHL 33* at [30].

99. *[2015] EWCA Civ 17*. at [52]. Sales L.J. also refers to *Les Laboratoires Servier v Apotex Inc [2014] UKSC 55* at [19] and [22].

100. *[2015] EWCA Civ 17* at [54].

101. *[2015] EWCA Civ 17* at [59] and [61].

102. ❗*[2016] UKSC 42, [2016] 1 W.L.R. 399*.

103. ❗See paras 16-014B et seq.

104. ❗This is particularly so of law set out in Vol.I, paras 16-008—16-014.

105. ❗*[2016] UKSC 42, [2016] 1 W.L.R. 399* (a panel of nine Justices).

106. *Patel v Mirza [2016] UKSC 42* at [2]: "Illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort, or unjust enrichment, and in a wide variety of circumstances".

107. [2015] Ch. 271. Gloster L.J. held that the claimant could recover as he did not have to rely on the illegal contract to recover his money.

108. *[1994] 1 A.C. 340*. The Supreme Court in *Patel* considered this judgment to be wrong: see below, para.16-198.

109. See below, paras 16-205—16-207.

110. *[2016] UKSC 42*.

111. *[2016] UKSC 42* at [110].

112. *[2016] UKSC 42* at [112].

113. *[2016] UKSC 42* (the minority judgments also favoured recovery).

114. On the remedy of restitution see para.16-194.

115. *[2016] UKSC 42* at [115].

116. *[2016] UKSC 42* at [101].

117. *[2016] UKSC 42*.

118. Burrows, *Restatement of the English Law of Contract* (OUP, 2016) at pp.221–223.

119. Burrows, *Restatement of the English Law of Contract* (2016) at p.224.

120. Burrows, *Restatement of the English Law of Contract* (2016) at p.225.

121. *[2016] UKSC 42* at [87]–[92] where Lord Toulson sets out the criticisms of Burrows, *Restatement of the English Law of Contract* (2016) at pp.224–229.

122. Burrows, *Restatement of the English Law of Contract* (2016) at pp.229–230 cited in *Patel v Mirza [2016] UKSC 42* at [93].

123. Burrows notes that the final factor could be given a wider or narrower interpretation depending on the meaning attached to inconsistency: Burrows, *Restatement of the English Law of Contract* (2016) at p.230.

124. *[2016] UKSC 42* at [107]. Lord Neuberger also considered that it was not "helpful to list all the potentially relevant factors": *[2016] UKSC 42* at [173].

125. *[2016] UKSC 42* at [145].

126. *[2016] UKSC 42* at [146].

127. *[2016] UKSC 42* at [146].

128. *[2016] UKSC 42* at [167].

129. *[2016] UKSC 42* at [159].

130. *[2016] UKSC 42* at [159].

131. *[2016] UKSC 42* at [162].

132. *[2016] UKSC 42* at [162].

133. *[2016] UKSC 42* at [162].

134. *[2016] UKSC 42* at [171].

135. *[2016] UKSC 42* at [171].

136. *[2016] UKSC 42* at [255].

137. *[1950] A.C. 327*.

138. *[2016] UKSC 42* at [255].

139. *[2016] UKSC 42* at [255].

140. *[2016] UKSC 42* at [174]–[175], referring to Lord Toulson's judgment at [101].

141. *[2016] UKSC 42* at [186]. Lord Clarke considered that Lord Neuberger "expressed some support for the approach of Lord Toulson" but he was not persuaded by his reasoning that it was appropriate: *[2016] UKSC 42* at [223].

142. *[2016] UKSC 42* at [175].

143. *[2016] UKSC 42* at [245]–[252].

144. *[2016] UKSC 42* at [197].

145. *[2016] UKSC 42* at [197]. In his opinion this principle had considerable lineage citing Mellish L.J. in *Taylor v Bowers [1876] 1 Q.B.D. 291* at 300.

146. *[2016] UKSC 42* at [198].

147. Set out at *[2016] UKSC 42* at [162] and dealt with above, para.16-014E.

148. *[2016] UKSC 42* at [198].

149. *[1993] 2 S.C.R. 159*.

150. Lord Toulson also referred to the Burrows range of factors approach: *[2016] UKSC 42* at [93].

151. *[2016] UKSC 42* at [206].

152. *[2016] UKSC 42* at [206].

153. *[1993] 2 S.C.R. 159* at 169 (now Chief Justice McLachlin). Also analysed by Lord Toulson at *[2016] UKSC 42* at [55]–[61].

154. *[2016] UKSC 42* at [230] citing the judgment of McLachlin J. in *Hall v Hebert [1993] 2 S.C.R. 159* at 169.

155. *Hounga v Allen [2014] UKSC 47, [2014] 1 W.L.R. 2889* at [55] (a dissenting judgment but not on this point) cited in *Patel v Mirza [2016] UKSC 42* at [232].

156. *Patel v Mirza [2016] UKSC 42* at [239].

157. *[2016] UKSC 42* at [239].

158. *[2016] UKSC 42* at [239].

159. *[2016] UKSC 42* at [239].

160. *[2016] UKSC 42* at [239].

161. *[2016] UKSC 42* at [240].

162. *[2016] UKSC 42* at [259].

163. Burrows, *Restatement of the Law of Contract* (2016) at pp.229–231.

164. The Illegality Defence (LCCP 189, 2009).

165. *[2016] UKSC 42* at [259].

166. *[2016] UKSC 42* at [261].

167. *[2016] UKSC 42* at [261].

168. *[1994] 1 A.C. 340*.

169. *[2016] UKSC 42* at [262(i)].

170. ❗*[2016] UKSC 42* at [262(ii)].

171. ❗*[2016] UKSC 42* at [262(ii)] Lord Sumption mistakenly refers to this as factor (f).

172. ❗*[2016] UKSC 42* at [262(iii)].

173. ❗*[2016] UKSC 42* at [262(iii)].

174. ❗*[2016] UKSC 42* at [262(iii)].

175. ❗*[2016] UKSC 42* at [262(iii)].

176. ❗*[2016] UKSC 42* at [262(iii)].

177. ❗*[2016] UKSC 42* at [265].

178. ❗Lord Toulson at *[2016] UKSC 42* at [109].

179. ❗*[2016] UKSC 42* at [265].

180. ❗*[2016] UKSC 42* at [268]. Lord Sumption considered that a possible objection to this is that the court should not sully itself by being involved with the illegality as not being a "reputable foundation for the law of illegality": *[2016] UKSC 42* at [268].

181. ❗These are set out in para.16-014K.

182. ❗*[2016] UKSC 42* at [216]. See also [223] where he disagrees with Lord Neuberger in so far as the latter supports the opinion of Lord Toulson. The criticisms of the "range of factors approach" are set out above, para.16-014L.

183. *Tinsley v Milligan [1994] 1 A.C. 340, 374*.

184. *[1990] Q.B. 1* (although the manner in which the court applied the illegality doctrine in this case was disapproved of in *Tinsley v Milligan [1994] 1 A.C. 340, 363*, the dictum quoted in the text must remain true as a general principle).

185. Below, paras 16-193 et seq.

186. Illegal Transactions: The Effect of Illegality on Contracts and Trusts (LC CP No.154, para.2.29) cited with approval in *Colen v Cebrian (UK) Ltd [2003] EWCA Civ 1676, [2004] I.R.L.R. 210* at [44].

187. *Coral Leisure Group Ltd v Barnett [1981] I.C.R. 503* at 509.

188. *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd [2013] EWHC 1063 (Comm)* at [27].

189. ❗Vol.I, paras 16-016—16-027.

190. ❗*[2016] UKSC 42, [2016] 1 W.L.R. 399*.

191. See above, para.16-014F.

192. *(1838) 8 A. & E. 129*; cf. *Dungate v Lee [1959] 1 Ch. 545*.

193. *(1838) 8 A. & E. 129, 134*. See also *Ewing v Osbaldiston (1836) 2 My. & Cr. 53*. Occasionally it will be difficult to classify a contract as being illegal as to formation as opposed to being illegal as performed: see *J. M. Allan (Merchandising) Ltd v Cloke [1963] 2 Q.B. 340*.

194. *Paros Plc v Wordlink Group Plc [2012] EWHC 394 (Comm)* at [80]. See para.16-195 ("Transfer of property under illegal transactions") and part 5 of this chapter ("Severance").

195. Where a party is not aware of the *facts* when the contract is made as a result of which the contract cannot be performed legally, see below, paras 16-020 and 16-193 et seq. for his remedies. Ignorance of the law is no excuse; see below, para.16-021.

196. *ParkingEye Ltd v Somerfield Stores Ltd [2012] EWCA 1338, [2013] Q.B. 840* at [33].

197. See further below, para.16-019.

198. *(1866) L.R. 1 Ex. 213, 217*. See also *K. v P. and J. [1993] Ch. 140* (defence of ex turpi causa does not preclude a claim for contribution under the Civil Liability (Contribution) Act 1978). For the application of the ex turpi causa principle in tort see *Hall v Herbert [1993] 2 S.C.R. 159* (noted, (1994) 110 L.Q.R. 357).

199. Knowledge of illegality by an agent generally has no less effect than knowledge by the principal: *Apthorp v Neville (1907) 23 T.L.R. 575*; cf. *Stoneleigh Finance Ltd v Phillips [1965] 2 Q.B. 537, 572, 580*.

200. *Apthorp v Neville (1907) 23 T.L.R. 575*; cf. *Stoneleigh Finance Ltd v Phillips [1965] 2 Q.B. 537, 572, 580*.

201. *Alexander v Rayson [1936] 1 K.B. 169, 182*; *Edler v Auerbach [1950] 1 K.B. 359*; *Bigos v Bousted [1951] 1 All E.R. 92*; *J.M. Allan (Merchandising) Ltd v Cloke [1963] 2 Q.B. 340*.

202. *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828*.

203. *[1973] 1 W.L.R. 828*.

204. *Coral Leisure Group Ltd v Barnett [1981] I.C.R. 503, 509*; see also *Newland v Simons & Willer (Hairdressers) Ltd [1981] I.C.R. 521, 530*; *Hall v Woolston Hall Leisure Ltd [2001] 1 W.L.R. 225*.

205. *[1957] 1 Q.B. 267*; see also below, para.16-158.

206. i.e. knowledge of fact, not of law; see below, para.16-021.

207. *Edler v Auerbach [1950] 1 K.B. 359*; *Nash v Stevenson Transport Ltd [1935] 2 K.B. 341*; *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828*.

208. *Mason v Clarke [1955] A.C. 778, 793, 805*; *Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd [1971] 1 W.L.R. 149*.

209. *[1961] 1 Q.B. 374*; *Davidson v Pillay [1979] I.R.L.R. 275*; *Corby v Morrison [1980] I.C.R. 564* (the test of knowledge is a subjective one). Where the contract is ex facie illegal, no question of knowledge arises: *Newland v Simons & Willer (Hairdressers) Ltd [1981] I.C.R. 521*. In *Hall v Woolston Hall Leisure Ltd [2001] 1 W.L.R. 225, 249*, Mance L.J. cast doubt on the reasoning and outcome of the *Newland* case.

210. *[1971] 1 W.L.R. 149*. See also *Credit Lyonnais v P.T. Barnard & Associates [1976] 1 Lloyd's Rep. 557*.

211. Contrast the position where the contract infringes a *foreign* exchange control regulation imposed consistently with the IMF Agreement and will be, if it is an "exchange contract", unenforceable in the United Kingdom under the Bretton Woods Agreement Act 1945, irrespective of the British party's ignorance of the foreign illegality: *Wilson, Smithett & Cope Ltd v Terruzzi [1976] Q.B. 683*. See below, paras 16-040 n.239. On the status of the Bretton Woods Agreement, see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), pp.2370–2376.

212. *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 387*.

213. *Clay v Yates (1856) 1 H. & N. 73*.

214. *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828*. A possible way of analysing this situation is that the contract has been varied by the parties and the new agreed contractual performance is illegal. See *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 393*.

215. *Townsend (Builders) Ltd v Cinema News & Property Management Ltd [1959] 1 W.L.R. 119*.

216. *Anglo-Petroleum Ltd v TFB (Mortgages) Ltd [2007] EWCA Civ 456, [2007] All E.R. (D) 243* at [78].

217. per Blackburn J. in *Waugh v Morris (1873) L.R. 8 Q.B. 202, 208*. And see *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 221*.

218. *(1945) 62 T.L.R. 85*; *Napier v National Business Agency Ltd [1951] 2 All E.R. 264*; *Tomlinson v Dick Evans "U" Drive Ltd [1978] I.C.R. 639* (rule about defrauding Revenue applies even in case of a junior employee who goes along with employer's tax fraud); *Newland v Simons & Willer (Hairdressers) Ltd [1981] I.C.R. 521*; *Hall v Woolston Hall Leisure Ltd [2001] 1 W.L.R. 225, 249*.

219. *Kiriri Cotton Co Ltd v Dewani [1960] A.C. 192*: *Re Mahmoud and Ispahani [1921] 2 K.B. 716*. The court may of course decide that breach of the statute does not render the contract unenforceable: see *Shaw v Groom [1970] 2 Q.B. 504* and below, para.16-157.

220. *J.M. Allan (Merchandising) Ltd v Cloke [1963] 2 Q.B. 340*.

221. *Waugh v Morris (1873) L.R. 8 Q.B. 202*. cf. *Nash v Stevenson Transport Ltd [1936] 2 K.B. 128*.

222. See *Reynolds v Kinsey [1959] (4) S.A. 50* where the authorities are reviewed. cf. *Best v Glenville [1960] 1 W.L.R. 1198*.

223. *Enfield Technical Services Ltd v Payne [2007] I.R.L.R. 840* (parties in good faith mistakenly treating a contract of service as a contract for services for tax purposes).

224. *Kok Hoong v Leon Cheong Kweng Mines Ltd [1964] A.C. 993, 1014–1019* (estoppel by way of judgment in default could not operate with respect to illegal moneylending agreement). cf. *A.R. Dennis & Co Ltd v Campbell [1978] Q.B. 365*.

225. *[1972] 2 Q.B. 151*.

226. "In my judgment, a bona fide agreement of compromise such as we have in the present case (which is a dispute as to whether the plaintiff is a moneylender or not) is binding": *[1972] 2 Q.B. 151, 158*, per Lord Denning M.R.

227. On compromises see above, paras 4-051—4-057.

228. *Beijing Siamlong Heavy Industry Group v Golden Ocean Group Ltd [2015] EWHC 1063 (Comm)*, at [23].

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 2. - The Position at Common Law

(b) - Contracts involving the commission of a legal wrong

(ii) - Acts or Objects Which are Illegal by Common Law or by Statute

Examples of criminality

16-023

Criminal acts or objects which disentitle a party to contractual relief include doing something forbidden by statute, [229] or delegated legislation, [230] such as infringing food and drug legislation [231] or exchange control legislation, [232] and the commission of offences at common law such as publication of a criminal libel [233] and blasphemy. [234] A fortiori the courts will not enforce a contract the object of which is such as to render the contract a criminal conspiracy, [235] e.g. to corrupt public morals [236] or to rig the market for shares in a company. [237] Whether an agreement to fight is illegal depends upon whether the infliction of the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public, which is a question of fact. [238] Similarly, a contract, even if made abroad, is illegal if its purpose is the infringement of the laws of England. [239] But mere knowledge that goods sold abroad may possibly be smuggled into England will not disentitle the seller to sue for their price. [240]

Evasion of statute

16-024

It is now established that it is not a criminal offence for any person, whether or not acting in concert with others, to do acts which are neither prohibited by Act of Parliament nor at common law, and do not involve dishonesty or fraud or deception, even though an object which Parliament hoped to achieve by its legislation may be thereby thwarted [241]: nor is it an offence to commit a conspiracy to effect a public mischief. [242] Even though agreements which frustrate the policy of an Act of Parliament are not per se criminal conspiracies, it may be uncertain whether such agreements are civilly enforceable. If, e.g. to take the facts of *Bhagwan*, [243] the owner of the vessel from which B disembarked in order to avoid immigration control had sued for his fare, could B have contended that the agreement was unenforceable since its purpose was to frustrate the policy of the Immigration Acts? It is submitted that unless the policy of the Act in question is one already recognised by the courts as protected under existing heads of public policy, or the means used by the parties are unlawful or dishonest, the agreement is fully enforceable. [244] There may also be the possibility of a restitutionary remedy where a contract is rendered void by statute. Thus where a contract was an illegal gaming contract, the principal could recover from the agent moneys intended to be used for betting which the agent had diverted to his own use. [245]

Waiver of statutory rights

16-025

Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (quilibet potest renunciare juri pro se introducto) difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver. Thus in *Johnson v Moreton* [246] the House of Lords held that a tenant could not contract out of the protection afforded by s.24 of the Agricultural Holdings Act 1948 as this would undermine the overall purpose of the Act in promoting efficient farming in the national interest. A contract between a landlord and a statutorily protected tenant whereby the tenant promises to give up possession in return for the landlord's promise of a sum of money is not illegal as an attempt to contract out of the Rent Acts; and although the landlord cannot obtain possession otherwise than under the Acts, [247] the tenant, if he performs his part, can recover the sum promised. [248]

Fraud

16-026

Where the object of a contract is the perpetration of a fraud, [249] e.g. upon prospective shareholders in a company [250] or upon the Government, [251] or a trader [252] the contract is illegal. Such frauds are usually criminal [253] but the rule appears to be general; thus a creditor cannot enforce an agreement with an insolvent debtor under which the latter is to pay him an amount in excess of his share under a composition agreement since the agreement to do so is a fraud upon the other parties to the composition agreement. [254] Likewise it is against public policy to enforce an agreement where the purpose of both parties was to defeat the proper claims of the Commissioners of Inland Revenue [255] or of a rating authority. [256] However, where the contract in question is remote from the illegality, the court will enforce the contract. [257]

Other civil wrongs

16-027

If a contract has as its object [258] the deliberate commission of a tort, [259] it would seem that the contract is illegal, even though no criminality or fraud is involved. [260] Thus a printer cannot recover the cost of printing matter which he knew to be libellous [261] and the purchaser cannot recover a sum of money deposited with the printer on account of the cost to be incurred in printing it. [262] However, a contract will not be illegal simply because it involves a tort or breach of contract. In the recent case of *Les Laboratoires Servier v Apotex Inc* [263] Lord Sumption, speaking for the majority, said: [264]

> "The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasicriminal" because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by Flaux J. in *Safeway Stores Ltd v Twigger*. [265]

> … Torts (other than those of which dishonesty is an essential element), breaches of contract, statutory and other civil wrongs, offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected."

Lord Sumption concluded that the illegality defence is not engaged by the mere selling of drugs manufactured in breach of the Canadian patent, which give rise to private rights no different to those founded on contract, breaches of statutory duty or torts. [266] *Patel v Mirza* [267] does not discuss the law on when a court will find that a civil wrong would render a contract illegal. However, the range of factors approach could well produce a result similar to that in *Les Laboratoires Servier v Apotex Inc*. [268]

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229. e.g. see below, paras 16-185, 16-189 but cf. below, para.16-193.

230. e.g. see *Palaniappa Chettiar v Arunasalam Chettiar [1962] A.C. 294*.

231. e.g. see *Langton v Hughes (1813) 1 M. & S. 593*; and *Askey v Golden Wine Co [1948] 2 All E.R. 35*.

232. *Bigos v Bousted [1951] 1 All E.R. 92*; *Shaw v Shaw [1965] 1 W.L.R. 537*; cf. *Wilson, Smithett & Cope Ltd v Terruzzi [1976] Q.B. 783*.

233. *Fores v Johnes (1802) 4 Esp. 97*; as to civil libels, see below, para.16-027.

234. *Cowan v Milbourn (1867) L.R. 2 Ex. 230*; but see now *Bowman v Secular Society [1917] A.C. 406*, as to what constitutes blasphemy.

235. As to where one or both parties are prohibited by statute from making a contract such as that sued upon, see below, paras 16-152 et seq.

236. *Poplett v Stockdale (1825) Ry & Mood. 337*; and see *Shaw v D.P.P. [1962] A.C. 220*.

237. *Scott v Brown, Doering, McNab & Co [1892] 2 Q.B. 724*; cf. *Harry Parker Ltd v Mason [1940] 2 K.B. 590*.

238. *Lane v Holloway [1968] 1 Q.B. 379*; thus an ordinary boxing match with gloves is not unlawful: *R. v Coney (1882) 8 Q.B.D. 534, 539*; see also Buller, *Nisi Prius*, 7th edn, p.16; and *Hunt v Bell (1822) 1 Bing. 1*.

239. *Clugas v Penaluna (1791) 4 Term Rep. 466*; *Waymell v Reed (1794) 5 Term Rep. 599*.

240. *Pellecat v Angell (1835) 2 Cr. M. & R. 311*; and see *Holman v Johnson (1775) 1 Cowp. 341*.

241. *D.P.P. v Bhagwan [1972] A.C. 60*; cf. *Zamir v Secretary of State for the Home Department [1980] A.C. 365*.

242. *D.P.P. v Withers [1975] A.C. 842*.

243. See above, n.156.

244. See above, para.16-004.

245. *Close v Wilson [2011] EWCA Civ 5*.

246. *[1980] A.C. 37*. See generally, Bennion, *Statutory Interpretation*, 5th edn (2007), pp.41–44.

247. *Barton v Fincham [1921] 2 K.B. 291*; see Megarry, *The Rent Acts*, 11th edn (1988), pp.26–27.

248. *Rajbenback v Mamon [1955] 1 Q.B. 283*; see Megarry, pp.26–27.

249. Deliberate deceit, even in the absence of moral turpitude, is sufficient: *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 Q.B. 621*. This should be distinguished from contracts induced by fraud which are not necessarily illegal: see Treitel in Tapper, *Crime, Proof and Punishment, Essays in Memory of Sir Rupert Cross* (1981), p.107.

250. *Begbie v Phosphate Sewage Co Ltd (1875) L.R. 10 Q.B. 491*.

251. *Willis v Baldwin (1780) 2 Doug. K.B. 450*.

252. *Berg v Sadler and Moore [1937] 2 K.B. 158*.

253. See *R. v Scott [1975] A.C. 819*; Treitel in Tapper, above, n.164, p.87. cf. Fair Trading Act 1973 Pt XI, brought into operation by Fair Trading Act 1973 (Commencement No.1) Order 1973 (SI 1973/1545) which provides for the regulation of pyramid selling and similar trading schemes.

254. *Cockshott v Bennett (1788) 2 T.R. 763*; *Mallalieu v Hodgson (1851) 16 Q.B. 689*; cf. above, para.4-127.

255. *Miller v Karlinski (1945) 62 T.L.R. 85*; *Napier v National Business Agency [1951] 2 All E.R. 264*; *Beauvale Furnishings Ltd v Chapman [2000] All E.R. (D) 2038*.

256. *Alexander v Rayson [1936] 1 K.B. 169*; cf. *Saunders v Edwards [1987] 1 W.L.R. 1116*.

257. *21st Century Logistic Solutions Ltd v Madysen Ltd [2004] EWHC 231 (QB), [2004] 2 Lloyd's Rep. 92*. (In this case a company that intended to evade the payment of VAT could nevertheless enforce a contract for the supply of goods, the avoidance of VAT not being an integral part of the contract.)

258. As to whether a person can found a contractual claim on his deliberate commission of a tort, see above, paras 16-026—16-027.

259. As to where the object is the deliberate procurement of a breach of contract with a third party, see Lauterpacht (1936) 52 L.Q.R. 494.

260. See Pearce L.J. in *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 Q.B. 621, 638*, though the case concerned fraud; *Allen v Rescous (1676) 2 Lev. 179*.

261. *Apthorp v Nevill (1907) 23 T.L.R. 575*; see above, para.16-020 as to the printer's proper course if he first learns of the libellous nature of the material after commencing performance of the contract.

262. *Apthorp v Nevill (1907) 23 T.L.R. 575*; as to agreements to indemnify against civil liability for libel, see below, para.16-192.

263. *[2014] UKSC 55, [2015] A.C. 430*.

264. *[2014] UKSC 55* at [29]–[30].

265. *[2010] EWHC 1 (Comm), [2010] 3 All ER 577*.

266. *[2014] UKSC 55* at [30].

267. *[2016] UKSC 42*.

268. *[2012] EWCA Civ 593*.

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(i) - Domestic Affairs

Sale of public offices and contracts

16-028

Contracts for the sale or transfer of public appointments, though they may not be prohibited in particular cases by the statutes relative to the sale of public offices, [269] are nonetheless contrary to public policy. [270] So also is a secret agreement to assign to another, in circumstances amounting to a fraud on the Government, the profits of a public contract, such as for the conveyance of the mails. [271] And where a clerk of the peace, appointed by the corporation of a borough under the Municipal Corporations Act 1882 and having fees attached to his office, entered into an agreement with the corporation to receive a salary and account to them for the fees, it was held that the agreement was against public policy, as the acceptor of an office of trust can make no bargain in respect of it, and the presumption is that the fees are required to enable the holder to perform the duties of his office. [272]

Contracts by employees and members of public authorities

16-029

It is an offence at common law for a public officer to accept a bribe or show favour [273] and a contract with such an object is undoubtedly unenforceable. It is now provided by statute that any officer with a direct or indirect pecuniary interest in a contract to be entered into by a local authority is to give notice that he is so interested and no officer is to take a fee or reward beyond his ordinary remuneration. [274] Members of local authorities are under a similar duty to disclose their interest if they are present at a meeting of the authority at which the contract is the subject of consideration. [275]

Procurement of honours

16-030

Though not exactly the sale of an office, an agreement to pay money in return for the procurement of a knighthood for the payer is against public policy since it gives a third person an immediate interest in procuring the title by means which are likely to be improper. [276] In *Parkinson v College of Ambulance Ltd* [277] the plaintiff had brought an unsuccessful action to recover money from a charity to which he had made a donation on the undertaking by the charity to secure a knighthood for the plaintiff. As Lord Toulson pointed out, where the bribe had been made to a public body such as a political party or the holder of a public office, it might be regarded “as more repugnant to the public interest that the recipient should keep it than that it should be returned”. [278] In *Patel v Mirza* [279]

Lord Neuberger stated that he considered that *Parkinson v College of Ambulance Ltd* [280] had been "wrongly decided". Likewise a will limiting estates to persons who should acquire the title of marquis or duke has been held against public policy, [281] but not, perhaps surprisingly, on condition of acquiring a baronetcy, as that was held not to involve public duties. [282]

Assignment of pay, pensions, etc. [283]

16-031

An agreement to assign or mortgage the salary of a public officer, i.e. one paid from national funds, [284] is against public policy; and the same is true of the pension attached to such an office. [285] For instance, the pay of a naval surgeon on active service cannot be assigned [286] nor can half-pay of an army officer. [287] A clerk of petty sessions cannot assign his salary. [288] But it has been held that there may be a lawful partnership in the profits of an office. [289]

Neglect of duty

16-032

An agreement, the natural effect of which is to induce a public officer to neglect his duty or which would influence him to perform it in a particular way, is against public policy. Thus an agreement between one who held the offices of town clerk and clerk of the peace of a borough and an attorney, that the former would, for reward to him, recommend the latter to parties who might want an attorney to conduct prosecutions arising in the town clerk's office, was held illegal. [290]

Procurement of public benefits

16-033

An agreement to induce a person who has access to persons of influence to use his position to procure a benefit from the Government is contrary to public policy. [291] Similarly the sale of a recommendation to be given on an application for a beer-house licence is contrary to public policy. But a contract between the tenant of a beer-house and brewers, one of whom was a magistrate, that, in consideration of their paying the costs of his application to the magistrates for a licence, he would tie the premises to them, was held not to be void although it involved the brewers supporting the application, on the ground, inter alia, that the agreement was not void for champerty since an application for a licence is not litigation, licensing sessions not being a court. [292]

Withdrawal of opposition to Bill

16-034

At any rate in the absence of any intention to practise a fraud on some individual or on the legislature, bargains between the promoters of a private Parliamentary Bill and a third party under which the promoters agree to purchase property from the third party [293] partly as an inducement for him to withdraw opposition to the proposed Bill, or to amend the Bill and pay the third party a sum of money, appear not to be contrary to public policy. [294] Although the court has jurisdiction to enforce by injunction a contract entered into by a person or corporation that they will not apply to Parliament, or will not oppose an application to Parliament, no such injunction appears ever to have been granted and judges have frequently stated that it is difficult to conceive a case in which such jurisdiction should be exercised. [295]

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269. For the definition of a public officer under s.47(3) of the Solicitors Act 1932 (re-enacted by s.22

of the Solicitors Act 1974 and amended by Administration of Justice Act 1985 s.6), see *Beeston & Stapleford U.D.C. v Smith [1949] 1 K.B. 656*.

270. *Blachford v Preston (1799) 8 T.R. 89, 94*; *Parsons v Thompson (1790) 1 H.Bl. 322*.

271. *Osborne v Williams (1811) 18 Ves. 379*.

272. *Liverpool Corp v Wright (1859) 28 L.J. Ch. 868*; and see *McCreery v Bennett [1904] 2 Ir.R. 69*.

273. *R. v Whitaker [1914] 3 K.B. 1283*.

274. Local Government Act 1972 s.117; cf. *Mellis v Shirley and Freemantle Local Board of Health (1885) 16 Q.B.D. 446*. See above, para.11-028.

275. Local Government Act 1972 s.94 (as amended by the Local Government and Housing Act 1989 Sch.11; Police and Magistrates' Courts Act 1994 Sch.4); repealed by Local Government Act 2000 s.107 as from a day to be appointed.

276. *Parkinson v College of Ambulance Ltd [1925] 2 K.B. 1*. Such an agreement would now constitute an offence under the Honours (Prevention of Abuses) Act 1925.

277. *[1925] 2 K.B. 1*.

278. *[2016] UKSC 42* at [118]. See also *[2016] UKSC 42* at [228].

279. *[2016] UKSC 42* at [150].

280. *[1925] 2 K.B. 1*.

281. *Egerton v Earl Brownlow (1853) 4 H.L.C. 1*.

282. *Re Wallace [1920] 2 Ch. 274*.

283. See below, para.19-048.

284. *Re Mirams [1891] 1 Q.B. 594* (involving the assignment of the salary of the chaplain to a workhouse which was held not to be against public policy).

285. *Grenfell v The Dean and Canons of Windsor (1840) 2 Beav. 544*. Such assignments may also be avoided by statute: e.g. see the Army Act 1955 s.203 (on which see *Roberts v Roberts [1986] 1 W.L.R. 437*), and the Air Force Act 1955 s.203; see also the Sale of Offices Act 1551 as extended by the Sale of Offices Act 1809 and the cases thereon cited in the 22nd edition of this work, paras 856–860. cf. Logan (1945) 61 L.Q.R. 240.

286. *Apthorpe v Apthorpe (1887) 12 P.D. 192*.

287. *Flarty v Odlum (1790) 3 T.R. 681*.

288. *McCreery v Bennett [1904] 2 Ir.R. 69*.

289. *Sterry v Clifton (1850) 9 C.B. 110*; and see *Collins v Jackson (1862) 31 Beav. 645*.

290. *Hughes v Statham (1825) 4 B. & C. 187l*; *Savill Bros v Langman (1898) 79 L.T. 44*.

291. *Montefiore v Menday Motor Components Co [1918] 2 K.B. 241*.

292. *Savill Bros v Langman (1898) 79 L.T. 44*; cf. *Hughes v Statham (1825) 4 B. & C. 187* and

Criminal Law Act 1967 ss.13, 14.

293. *Taylor v Chichester & Midhurst Ry (1870) L.R. 4 H.L. 628*.

294. *Simpson v Lord Howden (1842) 9 Cl. & Fin. 61*; and see *Shrewsbury and Birmingham Ry Co v London and N.W. Ry Co (1851) 17 Q.B. 652*; *Edwards v Grand Junction Ry Co (1836) My. & Cr. 650*. "A landowner cannot be restricted of his rights because he happens to be a Member of Parliament": *Earl of Shrewsbury v North Staffordshire Ry (1865) L.R. 1 Eq. 593, 613*. See also, Standards in Public Life (First Report of the Committee on Standards in Public Life, Cm.2850–1), Ch.2.

295. *Bilston Corp v Wolverhampton Corp [1942] Ch. 391*; *Ware v Grand Junction Waterworks Co (1831) 2 Russ. & My. 470, 483*; *Heathcote v North Staffordshire Ry Co (1850) 2 Mac. & G. 100, 109*; *Re London, Chatham & Dover Ry Arrangement Act (1869) L.R. 5 Ch. App. 671*.

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(ii) - Foreign Affairs

Trading with the enemy

16-035

All trading with the enemy, [296] except with royal licence, is against public policy. [297] On the same principle "it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of" this country in time of war [298] or involving intercourse with or benefit to the enemy, [299] however insignificant in quantum [300] and notwithstanding the benefit which may accrue to this country from such a contract. [301] Nor may the contract merely be suspended during hostilities. [302] Thus, a contract by a British subject to insure an enemy against loss through capture by British ships is unenforceable ab initio, even though it was entered into before the commencement of hostilities. [303] Similarly, a contract of insurance on goods shipped from an enemy's port on board a neutral ship, the goods having been purchased in the enemy's country by the agent of the assured after hostilities had commenced, has been held to be against public policy. [304] An English company found to have enemy character by reason of enemy control [305] does not cease, in the eye of English law, to be an English company subject to this rule. [306]

Illegality under applicable foreign law [307]

16-036

Where the contract is governed by a system of law other than English, i.e. under the principles of English private international law, as now laid down in the Rome Convention on the law applicable to contractual obligations, [308] the law governing the contract is foreign, and the contract is unenforceable for illegality under the relevant doctrine of the foreign system, the contract is also unenforceable in England, [309] unless the vitiating illegality under the governing law is one that the English court declines to recognise because, e.g. it imposes an unfair discrimination upon one or both of the contracting parties. [310]

Performance contrary to public policy in place for performance

16-037

Where a contract governed by English law is contrary to the public policy of the state where it is to be performed, this will not necessarily constitute a bar to the contract being enforceable in England. [311] However, in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [312] Phillips J. stated that [313]:

> "… the English courts should not enforce an English law contract which falls to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.
>
> In such a situation international comity combines with English domestic policy to militate against enforcement."

Presumably condition (i) would be sufficient to prevent the contract from being enforced irrespective of the governing law or where the place of performance of the contract may be. [314] However, not all principles of public policy are necessarily of universal application and where the policy is based on "considerations which are purely domestic" [315] then this would not constitute a bar to enforcement of a contract that has to be performed abroad.

Contracts legal under applicable law but not under English law

16-038

Where the contract is, however, valid by its foreign governing law, will it be unenforceable in England because it would be regarded as illegal or contrary to public policy under the rules governing domestic contracts? Article 16 of the Rome Convention provides that the:

> "… application of a rule of law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum." [316]

Under the previous law it was clear that if the contract involved criminality either by statute or at common law, then it might be unenforceable in England despite its validity under the governing law and it may be that this is still so if the criminality is serious enough. [317] Where, however, the contract, though not involving criminality, is alleged to offend against one of the recognised heads of English public policy, great care should be exercised by the courts in determining whether the domestic policy demands the non-enforcement of a contract with substantial or even exclusive foreign elements which is valid under the system of law with which it has the closest connection. It cannot, however, be said that the courts have carefully considered this problem; instead they have usually applied the English heads of public policy and held such contracts unenforceable in England. [318] In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [319] the court held that the approach adopted in this paragraph would also "seem apposite in the case of an English law contract to be performed abroad".

16-039

Where again the contract is valid by its foreign governing law, but fails to comply with an English regulatory statute rendering similar domestic contracts void or unenforceable but not illegal, the courts have sometimes enforced the agreement, [320] sometimes not. [321] It is thought that the proper principle is that such agreements should be enforced unless the social policy expressed in the English statute is of such paramount importance that it must be applied even to a transaction with foreign elements or unless the contract, or its breach, has a substantial contact with England. This seems to accord with art.16 cited above; and also art.7.2 which allows the application of:

> "… the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

Illegality under foreign law applicable to contract

16-040

Is a contract unenforceable in England in a case where it is illegal by a foreign law other than the law applicable to the contract? The decisions on this question are somewhat confusing, but the following propositions appear to represent the law before the adoption of the Rome Convention. First, the English courts would not enforce any contract the recognition of which might constitute a hostile act against a foreign friendly government. Thus, in *De Wütz v Hendricks* [322] the plaintiff, in order to raise a loan in support of Greek rebels against their Turkish government, deposited with the defendant certain papers. The loan having fallen through, the purpose of the transaction which encompassed the overthrow of a friendly government prevented the plaintiff recovering the papers. Likewise in *Regazzoni v K.C. Sethia (1944) Ltd* [323] a contract to export a commodity from India to South Africa contrary to the law of the former country was held unenforceable. And although the English courts have refused to enforce a penal law at the suit of a foreign state, [324] nevertheless they will not enforce a contract which involves the breach of such a law, [325] or grant equitable relief [326] to one whose claim is based on such breach unless the law in question was "repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country" or such that its enforcement would be against "morals". [327] English courts have also refused to enforce a contract where the common intention of the parties was to violate the law of a foreign friendly state. [328] The above principle, however, has not been extended to cases where there was a mere sale in England in the knowledge that the goods were to be imported into a foreign country contrary to the revenue law of that country [329] or where there was the giving of an English cheque as part of an arrangement which, as the parties knew and intended, would involve the doing of acts in a foreign country which were criminal by the laws of that country. [330] Nor has the fact that strict compliance with the contract would cause a party to perform illegal acts contravening exchange control regulations in the country of his residence, or place of business, prevented the English court from upholding the contract and awarding damages in the event of its breach. [331] The explanation of these cases was that performance of the contracts did not "necessarily" involve the doing of an act which was unlawful by the law of the place where it had to be carried out. [332] Difficulties have been encountered in ascertaining whether performance of a contract involves such an illegal act. In making this assessment it was said to be:

> "… immaterial whether one party has to equip himself for performance by an illegal act in another country. What matters is whether performance itself necessarily involves such an act." [333]

But all these matters may now require reconsideration in the light of the Rome Convention. [334]

Contract forbidden in place of performance

16-041

Secondly, it is said that English courts will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed. [335] This proposition, for which there is authority, [336] would clearly apply where the English law is the law governing the contract. However, beyond this the proposition has been doubted; the cases supporting it have been considered in the final analysis to turn on other propositions, [337] or to have reflected the application of standard principles of contract law or principles of English public policy. [338] There does not appear to be any overriding requirement of English public policy rendering such contracts unenforceable where they are governed by a foreign system of law and are not regarded as illegal under that system.

Foreign laws of extraterritorial application

16-042

Thirdly, certain foreign laws are of extraterritorial application and may purport to make contracts illegal although these contracts do not necessitate any illegal acts within the foreign jurisdiction and although the parties to them do not contemplate such acts. [339] In such circumstances there is no authority that the English courts would refuse to enforce the contract solely on account of the extraterritorial application of the foreign law, and there are indications to the contrary. [340]

Knowledge of foreign illegality

16-043

Where illegality by foreign law is pleaded, it may be that one of the parties is unaware of the illegality of the transaction, or of the illegal purpose intended by the other party. In such circumstances, the principles discussed above, paras 16-020, 16-021, have been applied, except that, foreign law being regarded by an English court as a matter of fact, ignorance as to the actual content of the foreign rule would appear to be equivalent to a mistake of fact, not of law. Thus in *Fielding & Platt Ltd v Najjar* [341] English machinery manufacturers contracted with a Lebanese company to make and deliver an aluminium press for £235,000, payment to be made by promissory notes given by N, the company's managing director, and payable at intervals during the progress of the work. The English manufacturers began the work, presented the first note for payment, but it was not honoured. In an action upon the note N pleaded that the whole transaction was illegal and unenforceable in that it was agreed that the manufacturers should render invoices which they knew to be false for the purpose of deceiving the Lebanese authorities into admitting goods into Lebanon under import licences which did not in fact cover these goods. The Court of Appeal held that the English manufacturers were entitled to succeed since, even on the assumption that the foreign illegality was capable of vitiating an English contract, it was not a term that the false invoices be made, so that the contract could be performed lawfully; and even if there were such a term, there was not sufficient evidence to show that the manufacturers appreciated the illegality or intended to participate in it.

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296. As to who is an enemy, see above, paras 12-024 et seq., and below, para.16-172.

297. *Ertel Bieber & Co v Rio Tinto Co [1918] A.C. 260, 273, 289*; and see *The Hoop (1799) 1 C.Rob. 196*; *Ogden v Peele (1826) 8 Dow. & Ry 1*; as to illegality by statute, see below, paras 16-152 et seq. See further McNair, *Legal Effects of War*, 4th edn; and see below, paras 16-172—16-173, as to the frustrating effect of war.

298. *Furtado v Rogers (1802) 3 Bos. & Pul. 191, 198*.

299. *Kuenigl v Donnersmarck [1955] 1 Q.B. 515, 536*; *Ertel Bieber & Co v Rio Tinto Co [1918] A.C. 260, 274*.

300. *Bevan v Bevan [1955] 2 Q.B. 277, 240*.

301. *The Hoop (1799) 1 C.Rob. 196, 199–200*.

302. *Ertel Bieber & Co v Rio Tinto Co [1918] A.C. 260*.

303. *Furtado v Rogers (1802) 3 Bos. & Pul. 191*; *Ertel Bieber & Co v Rio Tinto Co [1918] A.C. 260, 273, 289–290*.

304. *Potts v Bell (1800) 8 T.R. 548*. As to the validity of insurance against seizure immediately before the outbreak of hostilities, see *Janson v Driefontein Consolidated Mines Ltd [1902] A.C. 484, 499*.

305. See below, para.16-172.

306. *Kuenigl v Donnersmarck [1955] 1 Q.B. 515*; and see at 539: “Many of the old decisions dating from a more liberal age which suggest that British subjects in enemy territory enjoy a measure of freedom in their dealings with the enemy are of doubtful authority today.”

307. See below, paras 30-357 et seq.; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.216.

308. Applicable by virtue of the Contracts (Applicable Law) Act 1990.

309. Rome Convention arts 8, 10.

310. Rome Convention art.16; *Heriz v Riera (1840) 11 Sim. 318*; *Kahler v Midland Bank Ltd [1950] A.C. 24*; *Zivnostenska Banka National Corp v Frankman [1950] A.C. 57*; *MacKender v Feldia A.G. [1967] 2 Q.B. 590, 601*; *Re Lord Cable [1977] 1 W.L.R. 7*. As to meaning of applicable law see below, paras 30-129 et seq.

311. Collier (1988) C.L.J. 169, 170 and cases there cited.

312. *[1988] Q.B. 448*; *Tekron Resources Ltd v Guinea Investment Co Ltd [2004] 2 Lloyd’s Rep. 26*.

313. *[1988] Q.B. 448, 461*.

314. *[1988] Q.B. 448, 459*.

315. *[1988] Q.B. 448, 459*.

316. See generally, Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.221 and r.229.

317. *Boissevain v Weil [1950] A.C. 327*; Dicey & Morris at r.210.

318. *Grell v Levy (1864) 16 C.B.(N.S.) 73*; *Kaufman v Gerson [1904] 1 K.B. 591*; contrast the narrower and, it is submitted, better approach in *Addison v Brown [1954] 1 W.L.R. 779*. See also *Att-Gen of New Zealand v Ortiz [1984] A.C. 1*.

319. *[1988] Q.B. 448, 459*.

320. *Quarrier v Colston (1842) 1 Ph. 147*; *Saxby v Fulton [1909] 2 K.B. 208*; *Sayers v International Drilling Co [1971] 1 W.L.R. 1176*.

321. *Leroux v Brown (1852) 12 C.B. 801*; cf. *English v Donnelly (1958) S.C. 494* and *Brodin v A/R Seljan (1973) S.L.T. 198*.

322. *(1824) 2 Bing. 314*.

323. *[1958] A.C. 301*. Se also *Mahonia Ltd v JP Morgan Chase Bank [2003] 2 Lloyd’s Rep. 911*; *Mahonia Ltd v West LB AG [2004] EWHC 1938 (Comm)*; *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd [2004] EWHC 245 (Comm), [2004] 2 Lloyd’s Rep. 335, [2004] All E.R. (D) 10*.

324. *Government of India v Taylor [1955] A.C. 491*. On what constitutes a penal law see *Att-Gen of New Zealand v Ortiz [1984] A.C. 1*.

325. *Regazzoni v K.C. Sethia Ltd [1958] A.C. 301*; cf. *Pye v B.G. Transport Service [1966] 2 Lloyd’s Rep. 300*; *Fielding & Platt Ltd v Najjar [1969] 1 W.L.R. 357*.

326. *Re Emery’s Investment Trusts [1959] Ch. 410*.

327. *Regazzoni v K.C. Sethia Ltd [1958] A.C. 301, 327*, per Lord Keith; see also Lord Somerville, 330; *Brokaw v Seatrain UK Ltd [1971] 2 Q.B. 476*; *Att-Gen of New Zealand v Ortiz [1984] A.C. 1*

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328. *Foster v Driscoll [1929] 1 K.B. 470*; *Toprak Mahsullri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA [1979] 2 Lloyd's Rep. 98, 106–107*; *Ispahari v Bank Melli Iran (1997) T.L.R. 701*; *Soleimany v Soleimany (1998) C.L.C. 779, 792*: "Nor will it [i.e. English law] enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country." Although the courts will not enforce a contract illegal by the law of the country of performance, where it has been performed the courts may recognise its effect: *Royal Boskalis Westminster NV v Mountain [1997] C.L.C. 816, 866*.

329. *Foster v Driscoll [1929] 1 K.B. 470, 518*.

330. *Sharif v Azad [1967] 1 Q.B. 605*; cf. *Mansouri v Singh [1986] 1 W.L.R. 1393*. The contract in this case involved exchange control legislation, on which see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012) at r.264; *United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] 1 A.C. 168, 188–191*.

331. *Kleinwort Sons & Co v Ungarische Baumwolle Industrie Aktiengesellschaft [1939] 2 K.B. 678*; *Kahler v Midland Bank Ltd [1950] A.C. 24, 48*; *Rossano v Manufactures' Life Assurance Co [1963] 2 Q.B. 352*. See, however, Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012) at r.264.

332. *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728, 743–746*.

333. *[1989] Q.B. 728, 269*.

334. Below, paras 30-017 et seq. and paras 30-116—30-119.

335. *Ralli Bros v Compania Naviera Sota y Aznar [1920] 2 K.B. 287*. In *Eurobank Ergasias SA v Kalliroi Navigation Co Ltd [2015] EWHC 2377 (Comm)* at [36] the court considered "that *Ralli* remains good law" despite the Convention on the Law Applicable to Contractual Obligations (Rome Convention): see Vol.I, paras 30-017 et seq.

336. *Ralli Bros v Compania Naviera Sota y Aznar [1920] 2 K.B. 287*; *Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financière SA [1979] 2 Lloyd's Rep. 98*; *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728*.

337. Reynolds (1992) 109 L.Q.R. 553.

338. Reynolds (1992) 109 L.Q.R. 553; Collier, *Conflict of Laws*, 3rd edn (2001), pp.210–212; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), r.221 at paras 32-144—32-151; (discussing, inter alia, whether *Ralli Bros* survives the Rome Convention).

339. e.g. the United States Sherman Act 1890; see the Report of the Attorney-General's Committee to Study the Antitrust Laws (1955), pp.66–67; Brewster et al., Waller's Antitrust and American Business Abroad, 3rd edn (1997).

340. *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd [1953] Ch. 19*; *Sharif v Azad [1967] 1 Q.B. 605, 617*. See also Protection of Trading Interests Act 1980. Under s.7(1) effect may be given to the mandatory rules of another country but this, by s.7(2), is not to restrict effect being given to the law of the forum where it is mandatory, irrespective of the law otherwise applicable to the contract.

341. *[1969] 1 W.L.R. 257*.

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(i) - Agreements to Conceal Offences and Compromises

Concealment of crime generally

16-044

A provision in any agreement not to disclose misconduct of such a nature that it ought, in the public interest, to be disclosed to others is against public policy. [342] There is no confidence as to the disclosure of iniquity. [343] But it may well be permissible for a person against whom frauds have been, and are intended to be, committed to give a binding promise of secrecy, in order to obtain information relating to those frauds, which will enable him, by taking steps himself, to prevent the commission of future frauds. However, such a promise will be against public policy where it extends to frauds committed and contemplated against others to whom the communication of the information obtained would be of use in preventing the commission of such frauds. [344]

Criminality of agreements to conceal an arrestable offence

16-045

In many cases where there is, in effect, an undertaking not to disclose a crime, the crime amounts also to a civil wrong against the promisor and the undertaking is given as part of an agreement to compromise or settle the civil wrong; the question then arises whether the inclusion of the undertaking not to disclose the information or to instigate a public prosecution renders unenforceable the compromise of the civil wrong. Section 5 of the Criminal Law Act 1967 provides that where an arrestable offence [345] has been committed, anyone who knows or believes:

(i)

that an arrestable offence [346] has been committed; and

(ii)

that he has information which might be of material assistance in securing the prosecution or conviction of any offender for it,

is guilty of an indictable offence [347] if he accepts, for not disclosing that information, any consideration other than:

(a)

the making good of loss or injury occasioned by the offence; or

(b)

the making of reasonable compensation for that loss or injury. [348]

Otherwise the compounding of an offence (other than treason) is no longer a criminal offence by English law. [349]

16-046

An agreement, express or implied, [350] which is criminal by virtue of the provisions of s.5 of the Criminal Law Act 1967, is undoubtedly unenforceable civilly. [351] But are compromises of offences [352] other than those which are unlawful under s.5 of the Criminal Law Act 1967 enforceable? Where the consideration or part of it takes the form of a promise not to report the matter to the police, or not to initiate a prosecution, the transaction runs the risk of being considered a stifling of a prosecution and may be considered contrary to public policy. It is in any case clear that where a person has already made a statement with a view to the provision of evidence in support of criminal proceedings, even if that person is the victim of the alleged crime, that person becomes a witness and the promise to him of an inducement, [353] even by way of compensation for the loss or injury, to alter or withdraw the statement, constitutes the crime at common law of attempting to pervert the course of justice, [354] and is therefore unenforceable. It is clear that an agreement that would not be offensive to public policy is where the innocent party is seen clearly to be compromising *only* his civil claim, and is not offering either not to report the matter, or not to initiate a prosecution, or to withdraw statements already made. Whether other agreements, for example, one involving a promise not to bring a criminal action, would not be enforceable is not clear. Prior to the 1967 Act, an undertaking not to take action with respect to misdemeanours was binding and enforceable; where the agreement pertained to a crime which was a felony or a misdemeanour of a public nature it was not enforceable. What is left of the old learning in the light of both the abolition of the distinction between misdemeanours and felonies and s.5 of the Criminal Law Act 1967 is not clear. The commentators do not speak with a single voice. [355] Given that the courts appear to have been given an opportunity to reconsider the matter, the preferable solution would be to jettison completely the old rule and only strike down those compromises which were manifestly contrary to the public interest. [356]

Trustees in bankruptcy

16-047

The trustee in bankruptcy of one who has paid money or given security in pursuance of an agreement which is rendered illegal by s.5 of the Criminal Law Act 1967 is probably in no better position than the bankrupt and is therefore unable to recover [357] unless perhaps the payment was an offence against the bankruptcy laws. [358]

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342. *Initial Services Ltd v Putterill [1968] 1 Q.B. 396*. cf. *Schering Chemicals Ltd v Falkman Ltd [1982] Q.B. 1*; *Hubbard v Vosper [1972] 2 Q.B. 84*; *A. v Hayden (1985) 59 A.L.J.R. 6*. See also *Lion Laboratories Ltd v Evans [1985] Q.B. 526*; *Att-Gen v Guardian Newspapers Ltd (No.2) [1990] 1 A.C. 109, 268–269*.

343. *Gartside v Outram (1857) 26 L.J. Ch. 113, 114*.

344. *Howard v Odhams Press [1938] 1 K.B. 1, 41–42*.

345. As to what is an arrestable offence, see Police and Criminal Evidence Act 1984 s.24(1).

346. Police and Criminal Evidence Act 1984 s.24(1).

347. Not necessarily the offence which has in fact been committed.

348. Such an offence can be prosecuted only by or with the consent of the Director of Public Prosecutions: Criminal Law Act 1967 s.5(3).

349. Criminal Law Act 1967 s.5(1); cf. *Flower v Sadler (1882) 10 Q.B.D. 572*.

350. As to the implication of an agreement in such circumstances, see *William v Bayley (1886) L.R. 1 H.L. 200*; *Brook v Hook (1871) L.R. 6 Ex. 89*; *Whitmore v Farley (1881) 45 L.T. 99*; *McClatchie v Haslam (1891) 65 L.T. 691*; *Jones v Merionethshire Building Society [1892] 1 Ch. 173*. cf. *Howard v Odhams Press [1938] 1 K.B. 1*; *Bhowampur Banking Corp Ltd v Sreemati Durgesh Nandini Dasi (1941) 68 L.R.I.A. 144*, per Lord Atkin at 148. As to the possibility of a plea of duress or undue influence in such cases, see above, paras 8-045—8-047.

351. See above, para.16-023.

352. Criminal Law Act 1967 s.1(1) abolished as from January 1, 1968, the distinction between felonies and misdemeanours, and s.1(2) provides that, subject to the provisions of that Act, on all matters on which a distinction was previously made between felonies and misdemeanours, the law and practice is to be the law and practice applicable at the commencement of the Act in relation to misdemeanours. The special rules relating to the stifling of a prosecution of a felony have thus been abrogated.

353. If part of the consideration is also a promise not to commence a civil action for damages, see below, paras 16-211 et seq. for the principles on the possibility of severing the tainted from the untainted promise.

354. *R. v Panayiotou [1973] 1 W.L.R. 1032*.

355. See Hudson (1980) 43 M.L.R. 532.

356. Hudson (1980) 43 M.L.R. 532.

357. cf. *Re Mapleback (1876) 4 Ch. D. 150* as to the position at common law before 1968 (the trustee takes the estate subject to its limitations in the hands of the bankrupt).

358. cf. *Re Campbell (1884) 14 Q.B.D. 32* as to the position at common law before 1968; and see below, paras 20-024—20-025.

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(ii) - Other Contracts Affecting the Course of Justice

Interference with course of justice

16-048

Any contract which tends to abuse, prevent or impede the due course of justice is against public policy. A bond upon consideration that criminal proceedings shall be so conducted that the name of a certain person shall not be mentioned, or shall be mentioned only in such a way as not to damage him, is against public policy, [359] as is an agreement not to appear and give evidence at a criminal trial. [360] Similarly agreements to institute a prosecution as a means of gaining publicity, [361] or to consent to a verdict of not guilty in respect of a public nuisance, [362] have been held to be contrary to public policy. And a contract with one who has stood bail to indemnify him amounts to an indictable offence [363] and is unenforceable. [364] However, there are many circumstances in which parties can agree as to the future course of legal proceedings. Thus, for example, in a commercial agreement relating to the sale of land, it has been held not to be against public policy for one of the parties to agree to support the other party's application for planning permission. [365]

Procurement of pardon and withdrawal of election petition

16-049

An agreement to pay money, in consideration of a party using his interest to procure the pardon of a convict, is against public policy. [366] And so is an agreement in consideration of a money payment to withdraw an election petition in which charges of bribery are made, [367] it being in the public interest that the investigation should be carried out.

Winding up

16-050

An agreement by a shareholder in a company which is being compulsorily wound up that, in consideration of a sum of money, he would endeavour to postpone the making of a call or would support the claim of a creditor is unenforceable as being contrary to the policy of the insolvency legislation and perhaps also an interference with the course of public justice. [368]

Bankruptcy

16-051

All "composition" agreements between a debtor and creditor of a preferential character are unenforceable. [369] In addition the essence of such agreements being equality between the creditors, a creditor who has executed a composition deed is entitled to repudiate it against the other creditors if he afterwards discovers that they have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition, even if the bargain was made after his own execution of the deed. [370] Similarly, agreements for the withdrawal of opposition to the discharge of a bankrupt are unenforceable. [371] But a contract by an undischarged bankrupt in consideration of a small loan to pay in full a debt due from him at the commencement of and provable in his bankruptcy is not void as being contrary to public policy or the principles of the law of bankruptcy. [372]

Divorce: collusive agreements

16-052

A collusive agreement between the parties [373] to matrimonial proceedings is an agreement or bargain between the parties or their agents whereby the initiation of the suit is procured or its conduct provided for. [374] At one time these were held to be unenforceable. However, in *Sutton v Sutton* [375] the court held that public policy, particularly in the light of s.1(2)(d) of the Matrimonial Causes Act 1973 (permitting divorce by agreement after two years' separation), no longer rendered a contract unenforceable on the grounds of collusion. In that case the parties, who had lived apart for three years, agreed to an amicable divorce on the grounds of two years' separation and as part of the arrangement the husband agreed to transfer title to the matrimonial home to the wife. The wife sought specific performance of this promise and, although she was unsuccessful on the grounds that the agreement was unenforceable as an attempt to oust the jurisdiction of the court, the court held that the principle that collusive agreements were void and unenforceable, was no longer the law. If of course the parties fabricate the grounds on which a divorce is sought then this would make any agreement to do this unenforceable as an attempt to pervert the course of justice. [376]

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359. *Lound v Grimwade (1888) 39 Ch. D. 605*.

360. *Collins v Blantern (1767) 2 Wils. 341*; 1 Sm.L.C., 13th edn, p.406; cf. *Fulham Football Club Ltd v Cabra Estates Plc [1993] P.L.R. 29, [1994] 1 B.C.L.C. 363*.

361. *Dann v Curzon (1910) 104 L.T. 66*.

362. *Windhill Local Board v Vint (1890) 45 Ch. D. 351*.

363. *R. v Porter [1910] 1 K.B. 369*.

364. *Hermann v Jeuchner (1885) 15 Q.B.D. 561* (money actually deposited with a surety was held not to be recoverable); *Consolidated Exploration & Finance Co v Musgrave [1900] 1 Ch. 37*; *Re Gurwicz [1919] 1 K.B. 675*.

365. *Fulham Football Club Ltd v Cabra Estates Plc [1994] 1 B.C.L.C. 363*. A term in a settlement not to repeat claims made in proceedings was not against public policy: *Australia and New Zealand Bank Group Ltd v Cie Woga D'Importation et D'Exportation SA [2007] EWHC 293 (Comm), [2007] 1 Lloyd's Rep. 487*.

366. *Norman v Cole (1800) 3 Esp. 253*; but see *Lampleigh v Brathwait (1615) Hob. 105*.

367. *Coppock v Bower (1838) 4 M. & W. 361*.

368. *Elliott v Richardson (1870) L.R. 5. C.P. 744*.

369. *Mallalieu v Hodgson (1851) 16 Q.B. 689*; and see *Staines v Wainwright (1839) 6 Bing.N.C. 174*. See below, paras 20-027 et seq.

370. *Re Milner (1885) 15 Q.B.D. 605*. And see *Re Myers [1908] 1 K.B. 941*; *Farmers' Mart v Milne [1915] A.C. 106*; *Re Johns [1928] Ch. 737*; cf. above, para.16-026.

371. See *McKewan v Sanderson (1875) L.R. 20 Eq. 65*; *Kearley v Thomson (1890) 24 Q.B.D. 742*.

372. *Wild v Tucker [1914] 3 K.B. 36*; and see *Jakeman v Cook (1878) 4 Ex. D. 26* where the promisor was a discharged bankrupt.

373. cf. *Prevost v Wood (1905) 21 T.L.R. 694* as to an agreement between a petitioner and a third party with whom sexual relations took place.

374. *Gosling v Gosling [1968] P. 1, 11–12*.

375. *[1984] Ch. 184*; see Cretney and Masson, *Principles of Family Law*, 8th edn (2008), Ch.13.

376. Although there is a provision enabling the parties to refer an agreement to the court for approval, this procedure is now obsolete: see Rayden and Jackson, *Law and Practice in Divorce and Family Matters*, 16th edn (1991), p.508.

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(iii) - Ouster of Jurisdiction

Maintenance agreements

16-053

Any provision by which a wife binds herself not to apply to the divorce court for maintenance is void as an ouster of the jurisdiction of the courts [377]: but one which, by purporting to make maintenance a debt enforceable at law, is now by statute [378] binding on the parties and provides consideration for a counter-promise, although on application to the court it may be varied or revoked. [379] But an agreement is not, even at common law, void as contrary to public policy merely because it limits a husband's right to apply to the courts for a reduction in his liability for maintenance for his wife [380] or because it ousts the jurisdiction of a foreign court. [381]

Arbitration [382]

16-054

If the parties seek by agreement to take the law out of the hands of the courts and into the hands of a private tribunal, except as permitted by the Arbitration Act 1996, then the agreement, to the extent that it deprives recourse to the courts in case of errors of law, is contrary to public policy. [383] In *Leigh v National Union of Railwaymen*, [384] it was held that, since the court's jurisdiction could not be ousted, the court was not bound by an express provision in a trade union's rules that domestic remedies must be exhausted first, though a plaintiff would have to show cause why the court should intervene; in the absence of any such provision, though the court would more readily grant relief, it might first require the plaintiff to resort to the domestic remedies. An arbitration clause per se does not at common law oust the jurisdiction of the court [385] and it was held in *Scott v Avery* [386] that a provision making an arbitration award a condition precedent to the bringing of an action did not oust the jurisdiction of the court. And it is not against public policy to agree that all claims are to be taken to arbitration and that unless this is done within a certain period (however short) a claim is to be deemed as having been waived. [387] The court will set aside an arbitrator's award if it seeks to give effect to a contract which is illegal or contrary to public policy. [388]

16-055

The Arbitration Act 1996 enables parties to enter into binding arbitration agreements which enable the parties to determine "how their disputes are resolved" [389] and to curtail the jurisdiction of the court to interfere with the arbitral procedure which they have established. [390] In order to oust effectively the jurisdiction of the court and to have the rights of the parties determined by arbitration, the parties must have entered into an arbitration agreement. An arbitration agreement is defined as any agreement by the parties in writing [391] to submit their disputes to arbitration. [392] Where an arbitration agreement within the meaning of the 1996 Act is entered into, certain provisions of the Act, referred to as

mandatory provisions, have effect irrespective of any agreement of the parties to the contrary. [393] The effect of these mandatory provisions is to ensure that the dispute is resolved by the terms of the agreement and not by recourse to courts. [394]

Questions of fact and expert evaluation

16-056

There is no objection to the parties making a private tribunal the final arbiter on questions of fact. [395] Thus, it often happens that by the rules of a game or a race or competition a stated person is to decide who is the winner and so on and that his decision shall be final. Those questions must be decided by the designated person or persons. [396] Where an agreement provides that in the case of a dispute the services of an expert should be used and that his decision "shall be conclusive and final and binding for all purposes", this will be binding on the parties unless there has been fraud or bias on the part of the expert or he has been guilty of "mistake". [397] Mistake in this context requires the expert to have "departed from his instructions in a material respect" [398] for example, an expert who has been employed to value shares values the wrong number of shares or values shares in the wrong company. [399] Accordingly, the determination of the expert will be binding if "he has answered the question in the wrong way" but if "he has answered the wrong question, his decision will be a nullity". [400] However, an attempt to oust completely the jurisdiction of the court in the sense that the parties are precluded from seeking judicial redress even if there is fraud or bias by the expert would be ineffective. [401] However, the parties can validly give a power to one of them "to determine something which affects their rights". [402]

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377. *Hyman v Hyman [1929] A.C. 601*; *Bennett v Bennett [1952] 1 K.B. 249*; *Sutton v Sutton [1984] Ch. 184, 195–198*; Matrimonial Causes Act 1973 s.34.

378. Matrimonial Causes Act 1973 s.34. As to the previous position at common law, see *Bennett v Bennett [1952] 1 K.B. 249, 262*, see also para.16-052. The private ordering of the consequences of divorce raises difficult issues: see Cretney and Masson, *Principles of Family Law*, 8th edn (2008), Ch.13.

379. Matrimonial Causes Act 1973 s.35 (as amended).

380. *Russell v Russell [1956] P. 283*.

381. *Addison v Brown [1954] 1 W.L.R. 779*.

382. See Ch.32.

383. *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329*.

384. *[1970] Ch. 326*.

385. *Scott v Avery (1856) 5 H.L.C. 811*; *Edwards v Aberayron Mutual Ship Insurance Society (1876) 1 Q.B.D. 563*; *Hallen v Spaeth [1923] A.C. 684*.

386. *(1856) 5 H.L.C. 811*.

387. *Atlantic Shipping & Trading Co Ltd v Louis Dreyfus & Co [1922] 2 A.C. 250*. But under s.12 of the Arbitration Act 1996 the court has power to extend the time: Ch.32.

388. *David Taylor & Son Ltd v Barnett Trading Co [1953] 1 W.L.R. 562*; cf. *Birtley & District Co-operative Society Ltd v Windy Nook & District Industrial Co-operative Society Ltd (No.2) [1960] 2 Q.B. 1*; but see *Bellshill & Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd [1960] A.C. 832*.

389. s.1(b).

390. s.1(c).

391. s.5, note in particular s.5(3) and (6).

392. s.6 (the dispute does not have to be contractual).

393. s.4 and Sch.1.

394. in particular, ss.9–11.

395. *Baker v Jones [1954] 1 W.L.R. 1005, 1010*; *West of England Shipowners Mutual Insurance Association v Cristal Ltd [1996] 1 Lloyd's Rep. 370*. Such a decision, however, is open to challenge on the grounds of fraud or perversity: *West of England Shipowners' [1996] 1 Lloyd's Rep. 370, 377–379*.

396. *Brown v Overbury (1856) 11 Exch. 715*; *Sadler v Smith (1869) L.R. 5 Q.B. 40*; *Cipriani v Burnett [1933] A.C. 83*.

397. *Jones v Sherwood Computer Service Plc [1989] 1 W.L.R. 277* (noted (1993) 109 L.Q.R. 385).

398. *Jones v Sherwood Computer Service Plc [1989] 1 W.L.R. 277, 287*.

399. *Jones v Sherwood Computer Service Plc [1989] 1 W.L.R. 277*.

400. *Nikko Hotels (UK) Ltd v MEPC Plc [1991] 2 E.G.L.R. 103, 108*. For other relevant authorities see (1993) 109 L.Q.R. 385.

401. (1993) 109 L.Q.R. 385 discussing *Re Davstone Estate's Ltd Leases [1969] 2 Ch. 378*.

402. *Charles Stanley & Co v Adams [2013] EWHC 2137 (QB)* at [17]. This is subject to the normal caveat that the parties cannot oust the jurisdiction of the court.

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(iv) - Maintenance and Champerty

Maintenance and champerty formerly crimes

16-057

For many centuries prior to 1968 maintenance and champerty were crimes both at common law [403] and by statute. [404] However the Criminal Law Act 1967 now provides [405] that, as from January 1, 1968, "any distinct offence under the common law in England and Wales of maintenance (including champerty)" should be abolished; and the Act repealed [406] various old statutes relating to the two crimes. The Act further abolished [407] tortious liability for maintenance and champerty. But s.14(2) of the Act provides that:

> "… the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."

Public policy today respecting maintenance and champerty

16-058

It is thought that the provisions of s.14(2) of the Criminal Law Act 1967 must mean that at least prima facie contracts which under the law before 1968 would have been unenforceable for maintenance [408] or champerty [409] are still to be unenforceable therefor, even though the criminality attaching to such contracts has been removed. In *Trendtex Trading Corp v Credit Suisse*, [410] Lord Roskill considered it plain from s.14(2) that:

> "Parliament intended to leave the law as to the effect of maintenance and champerty upon contracts unaffected by the abolition of them as crimes and torts."

This is an area where the courts clearly recognise that public policy is subject to change in the light of, for example, the need to ensure access to civil justice. [411] Thus the recent reforms on "no win no fee" arrangements obviously effect a significant change in public policy with respect to maintenance and champerty. [412] In *Kellar v Williams* [413] Lord Carswell stated obiter that the:

> "… content of public policy can change over the years, and it may now be time to reconsider the accepted [common law] prohibition [on conditional fees] in the light of modern practising conditions." [414]

In *Sibthorpe v Southwark LBC* [415] it was argued that the modern law of champerty should reflect the more tolerant attitude towards maintenance and champerty and ask (in this case, with respect to a conditional fee arrangement):

> "whether it would undermine the purity of justice, or would corrupt public justice, a question to be decided on a case by case basis." [416]

Although the court saw the attractions of such an approach, it considered that on the basis of authority it had no application to a champertous agreement:

> "entered into with a person who is conducting the litigation in question (or providing advocacy services in connection therewith)." [417]

Such arrangements were considered a "special" case and subject to stricter rules.

Maintenance

16-059

A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. [418] The mischief directed against is wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever and where the assistance he renders to one or the other party is without justification or excuse. [419] The bounds of justification and excuse for supporting litigation by others have been greatly widened over time. [420] In the strict sense of the term, the doctrine of maintenance applies only to litigation [421] actually pending [422]; but unjustified *instigation* of actions by others is treated as "savouring of maintenance". [423] It is not the less maintenance because the maintained action was successful. [424]

Justification

16-060

The doctrine of maintenance, being founded on considerations of public policy, "cannot at any time become frozen into immutable respectability" [425] but must be "reappraised in light of current notions of public policy and of international trading practices". [426] As long ago as 1883 it was said that it was unhelpful to go back very far in the authorities relating to justification [427] and the grounds of justification have been further greatly widened, [428] so that Danckwerts J.'s judgment in *Martell v Consett Iron Co Ltd* [429] can now be taken as the foundation of the modern law. [430] In that case an association for the protection of the rights of owners and occupiers of fisheries and for the prevention of pollution of rivers supported an action by one of its members in respect of alleged pollution of a river flowing through the member's land. Danckwerts J. rejected the defendant's contention that the association was unlawfully maintaining the action, holding that "support of legal proceedings based on a bona fide community of pecuniary interest or religion or principle or problems" did not constitute maintenance. [431] The Court of Appeal, in affirming the decision, held that the defendants had not shown that the association was not acting in defence of the collective interests of its members on the principle of mutual protection. [432]

Examples of justification

16-061

It has been said that most of the actions in our courts today:

> "… are supported by some association or other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies." [433]

It is clear that ordinarily none of those cases today constitutes maintenance. [434] Similarly a body is not guilty of maintenance in supporting an action for defamation brought by one of its officers where, if the defamatory words complained of are true, the officer is unfit to continue in the body's employment. [435] It has always been a justification for the maintenance of an action that the maintainer acted solely with a charitable motive, and that is so even though there was no ground for the maintainer's action which he took without reasonable inquiry. [436] There may be evidence of maintenance in a solicitor taking up an action for a poor person [437] though it is probable that he may do so if he acts bona fide and has perhaps satisfied himself that there is a proper cause of action. [438] Blood relationship would seem to be a justification for maintenance. [439] The courts, particularly in commercial cases, have recognised that a sufficient interest does not have to be proprietary in character and in *Trendtex Trading Corp v Credit Suisse* [440] Oliver L.J. was willing to go so far as to hold that maintenance would be justified "wherever the maintainer has a genuine pre-existing financial interest in maintaining the solvency of the person whose action he maintains". The interest, however, must be distinct from any benefit which arises under the contract which is allegedly illegal as constituting maintenance. [441] It has been held that despite the judgment of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd* [442] a majority shareholder in a company possesses a sufficient interest so that an assignment to him of the company's cause of action is not against public policy. [443]

Effect of maintenance

16-062

In principle a contract of maintenance should be held to be unenforceable between the parties to it. [444] But even when maintenance was a crime, the illegal maintenance of an action was not a defence to the action, nor did it afford a ground for stay of proceedings. [445] The remedy of the other party to the litigation was before 1968 an action in tort. It would still appear to be the position that the court will not stay proceedings which are being maintained provided the proceedings do not constitute an abuse of the process of the court, that is, an action commenced in bad faith with no genuine belief in its merits but commenced for an ulterior purpose. [446] Also, the court does not have inherent jurisdiction to dismiss a maintained action which is not an abuse of the process of the court because the maintainer declines to give an undertaking as to costs, or to make such an order itself. [447]

Champerty

16-063

Champerty has been defined as "an aggravated form of maintenance" [448] and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit [449] or other contentious proceedings where property is in dispute. [450] For champerty there must not only be interference in the suit but there must be the added factor of a division of the spoils. [451] There is an obvious relationship between maintenance and champerty, you cannot have the latter without the former but "there can still be champerty even if the maintenance is not unlawful". [452] In *Sibthorpe v Southwark LBC* [453] an agreement by a solicitor to indemnify a claimant client against any liability for costs awarded in favour of the defendant was not champertous. The court found that no case had been cited to it in which an agreement was held champertous where a person agreed "to run the risk of a loss if the action in

question fails, without enjoying any gain if the action succeeds". [454] The court considered that the various definitions of champerty "all envisage a gain if the action concerned succeeds". [455] The court also considered that modern public policy was to facilitate access to civil justice and accordingly it was hard to accept that it was against public policy for a lawyer to agree to shoulder the risk of an adverse order for costs. In *Giles v Thompson*, [456] Lord Mustill was of the opinion that champerty as it related to an agreement by a solicitor to accept payment of his fees measured as a proportion of the damages recovered by his client survived largely as a rule of professional conduct. [457] While there undoubtedly have been significant changes in the rules relating to fee arrangements between solicitors and their clients which now permit arrangements which previously would have been champertous, [458] it is suggested that it would be going too far to treat the rule as being merely one of professional conduct. It is no justification for a champertous agreement that the contracting parties are related by blood. [459] The question arises whether the court can enjoin proceedings that are champertous. The reasoning in *Abraham v Thompson* [460] would suggest not. Where the plaintiff relies on a champertous assignment to sue, the action would be enjoined not, however, because of the champerty as such but because it is not possible to assign a cause of action.

Champertous agreements between solicitor and client

16-064

At common law an agreement by a solicitor to provide funds for litigation [461] or without charge to conduct litigation, [462] in this country, in consideration of a share of the proceeds is champertous, [463] and this is so even though the agreement was made abroad. [464] It was argued in *Wallersteiner v Moir (No.2)* [465] that considerations of policy demanded an exception to this rule, namely where a shareholder intended to bring an action on behalf of a company against those in control of the company who had allegedly committed wrongs against it, such an action being extremely costly to the individual and, in the event of success, bringing him probably small personal benefit. But a majority [466] of the Court of Appeal refused to create such an exception. In *Awwad v Geraghty & Co (A Firm)* [467] it was held that at common law an agreement whereby the client would pay a lower fee if he lost but a higher fee if he won was illegal and unenforceable. [468] The agreements in *Awwad* and *Thai Trading* would now be valid under s.27 of the Access to Justice Act 1999. [469] An agreement whereby a solicitor obtained more than his profit costs (unless it was a permitted conditional fee), or a contingent fee, would probably be unenforceable. [470] Where a solicitor enters into a champertous agreement, he cannot recover from his client his own costs [471] or even his out-of-pocket expenses. [472] But the solicitor does not act champertously unless he is a party to the agreement or participates in it by voluntarily doing a positive act to assist the parties in its execution, and the mere fact that the solicitor knows or gets to know of a champertous agreement relating to litigation in which he is engaged does not prevent him from suing on an otherwise lawful retainer. [473] If a lawful retainer is subsequently varied by a champertous agreement, the solicitor probably cannot disregard the agreement and rely on his ordinary rights under the retainer. [474]

Non-champertous agreements between solicitor and client

16-065

Section 58 of the Courts and Legal Services Act 1990, as amended by s.27 of the Access to Justice Act 1999, is designed to enable a solicitor and client to enter into a conditional fee agreement. A conditional fee agreement is one whereby a person providing advocacy or litigation services is only to be paid his fees or expenses in specified circumstances, [475] or which provides for a success fee. [476] Such an agreement must be in writing, relate to proceedings which can be the subject of conditional fee arrangements, and comply with the requirements (if any) specified by the Lord Chancellor. [477] Where the conditional fee provides for a success fee, the percentage increase must comply with any order made by the Lord Chancellor regulating the permitted percentage of increase. [478] Section 58 provides that agreements "shall not be unenforceable by reason of being a conditional fee agreement" as permitted by s.58 but that other conditional fee agreements shall be unenforceable. [479] Certain proceedings cannot be the subject matter of any form of conditional fee; these are criminal and family proceedings as defined in s.58A of the Courts and Legal Services Act

1990. There are other forms of fee agreement between a solicitor and client which are not treated as being champertous. There is no objection to a solicitor agreeing to charge no costs against his client. [480] And a solicitor and client may agree for a fixed remuneration in lieu of costs, [481] such agreement must be in writing and is subject to the proviso that no validity is given to any purchase by a solicitor of his client's interests in any action, suit or other contentious proceedings, or to any success. [482] The mere fact that a solicitor had conducted proceedings on credit or that he was aware of his clients lack of means did not entail that he was unlawfully maintaining that action. [483] Section 58 of the 1990 Act (as amended) only applies to those who could be described as "litigators", that is, advocates and those conducting the litigation. [484] Thus it has been held that an agreement whereby accountants were paid 8 per cent of damages recovered for professional services in preparing claimants' claim but which did not involve the issue of liability, was not champertous. [485] An agreement made in England which is champertous is lawful if it relates to litigation in a country where champerty is lawful. [486] A similar result was reached where a claims' recovery agent in respect of damages to sea cargo, acted on a "no cure no pay" basis but if the claim was successful 5 per cent of the recovery would be paid to the agent. [487] However, situation where an expert was to give evidence on a contingent fee basis was highly undesirable and the court would seldom consent to an expert being instructed on a contingent fee basis. [488]

Agreements savouring of champerty: assignments of the right to litigate

16-066

In *Trendtex Trading Corp v Credit Suisse*, [489] the Court of Appeal and House of Lords fundamentally re-examined the law of maintenance and champerty in so far as it applied to the assignment of the right to litigate. Much simplified, the facts in that case were as follows. The plaintiff (T) sold cement, payment to be made by confirmed letter of credit. The issuing bank (CBN) failed to honour the letter of credit and T sued for payment. T was successful in the Court of Appeal but leave was given to CBN to appeal to the House of Lords. At this juncture T assigned its right of action against CBN to the defendants, Credit Suisse, to whom T was heavily indebted for financial assistance provided in connection with the cement contract and the litigation arising out of the dishonouring of the letter of credit. The agreement whereby T assigned its right of action to Credit Suisse also provided that Credit Suisse could assign the right of action to a third party which Credit Suisse eventually did. T subsequently considered that it had been duped by the defendants into making the assignment for what turned out to be a gross undervaluation, and sought to have the assignment set aside on the ground that the whole transaction was champertous. [490] The Court of Appeal upheld the assignment. The defendants had a close commercial relationship with the defendants which would have justified them in maintaining an action by the plaintiff or in participating in any proceeds of action and, in the light of this, Oliver L.J., could not see why the actual "assignment of the cause of action itself" should not also be valid. [491] Lord Denning M.R. saw no reason why the benefit of the right to sue for damages for breach of contract should not be assignable given that the benefit of the contract before breach was assignable. [492] However, the right to litigate about purely personal claims is not assignable [493] and where a solicitor is involved the courts would not adopt such a tolerant attitude to the validity of the assignment:

> "… because an English court will not permit one of its own officers to put himself in a position in which his interest and duty may conflict." [494]

16-067

Broadly speaking the House of Lords supported the reasoning of the Court of Appeal, although it differed on the application of that reasoning to the facts of the instant case. Lord Roskill considered that Oliver L.J., had not failed [495] to distinguish between the interest:

> "… necessary to support an assignment of a cause of action and the interest which would justify the maintenance of an action by a third party."

If the assignee has:

> "… a genuine commercial interest in taking the assignment and in enforcing it for his own benefit (there was) no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance." [496]

Lord Roskill did, however, disapprove [497] of the view of Lord Denning M.R. in the Court of Appeal that "[t]he old saying that you cannot assign a 'bare right of litigate' is gone"; this still remained a fundamental principle of English law and the assignee needed to demonstrate a commercial interest in the enforcement of the claim for the assignment to be valid. [498] The House of Lords considered that the assignment in this case was void because it was the first step in a transaction whereby the cause of action was to be assigned to a third party who had no legitimate commercial interest in the transaction. If the assignment had merely been to Credit Suisse it would have been valid. [499]

Personal claims

16-068

As was stated above, [500] a personal claim is not capable of assignment. [501] It has been held that in determining whether a claim is personal for the purpose of this prohibition the "critical question … is whether the identity of the person to whom the obligation is owed is an essential aspect of it". [502] A very narrow interpretation has been given to this prohibition and it has been considered that it does not preclude assignment of a claim for damages for personal injury. [503] The court reasoned that it was difficult to see why a claim for damages to property caused by negligence could not be assigned and, if this were the case, a claim for damages for personal injury should be treated analogously. [504] The court did recognise that enforcing such a claim could give rise to complications such as those relating to "the provision of statements of truth, disclosure, set-off and counterclaim and other procedural matters" [505] but that these were inherent in all assignments of a cause of action and not unique to personal injury claims.

16-069

That the vice in *Trendtex* was that the assignment contemplated the assignee selling the claim to a stranger for a higher price than it had paid for it is clear from *Brownton Ltd v Edward Moore Inbucon Ltd*. [506] In that case the plaintiffs sought advice from A on the installation of computer equipment and on the basis of that advice purchased equipment from B. The equipment never worked. The plaintiffs sued A for damages who in turn alleged that the defective operation of the equipment was due to the fault of B, whereupon the plaintiffs joined B as second defendants. A paid a sum of money into court in settlement of its liability towards the plaintiffs and the plaintiffs were willing to accept this as full satisfaction of its claim against both A and B provided it could reach a satisfactory arrangement on the costs of the various parties. When B refused to agree to any arrangement, A assigned to the plaintiffs any cause of action it might have against B arising out of installation of the equipment. B's claim that this assignment was champertous failed. The court found that the plaintiffs had a sufficient commercial interest to justify the assignment and this distinguished the case from *Trendtex* where the:

> "… contemplated assignment to the anonymous third party was objectionable … because he had no genuine pre-existing commercial interest in the outcome of the cause of action." [507]

The court also held that for the assignment to be valid it was not necessary that the "assignee's interest applied to every facet of the cause of action", [508] all that was needed was that the assignee possess a genuine commercial interest which had to be determined on an examination of the transaction as a whole. In addition, it was not fatal to the validity of an assignment that the assignee might be better off as a result of the assignment, or that the assignee might make a profit out of it. [509]

However, where the "figures … were massively disproportionate", the figures being what the assignee paid and what he was liable to gain, then the agreement would be champertous. [510]

16-070

All previous authorities must now be read in the light of *Trendtex's* greater liberality on assignments of the right to litigate and its rejection of any broad rule supposedly prohibiting the assignment of the right to litigate for damages. What appears in the following paragraphs are examples of recurrent situations involving the assignment of a right to litigate. Of course, where the court permitted assignment before *Trendtex* then obviously it will also be permitted after it. Thus assignments of debts are permissible [511] (even though the assignee's object in taking the assignment was to make the debtor bankrupt), [512] or assignments of the fruits of an action, [513] or assignments of property (even though the property is incapable of being recovered without litigation), [514] or assignments designed "to support or enlarge" a property interest which the assignee already possesses. [515] It may also be that the old distinctions between maintenance, champerty and assignment are being dissolved. As was stated by Lloyd L.J. in *Brownton Ltd v Edward Moore Inbucon Ltd* [516] there is no difference between the interest "required to justify a share in the proceeds, or the interest required to support an out-and-out assignment". On this reasoning involvement in litigation will be justified if it can be shown that the party in question has sufficient interest in the litigation.

Assignment incidental to transfer of property

16-071

An assignment of a right to litigate is good if it is incidental and subsidiary to a transfer of property. [517] The question is whether the subject matter of the assignment is property with an incidental remedy for its recovery, or a bare right of action. [518] Thus a conveyance of property by a vendor who has previously conveyed that property to another by a deed voidable in equity is good, as the vendor retained an interest which he could dispose of and which carried with it a right of action to have the earlier deed set aside. [519] In *Williams v Protheroe* [520] the vendor and purchaser of an estate agreed that the purchaser, bearing the expense of certain suits which had been commenced by the vendor against an occupier for bygone rent, should have any rent recovered and also any sum that might be recovered for dilapidations, and that the purchaser might at his own expense use the name of the vendor in any action he might think fit to commence against the occupier for arrears of rent or dilapidations. It was held that this agreement was not illegal as amounting to champerty. In *Ellis v Torrington* [521] the plaintiff took an assignment of the benefit of certain covenants to repair contained in an expired underlease, having already purchased the fee simple of the property from another person. This assignment was held free from objection on the ground of champerty, the right of action on the covenants being so connected with the enjoyment of property as to be more than a bare right to litigate. It was held to be immaterial that the assignment was made later than the purchase of the property, and by a person other than the vendor. Again, in *Performing Rights Society Ltd v Thompson* [522] the plaintiff society had been formed as a company to protect the copyright interests of its members, who assigned their copyrights to the society and by its rules shared in all damages recovered by the society. This was held to be a legitimate business arrangement and not champertous. In *Camdex International Ltd v Bank of Zambia*, [523] the court held that the assignment of a debt in accordance with s.136 of the Law of Property Act 1925, in circumstances where it was contemplated that an action would be necessary in order to obtain payment, did not constitute maintenance. Also, such an assignment would not be contrary to public policy even if the assignor maintained some interest in the debt.

Assignment to person beneficially entitled to right

16-072

Where before the Judicature Act 1873 equity would have compelled A to exercise his rights against a contract breaker or tortfeasor for the benefit of B, those rights can validly be assigned by A to B and, subject to due compliance with s.136 of the Law of Property Act 1925, can be enforced by B in his own name at law. [524] Therefore an underwriter, who has indemnified his insured under a policy of

insurance and has in consequence been legally assigned the insured's rights of action against third parties, may sue those third parties in his own name to enforce those rights of action. [525]

Assignment by trustee in bankruptcy and liquidator

16-073

Rights of action which are the property of a bankrupt and pass to his trustee in bankruptcy may be assigned by the trustee, even though they may be only bare rights of action. These are treated as saleable as being part of the assets for the benefit of creditors. [526] And an agreement between some of the creditors of a bankrupt and the trustee that an action of the bankrupt should be carried on at their private expense, on the terms of receiving a larger share of the fruits of the action, was held not to offend against the law of champerty. [527] It has also been held that an assignment of a cause of action can be made by a liquidator. [528] It is normally not possible for a company to obtain legal aid but it may be awarded in exceptional circumstances. [529] The combined effect of these rules has serious consequences for a company that goes into liquidation since it will often find it difficult to fund litigation unless the creditors are willing to put it in funds. To circumvent these rules, the question arises as to whether it is possible for the liquidator to assign a cause of action of the company to an individual with an interest in the litigation, for example, a director or the majority shareholder. The reason for such assignment is that the individual, unlike the company, is entitled to legal aid and not subject to a security for costs order. *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd* [530] involved such an assignment which, inter alia, provided that the fruits of the action would be first used to pay the company's creditors and any balance divided equally between the company and the assignee. The assignment was made under the liquidator's powers to sell the company's property which includes choses in action. [531] The court held that the assignment was valid and on established principles was not subject to the rules relating to maintenance and champerty. It has been held that the rules relating to maintenance and champerty apply to the assignment of the fruits of an action (but not the cause of action itself) where the assignee agrees to fund the action. [532] This decision, without expressing any definite view, has been doubted. [533] It is submitted that these doubts are justified. There are no compelling reasons for placing such a gloss on the power of the liquidator to assign a cause action vested in the company. If an assignment of the fruits of an action where the assignee does not undertake to provide funding for the action is valid, [534] it is difficult to see why an undertaking to provide such funding should make a difference; and similar principles apply to an assignment of a bankrupt's cause of action by the trustee in bankruptcy. [535]

Assignments of rights to solicitors

16-074

A solicitor cannot lawfully purchase anything in litigation of which he has had the management, [536] nor can he purchase fruits of such litigation before judgment [537]; but an assignment of an action to a solicitor preceding his employment as such is good unless it would have been unenforceable as between strangers. [538] A solicitor may lawfully take from his client a security upon property which is the subject matter of an action for advances already incurred in the action, [539] and he may take security from his client for his costs to be ascertained by taxation or otherwise. [540]

Other agreements "savouring of champerty"

16-075

An agreement merely to communicate information to a person in consideration of receiving a share of property to be recovered thereby is unobjectionable, provided there is no suit pending and no stipulation that one shall be commenced. [541] But if it is a term of the agreement that the person giving the information and who is to share in what may be recovered shall himself recover the property or actively assist in its recovery by procuring evidence or otherwise, the agreement is unenforceable as "savouring of champerty", [542] and will be set aside in equity, [543] though it may be on terms. [544]

Effect of champerty

16-076

A champertous agreement is certainly unenforceable as between the parties, [545] though sums actually advanced to the champertor under the agreement have sometimes been held to be recoverable. [546] In respect of any loss sustained in connection with a champertous agreement, a solicitor cannot maintain a claim on a policy of indemnity. [547] The champertous support of the plaintiff in an action is probably not a defence to the action and probably affords no ground for a stay of proceedings. [548] Where a champertous agreement is entered into, a solicitor who provides services under it cannot recover on the grounds of quantum meruit or any other basis for the services that he has rendered. However, where payment has been made to a solicitor under a champertous agreement and he has not behaved unconscionably towards the payor or has not been unjustly enriched, the payor is not entitled to recover the price of those services while retaining the benefit of them: the champertous agreement in this situation is simply unenforceable. [549]

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403. Maintenance: *Pechell v Watson (1841) 8 M. & W. 691*; *Neville v London Express Newspaper Ltd [1919] A.C. 368, 383, 386*, indicating need to prove want of reasonable or probably cause; champerty: *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 224*; *Master v Miller (1791) 4 T.R. 320, 340*.

404. See Criminal Law Act 1967 Sch.4.

405. s.13(1)(a).

406. s.13(1)(b) and Sch.4.

407. s.14(1).

408. See below, paras 16-059—16-062.

409. See below, paras 16-063—16-076.

410. *[1982] A.C. 679, 702*. See also the views of Lord Denning M.R. in the Court of Appeal that by striking down both the tort and crime of maintenance the Criminal Law Act 1967 also "struck down our old cases as to what constitutes maintenance, including champerty in so far as they were based on an outdated policy": *[1980] 1 Q.B. 629, 653*. Lord Denning considered that modern public policy could be found in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 K.B. 1006*; *Martell v Consett Iron Co Ltd [1955] Ch. 363*; and *Hill v Archbold [1968] 1 Q.B. 686*.

411. See *Giles v Thompson [1993] 3 All E.R. 321, 348 CA*, per Bingham M.R.; "the law on maintenance and champerty has not stood still, but has accommodated itself to changing times", per Lord Mustill in the House of Lords at *[1994] 1 A.C. 142, 164*. See also *Thai Trading Co v Taylor [1998] 3 All E.R. 65* (this case was disapproved of in *Awwad v Geraghty & Co (A Firm) [2000] 1 All E.R. 608*. See Walters (2000) 116 L.Q.R. 371); *Bevan Ashford v Geoff Yeandle (Contractors) Ltd [1999] Ch. 239*. This decision involved the use of conditional fee arrangements with respect to alternative dispute resolution procedures and in this context it is now expressly recognised by the new s.58A of the Courts and Legal Services Act 1990 (introduced by s.27 of the Access to Justice Act 1999) that conditional fee arrangements apply to "any sort of proceedings for resolving disputes" (s.58A(4)). *Camdex International Ltd v Bank of Zambia [1996] C.L.C. 1477, 1481*: "The modern approach is not to extend the types of involvement in litigation that are considered objectionable. There is a tendency to recognise less specific interests as justifying the support of the litigation of another."

412. These reforms are set out in the judgment of Steyn L.J. in *Giles v Thompson [1993] 3 All E.R. 321*. See also below, para.16-065.

413. *[2004] UKPC 30, [2004] All E.R. (D) 286 (Jun)*.

414. *[2004] UKPC 30* at [21].

415. *[2011] EWCA Civ 25, [2011] 1 W.L.R. 2111*.

416. *[2011] EWCA Civ 25* at [36].

417. *[2011] EWCA Civ 25* at [37].

418. *Hill v Archbold [1968] 1 Q.B. 686*; *Trendtex Trading Corp v Credit Suisse [1980] 1 Q.B. 629, 663*. See Winfield (1919) 35 L.Q.R. 50 on the history of maintenance. See also Walters (1996) 112 L.Q.R. 560.

419. *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 K.B. 1006, 1012*; *Hill v Archbold [1968] 1 Q.B. 686, 697*; *Giles v Thompson [1994] 1 A.C. 142, 164*.

420. See below, para.16-060.

421. See *Re Trepca Mines Ltd (No.2) [1963] Ch. 199*; cf. *Moore v Usher (1835) 7 Sim. 383, 388*; cf. *Pickering v Sogex Services (UK) Ltd (1982) 262 E.G. 770*.

422. *Flight v Leman (1843) 4 Q.B. 883*.

423. *Flight v Leman (1843) 4 Q.B. 883*; *Greig v National Amalgamated Union of Shop Assistants (1906) 22 T.L.R. 274*.

424. *Neville v London Express Newspaper Ltd [1919] A.C. 368*.

425. *Martell v Consett Iron Co Ltd [1955] Ch. 363, 375*; *Giles v Thompson [1994] 1 A.C. 142, 164*.

426. *Trendtex Trading Corp v Credit Suisse [1980] 1 Q.B. 629, 663*; see also *[1982] A.C. 679, 702*.

427. *Bradlaugh v Newdegate (1883) 11 Q.B.D. 1, 7*; and see *Ellis v Torrington [1920] 1 K.B. 399, 412*.

428. *Hill v Archbold [1968] 1 Q.B. 686, 694, 697*; *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679, 702*; see also the Law Commission, Proposals for the Reform of the Law Relating to Maintenance and Champerty (1966), pp.3–4; *Giles v Thompson [1993] 3 All E.R. 321, 330, CA*.

429. *[1955] Ch. 363*.

430. *Hill v Archbold [1969] 1 Q.B. 686, 694, 700*; *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679, 702*.

431. *Martell v Consett Iron Co Ltd [1955] Ch. 363, 387*.

432. *Martell v Consett Iron Co Ltd [1955] Ch. 363, 389, 420, 430*.

433. *Hill v Archbold [1968] 1 Q.B. 686, 694–695*.

434. *Hill v Archbold [1968] 1 Q.B. 686*; *Bourne v Colodense Ltd [1985] I.C.R. 291*.

435. *Scott v National Society for the Prevention of Cruelty to Children (1909) 25 T.L.R. 789*; *Hill v Archbold [1968] 1 Q.B. 686*, where the Court of Appeal stated that *Oram v Hutt [1914] 1 Ch. 98 CA* and *Baker v Jones [1854] 1 W.L.R. 1005* (Lynskey J.) would not now be decided as they were; contrast *Martell v Consett Iron Co Ltd [1955] Ch. 363, 389, 414–419, 425*.

436. *Harris v Brisco (1886) 17 Q.B.D. 504*; *Holden v Thompson [1907] 2 K.B. 489*; cf. *Cole v Booker (1913) 29 T.L.R. 295*. In *Simpson v Norfolk & Norwich University Hospital NHS Trust [2011]*

EWCA Civ 1149 at [23] the court considered *Holden v Thompson* to be "expressly based on an exception to the general law of maintenance in respect of charitable support and is not … authority of any broader proposition".

437. *Wiggins v Lavy (1928) 44 T.L.R. 721*, but that was before legal aid.

438. *Ladd v London Road Car Co, The Times, March 14, 1900*.

439. *Rothewel v Pewer (1431) Y.B. 9 Hen. 6, 64*, pl.713; *Pomeroy v Abbot Buckfast (1443) Y.B. 22 Hen. 6; (1442) Y.B. 21 Hen. 6, 15*, pl.30; and see *Harris v Brisco (1886) 17 Q.B.D. 504, 512–513*; 1 Hawkins P.C., 8th edn, p.488; cf. *Hutley v Hutley (1873) L.R. 8 Q.B. 112*.

440. *[1980] 1 Q.B. 629, 668*. This view was implicitly endorsed in the House of Lords. There Lord Roskill was willing to hold that a genuine commercial interest was sufficient to enable an assignee of a cause of action to enforce it and on this reasoning the views of Oliver L.J. on what constitutes a sufficient justification for maintaining an action were implicitly adopted; see *[1982] A.C. 679, 703*; see also *Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All E.R. 499* ; below, para.19-049.

441. *Giles v Thompson [1994] 1 A.C. 142, 163 HL*.

442. *[1982] Ch. 204* (shareholder had no standing to bring action where wrong to the company allegedly reduced the value of his shares) (cf. *Fischer (Great Britain) Ltd v Multi Construction Ltd [1995] 1 B.C.L.C. 260*; *Johnson v Gore Wood [2002] 2 A.C. 1*).

443. *Circuit Systems Ltd & Basten v Zucken Redac (UK) Ltd (1995) 11 Const. L.J. 201, 209* (on appeal this point did not have to be decided: *[1996] 3 All E.R. 748*).

444. *Cole v Booker (1913) 29 T.L.R. 295, 297*; Lord Coleridge C.J.'s obiter dictum to the contrary in *Bradlaugh v Newdegate (1883) 11 Q.B.D. 1, 4* cannot be taken to represent the law.

445. *Martell v Consett Iron Co Ltd [1955] Ch. 363*.

446. *Abraham v Thompson [1997] 4 All E.R. 362*. It is considered that *Grovewood Holdings Plc v James Capel & Co Ltd [1995] Ch. 80* (dealing with a champertous agreement) is no longer good law: see note (1998) 114 L.Q.R. 207.

447. *Abraham v Thompson [1997] 4 All E.R. 362*. See also *Murphy v Young & Co's Brewery Plc [1997] 1 Lloyd's Rep. 236*. It is submitted that *McFarlane v E.E. Caledonia Ltd (No.2) [1995] 1 W.L.R. 366* is no longer good law. The proper way to proceed is to seek an order against the maintainer under s.51 of the Senior Courts Act 1981. The court could make an order under s.51 against a shareholder of a company as a shareholder who funded or controlled a company's litigation in order to protect his own financial interests: see *CIBC Mellon Trust Co v Stolzenberg [2005] EWCA Civ 628, [2005] 2 B.C.L.C. 618*.

448. *Giles v Thompson [1993] 3 All E.R. 321, 328, CA*.

449. *Trendtex Trading Corp v Credit Suisse [1980] 1 Q.B. 629, 663*; *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 219*; *Haseldine v Hosken [1933] 1 K.B. 822, 831*; and see *Anderson v Radcliffe (1858) E.B. & E. 806, 819, 825*. Champerty only relates to legal proceedings: *Pickering v Sogex Services (UK) Ltd (1982) 262 E.G. 770*.

450. *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 224*; *Master v Miller (1791) 4 T.R. 320, 340*.

451. *Giles v Thompson [1994] 1 A.C. 142, 161*.

452. *Thai Trading Co v Taylor [1998] 3 All E.R. 65, 69*. This case was disapproved of in *Awwad v Geraghty & Co (A Firm) [2000] 1 All E.R. 608* but this does not affect this aspect of the judgment.

453. *[2011] EWCA Civ 25, [2011] 1 W.L.R. 2111*.

454. *[2011] 1 W.L.R. 2111* at [43].

455. *[2011] 1 W.L.R. 2111* at [43].

456. *[1994] 1 A.C. 142*.

457. *Giles v Thompson [1994] 1 A.C. 142, 153–154*.

458. See below, para.16-065.

459. *Hutley v Hutley (1873) L.R. 8 Q.B. 112*; cf. above, para.16-061.

460. See n.356, above.

461. See above, para.16-061. As to assignments of rights to solicitors, see below, para.16-074.

462. See above, para.16-061.

463. *Re Masters (1835) 4 Dowl. 18*; *Strange v Brennan (1846) 15 Sim. 346*; *Hilton v Woods (1867) L.R. 4 Eq. 432*; *Earle v Hopwood (1861) 9 C.B.(N.S.) 566*; *Hutley v Hutley (1873) L.R. 8 Q.B. 112*; *Re A Solicitor [1912] 1 K.B. 302*; *Re A Solicitor (1913) 29 T.L.R. 354*; *Wiggins v Lavy (1928) 44 T.L.R. 721*. See also *Westlaw Services Ltd v Boddy [2010] EWCA Civ 929* (an agreement to pay a percentage of the fees received by a solicitor from the Legal Services Commission for help provided by non-solicitors who acted as "legal consultants" was void and unenforceable and there could be no quantum meruit award for any of the services rendered. The Solicitors Regulatory Authority intervened as an interested party and argued against the enforceability of the agreement). See now, SRA Code of Conduct 2011: Ch.9, "Fee Sharing and Referrals".

464. *Grell v Levy (1864) 16 C.B.(N.S.) 73*.

465. *[1975] Q.B. 373*.

466. Lord Denning was prepared to allow a "contingency fee" in such circumstances. See also *Trendtex Trading Corp v Credit Suisse [1980] 1 Q.B. 629, 654, 663*.

467. *[2000] 2 All E.R. 608*.

468. The court declined to follow *Thai Trading Co (A Firm) v Taylor [1998] Q.B. 781* where such an agreement was upheld.

469. This amended s.58 of the Courts and Legal Services Act 1990. See Current Law Statutes where the Lord Chancellor is reported as stating: "Section 58 is intended to bring into effect the judgment of the Court of Appeal in *Thai Trading* into Statute Law" (Hansard, HL Vol.596, cols 956–965).

470. Courts and Legal Services Act 1990 s.58. A fee splitting agreement may be in breach of the Law Society Rules and unenforceable because it is accordingly illegal: see *Mohamed v Alaga Co [1998] 2 All E.R. 720*.

471. *Wild v Simpson [1919] 2 K.B. 544*.

472. *Re Trepca Mines Ltd (No.2) [1963] Ch. 199*.

473. *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 220–221*.

474. *Wild v Simpson [1919] 2 K.B. 544, 565*, disapproving *Grell v Levy (1864) 16 C.B.(N.S.) 73*; and see *Re Trepca Mines Ltd (No.2) [1963] Ch. 199, 222*.

475. ! Court and Legal Services Act 1990 s.58(2)(a). For techniques available to the court to regulate costs in an action involving a conditional fee agreement: see *King v Telegraph Group Ltd [2004] EWCA Civ 613, [2005] 1 W.L.R. 2282*; *Lexlaw Ltd v Zuberi [2017] EWHC 1350 (Ch)*.

476. ! Court and Legal Services Act 1990 s.58(2)(b); *Lexlaw Ltd v Zuberi [2017] EWHC 1350 (Ch)*.

477. s.58(3). Various statutory instruments have been made with respect to conditional fee orders: see *Sharratt v London Central Bus Co Ltd [2003] EWCA Civ 718, [2003] 4 All E.R. 590* where the law is fully analysed.

478. Court and Legal Services Act 1990 s.58(4)(c). The agreement must also state this amount: s.58(4)(b).

479. s.58(1).

480. *Jennings v Johnson (1873) L.R. 8 C.P. 425*. Such an agreement precludes the recovery of costs by the client from the other party to the litigation, as costs are given by way of indemnity: *Gundry v Sainsbury [1910] 1 K.B. 645*.

481. Solicitors Act 1974 ss.59–63 (contentious business); cf. s.57 (non-contentious business) (certain aspects of ss.57, 59, 60 and 61 of the 1974 Act have been amended by s.98 of the Courts and Legal Services Act 1990). See also para.16-074; *Electrical Trades Union v Tarlo [1964] Ch. 720*.

482. Solicitors Act 1974 s.59(1); and see *Electrical Trades Union v Tarlo [1964] Ch. 720*.

483. *Burstein v Times Newspapers Ltd [2002] EWCA Civ 1739, [2002] All E.R. (D) 442 (Nov)*.

484. *R. (on the application of Factortame and others) v Secretary of State for Transport, Environment and the Regions (No.2) [2002] EWCA Civ 932, [2002] 3 W.L.R. 1104*.

485. *R. (on the application of Factortame and others) v Secretary of State for Transport, Environment and the Regions (No.2) [2002] 3 W.L.R. 1104*; *Mansell v Robinson [2007] EWHC 101 (QB), [2007] All E.R. (D) 279 (Jan)*.

486. *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2) [2002] EWHC 2130 (Comm), [2002] Lloyd's L.R. 692*.

487. *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2) [2002] Lloyd's L.R. 692*.

488. *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2) [2002] Lloyd's L.R. 692*. See also *Dal-Sterling Group Plc v W.S.P. South & West Ltd Unreported August 18, 2001*.

489. *[1980] Q.B. 629, CA; [1982] A.C. 679*; *Kaukomarkkinat O/Y v "Elbe" Transport-Union GmbH (The "Kelo") [1985] 2 Lloyd's Rep. 85*; *24 Seven Utility Services Ltd v Rosekey Ltd [2003] EWHC 3415 (QB), [2004] All E.R. (D) 288 (Feb)*.

490. The Criminal Law Act 1967 s.14(2), has a bearing on this issue. As s.14(2) only applies to "cases in which *a contract* is to be treated as contrary to public policy or otherwise illegal", it may therefore be argued that completed assignments, which operate as transfers of property and not as contracts, are no longer to be avoided on grounds of public policy. It is submitted that such an argument would fail. Even before the passing of the Criminal Law Act 1967 such assignments were neither crimes nor tort but, being analogised with maintenance and champerty, were on the grounds of public policy simply treated as ineffective. These grounds of public policy remain unaffected by the Criminal Law Act 1967. See above, para.16-058.

491. *[1980] Q.B. 629, 670*.

492. *[1980] Q.B. 629, 656–657*. See also Oliver L.J., at 674: "For my part, I would be prepared to

hold that where a cause of action arises out of a right which was itself assignable, the cause of action equally remains assignable."

493. *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629, 657 and 674* (referred to by Oliver L.J. as "personal and non-assignable" contracts). Lord Denning also considered that the right to sue with respect to certain torts to property would also be assignable, but not with respect to personal torts (656–657). See, e.g. *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 K.B. 1006*. See also para.16-069.

494. *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629, 675*, per Oliver L.J., citing *Grell v Levy (1864) 16 C.B.(N.S.) 73*; *Simpson v Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149* at [21] ("Stricter rules … continue to apply to agreements entered into by those conducting the litigation or providing advocacy services").

495. *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679, 703*.

496. *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679*.

497. *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679*.

498. *Giles v Thompson [1994] 1 A.C. 142, 153* (a bare right of action is not assignable); *Simpson v Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149* at [24]: "assignment of a bare cause of action for personal injury remains unlawful and void."

499. One of the features of the assignment was that the plaintiffs assigned all rights even if the assignee recovered more than the debt owing from the plaintiff to the defendant. Lord Roskill considered this to be an agreement to divide the "spoils" between the defendant and the third party: *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679, 779*. Quaere what the position would have been if recovery beyond the debt was repayable to the plaintiff.

500. See above, para.16-066.

501. It has been held that this prohibition is not an unlawful interference with the holder's property right contrary to art.1, Protocol 1 of the European Convention on Human Rights as it constitutes a "delimitation" rather than a "deprivation": see *Simpson v Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149, [2012] Q.B. 640* at paras [25]–[27].

502. *Simpson v Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149, [2012] Q.B. 640* at [8]. See also para.19-056.

503. *Simpson v Norfolk & Norwich University Hospital NHS Trust [2012] Q.B. 640*.

504. *Simpson v Norfolk & Norwich University Hospital NHS Trust [2012] Q.B. 640* at [7].

505. *Simpson v Norfolk & Norwich University Hospital NHS Trust [2012] Q.B. 640* at [9].

506. *[1985] 3 All E.R. 499*.

507. *Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All E.R. 499, 509*, per Lloyd L.J.

508. *Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All E.R. 499, 505*, per Sir John Megaw.

509. Lloyd L.J. left open the question as to whether any profit would be returnable by the assignee to the assignor *([1985] 3 All E.R. 499, 509*). If the assignment is out and out and not by way of security it is difficult to see why this should be so.

510. *Advanced Technology Structures Ltd v Cray Valley Products Ltd [1993] B.C.L.C. 723, 733–734*.

511. *Ellis v Torrington [1920] 1 K.B. 399*; *Defries v Milne [1913] 1 Ch. 98*.

512. *Fitzroy v Cave [1905] 2 K.B. 364* (see the observations on this case in *Trendtex [1980] Q.B. 673*). Similarly a person may acquire shares in a company for the express purpose of challenging acts of the directors in litigation: *Bloxham v Metropolitan Ry (1868) L.R. 3 Ch. App. 337, 353*.

513. *Glegg v Bromley [1912] 3 K.B. 474*. See also (fraudulent claims relating to part of a claim under insurance policy vitiating whole claim), *Galloway v Guardian Royal Exchange (UK) Ltd [1999] Lloyd's Rep. I.R. 209*.

514. *Dawson v Great Northern & City Ry [1905] 1 K.B. 260*.

515. *Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 Q.B. 101*.

516. *[1985] 3 All E.R. 499, 509*.

517. *Williams v Protheroe (1829) 3 Y. & J. 129*.

518. *Glegg v Bromley [1912] 3 K.B. 474, 490*; *Technotrade Ltd v Larkstore Ltd [2007] 1 All E.R. (Comm) 104*.

519. *Dickinson v Burrell (1866) L.R. 1 Eq. 337*.

520. *(1829) 3 Y. J. 129*.

521. *[1920] 1 K.B. 399*; and see *County Hotel & Wine Co Ltd v London & N.W. Ry Co [1918] 2 K.B. 251 (affirmed on other grounds [1921] 1 A.C. 85)*.

522. *(1918) 34 T.L.R. 351*.

523. *[1998] Q.B. 22*.

524. *Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 Q.B. 101, 121*.

525. *Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 Q.B. 101*; and see Vol.II, para.42-115.

526. *Seear v Lawson (1880) 15 Ch. D. 426*; Insolvency Act 1986 s.314(1); *Weddell v J. A. Pearce & Major [1988] Ch. 26*; *Farmer v Moseley (Holdings) Ltd [2001] 2 B.C.L.C. 572*. See further below, para.20-019.

527. *Guy v Churchill (1888) 40 Ch. D. 481*.

528. *Freightex Ltd v International Express Co Ltd Unreported April 15, 1980, CA*. The assignment in this case was made to the managing director of the company who arguably had an interest, but the court considered that the language of the legislation, s.242(2)(a) of the Companies Act 1948, absolved the actions of the liquidator from the taint of maintenance or champerty. See now, Insolvency Act 1986 ss.166, 167, 436 and Sch.4.

529. Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.31, Sch.3 (this is to deal with human rights litigation).

530. *[1997] 3 W.L.R. 1177*.

531. In so far as the assignees were eligible for legal aid and the company was not, the House of Lords considered that this was a matter for the Legal Aid Board. Regulations have now been passed to deal with this: see *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd [1997] 3 W.L.R. 1177, 1187*.

532. *Grovewood Holdings Plc v James Capel & Co Ltd [1995] Ch. 80*. This case was not followed in *Re Movitor Pty Ltd (1996) 19 A.C.S.R. 440*.

533. *Re Oasis Merchandising Services Ltd [1998] Ch. 170, 179–180*. This case held that the liquidator could not assign a cause of action under s.214 of the Insolvency Act 1986 (wrongful trading) as such a cause of action was not property vested in the company. See also *Farmer v Morseley (Holdings) Ltd [2001] 2 B.C.L.C. 572, [2001] B.P.I.R. 473*. It has also been held that the liquidator could not assign his "discretionary power" to prosecute proceedings that were granted to him in his personal capacity: *Rawnsley v Weatherall Green & Smith North Ltd [2010] 1 B.C.L.C. 658*.

534. *Glegg v Bromley [1912] 3 K.B. 474*. A liquidator can assign the fruits of an action vested in the company but cannot assign his discretionary power to prosecute proceedings: see *Rawnsley v Weatherall Green & Smith North Ltd [2010] 1. B.C.L.C. 658* at [76].

535. *Stein v Blake [1996] 1 A.C. 243*.

536. *Hall v Hallet (1784) 1 Cox 134*; *Simpson v Lamb (1857) 7 E. & B. 84*; cf. *Strachan v Brander (1759) 1 Eden 303*.

537. *Wood v Downes (1811) 18 Ves. 120*; *Simpson v Lamb (1857) 7 E. & B. 84*; *Pittman v Prudential Deposit Bank Ltd (1896) 13 T.L.R. 110*. There is also a dictum to the effect that public policy in this area may be more strict where solicitors are involved: *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629, 674–675*; above, para.16-066; *Giles v Thompson [1994] 1 A.C. 142*.

538. *Davis v Freethy (1890) 24 Q.B.D. 519*.

539. *Anderson v Radcliffe (1858) E.B. 806, 819*. cf. Turner L.J. in *Knight v Bowyer (1858) 2 De G. & J. 421, 445*.

540. Solicitors Act 1974 s.65(1) (contentious business); s.56(6) (non-contentious business), as amended by Legal Services Act 2007 s.177; see also SI 1994/2616.

541. *Sprye v Porter (1856) 7 E. & B. 58*; *Rees v De Bernardy [1896] 2 Ch. 437*.

542. *Stanley v Jones (1831) 7 Bing. 369, 377*; *Rees v De Bernardy [1896] 2 Ch. 437*; *Wedgerfield v De Bernardy (1908) 25 T.L.R. 21*.

543. Above, para.16-066.

544. *Strachan v Brander (1759) 1 Eden 303*.

545. *Hutley v Hutley (1873) L.R. 8 Q.B. 112*.

546. *James v Kerr (1888) 40 Ch. D. 449*.

547. *Haseldine v Hosken [1933] 1 K.B. 822*.

548. cf. above, para.16-063.

549. *Aratra Potato Co Ltd v Taylor Joynson Garrett [1995] 4 All E.R. 695*. This case was disapproved of in *Thai Trading Co v Taylor [1998] 3 All E.R. 65* but it is submitted that this aspect of the judgment remains good law. In *Farjab v Symth Unreported, August 28, 1998 CA* the court held that champerty did not itself constitute a ground for staying proceedings; *Stocznia Gdanska SA v Laftrers Inc [2001] 2 B.C.L.C. 116* is to the same effect.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 2. - The Position at Common Law

(e) - Objects Injurious to Morality and Marriage

(i) - Immorality

Cohabitation [550]

16-077

Agreements by unmarried persons to cohabit obviously raise important questions of public policy as these agreements could be treated as being contra bonos mores [551] and therefore unenforceable. In a number of earlier authorities the courts adopted this position. Agreements in consideration of future illicit cohabitation, even though made under seal, have been held to be unenforceable. [552] But a promise given in consideration of past illicit cohabitation is good as a voluntary promise, and can be enforced if made under deed, [553] or supported by some other consideration, but not otherwise. [554] A bond given for such consideration is not invalidated by the mere fact that the illicit cohabitation continues after its execution [555]; nor that the parties contemplated its continuance, provided their intention forms no part of the consideration for the bond. [556] An agreement by a man to pay a woman with whom he was cohabiting a sum down and an annuity for life if they should separate and she should continue single and not cohabit with one D.G. or anyone else, has also been held good as being a gift on condition that she remained sole and chaste [557]; and so was an agreement by a reputed father of an illegitimate child to pay the mother an annuity if she would maintain the child and keep their connection secret, the maintenance of the child being a sufficient consideration for the contract. [558]

16-078

Extra-marital cohabitation is obviously an area where values change [559] and the older authorities clearly reflect a marriage morality which is out of tune with contemporary mores. Recently the courts have been obliged to deal with legal problems arising out of unmarried persons setting up relatively stable domestic arrangements and when these problems have arisen the issue of illegality does not appear to have been argued. For example, in *Tanner v Tanner* [560] a married man had twins by his mistress and he provided the mistress and the twins with a house. When the man subsequently attempted to evict the mistress, the court held that there was an implied contract between the parties that the mistress could live in the house, the consideration given by the mistress being her relinquishment of a rent-controlled flat. Although the contract undoubtedly involved sexual relations outside of marriage, no question of illegality was raised and there is little doubt that the court would have been unsympathetic to such a plea. [561] One way of reconciling *Tanner v Tanner* with previous authority is that:

> “an agreement for an immoral consideration is to be treated as enforceable, if there be any other, lawful consideration to support it.” [562]

From this it would follow that contractual arrangements involving unmarried parties to a relatively

stable domestic arrangement will be enforceable and the older authorities will only apply to relationships which are wholly related to the provision of sexual services. [563]

Prostitution

16-079

An action is not maintainable to recover the rent of lodgings knowingly let for the purpose of prostitution [564] or to a man's mistress for the purposes of the liaison. [565] And where the landlord, although not aware of the true facts at the time of the letting, permitted the tenant to remain after discovering that she was using the lodgings for prostitution, it was held that he could not recover from her the rent which accrued after this had come to his knowledge and he had failed to take steps to evict her. [566] All covenants in an assignment of a lease of premises which the assignor knows the assignee intends to use as a brothel are similarly unenforceable. [567] But although the tenant of an apartment may be a prostitute, and the landlord is aware of her character, he may recover his rent if she does not use his premises for immoral purposes [568]; and, in the absence of evidence specifically to connect the contract with the prostitution, [569] a contract to sell clothes to a prostitute, [570] or to wash for her, [571] is good. Where a contract of employment requires the employee to procure prostitutes, this would be a contract entered into for an immoral purpose and would be illegal and unenforceable. [572]

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550. See Cretney and Masson, *Principles of Family Law*, 8th edn (2008), at pp.188–189, 236–238.

551. "In this branch of the law the word 'immoral' connotes only sexual immorality": *Coral Leisure Group Ltd v Barnett [1981] I.C.R. 503, 506*.

552. *Benyon v Nettlefold (1850) 3 Mac. & G. 94*; *Ayerst v Jenkins (1873) L.R. 16 Eq. 275*.

553. per Lord Selborne L.C. in *Ayerst v Jenkins (1873) L.R. 16 Eq. 275, 282*; and see *Annandale, Marchioness of v Harris (1728) 1 Bro. P.C. 250; 2 P.Wms. 432*; *Turner v Vaughan (1767) 2 Wils. K.B. 339*; *Gray v Mathias (1800) 5 Ves. 286*; *Nye v Moseley (1826) 6 B. & C. 133*.

554. *Beaumont v Reeve (1846) 8 Q.B. 483*. There is no public policy against enforcing such promises as they do not promote immorality and all that is needed is consideration to make the contract binding.

555. *Hall v Palmer (1844) 3 Hare 532*; *Re Vallance (1884) 26 Ch. D. 353*.

556. *Re Wootton Isaacson (1904) 21 T.L.R. 89*; cf. *Friend v Harrison (1827) 2 Car. & P. 584*.

557. *Gibson v Dickie (1815) 3 M. & S. 463*.

558. *Jennings v Brown (1842) 9 M. & W. 496*; see also *Hicks v Gregory (1849) 8 C.B. 378*; *Smith v Roche (1859) 6 C.B.(N.S.) 223*; *Ward v Byham [1956] 1 W.L.R. 496*; *Horrocks v Foray [1976] 1 W.L.R. 230, 299*.

559. See above, para.16-004.

560. *[1975] 1 W.L.R. 1346*; see also *Chandler v Kerley [1978] 1 W.L.R. 693*; *Bernard v Josephs [1982] Ch. 391*. cf. *Horrocks v Foray [1976] 1 W.L.R. 230* (the court found that there was no contract between a man and his mistress, but the issue of illegality was not raised). See also on changing values as regards sexual mores; *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 188*; *Fitzpatrick v Sterling Housing Association Ltd [1998] Ch. 304, 308; [2001] 1 A.C. 27*; *Mendoza v Ghaidan [2002] EWCA Civ 1533, [2003] 1 F.L.R. 468*.

561. See, e.g. *Cook v Head [1972] 1 W.L.R. 518*; *Eves v Eves [1975] 1 W.L.R. 1338*.

562. Barton (1976) 92 L.Q.R. 168, 169. See also *Eves v Eves [1975] 1 W.L.R. 1338* at 1345C; *Paul v Constance [1977] 1 W.L.R. 527*.

563. See, e.g. *Marvin v Marvin (1976) 557 P.2d. 104*; *Bernard v Josephs [1982] Ch. 391*; *Heglibiston Establishment v Heyman (1977) 36 P. & C.R. 351, 360–362*; *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 188* ("Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this"). See generally Cretney, *Family Law in the Twentieth Century: A History* (2003), pp.516–527.

564. *Girardy v Richardson (1793) 1 Esp. 13*. Similarly a seller cannot recover the price of clothes furnished specifically to enable the purchaser to carry on her trade as a prostitute, the seller expecting to be paid from the profits thereof: *Bowry v Bennet (1808) 1 Camp. 348*; and see *Pearce v Brooks (1866) L.R. 1 Ex. 213*, para.16-174, below. Contrast *Lloyd v Johnson (1798) 1 B. & P. 340* (a contract for the cleaning of a prostitute's clothes, in which it was said that the use to be made of the clothes was irrelevant at least where the clothes were of such a nature that the prostitute would need them anyhow). Generally, cf. *Shaw v D.P.P. [1962] A.C. 220*.

565. *Upfill v Wright [1911] 1 K.B. 506* (in *Heglibiston Establishment v Heyman (1977) 36 P. & C.R. 351, 360–362* it was doubted if this case would today be decided the same way on its facts). cf. Vol.II, para.31-050.

566. *Jennings v Throgmorton (1825) R. & M. 251*.

567. *Smith v White (1866) L.R. 1 Eq. 626*.

568. *Appleton v Campbell (1862) 2 C. & P. 347*.

569. *Appleton v Campbell (1862) 2 C. & P. 347*.

570. *Bowry v Bennett (1808) 1 Camp. 348*.

571. *Lloyd v Johnson (1798) 1 B. & P. 340*.

572. *Coral Leisure Group Ltd v Barnet [1981] I.C.R. 503*.

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Chapter 16 - Illegality and Public Policy

Section 2. - The Position at Common Law

(e) - Objects Injurious to Morality and Marriage

(ii) - Interference with Marriage [573]

Promise of marriage by married person

16-080

A promise by a married man to marry one who knew him to be already married was unenforceable as against public policy and as tending to immorality. [574] No action lay for breach of such a promise even after the death of the wife. [575] So also with a similar promise by a married woman to marry after the death of her husband [576] or divorce. [577] A promise of marriage made by a married man in the interval between decree nisi and decree absolute was actionable if broken—since after the decree nisi the normal obligations and conditions of marriage have disappeared and consortium has come to an end. [578] Actions for breach of promise of marriage were abolished by s.1 of the Law Reform (Miscellaneous Provisions) Act 1970, so that the cases just discussed are, strictly speaking, obsolete. However, s.2 of the Act provides that "where an agreement to marry is terminated" the formerly engaged couple are to be treated for the purpose of certain rights in and disputes about property as if they had been married; and these provisions can obviously give rise to difficulty where a man has both a wife and an ex-fiancée. It may be that the difficulty can be mitigated by holding that an "agreement" in s.2 must not be contrary to public policy in the sense of the old law. But the analogy is not perfect, and the courts may take the view that, so long as the interests of the wife (or former wife) are protected, an ex-fiancée may sometimes be allowed to take the benefit of s.2 even though she could not before the Act have claimed damages. However, the Act is of very limited effect because, apart from the right to claim a share or enlarged share in a partner's property by having spent money on improvements to that property, [579] property rights between spouses are determined in accordance with the principles of property and trusts law. [580]

Marriage brokage contract

16-081

A marriage brokage contract, that is, an undertaking for reward to produce a marriage between two parties, is against public policy. [581] It has, however, been observed that "it is hard to see what is wrong with these [contracts] in modern times" [582] as many are made by quite respectable marriage bureaux. It may be that this is an area where the public policy embodied in the old cases is in need of reappraisal.

Contracts in restraint of marriage

16-082

A contract, the object of which is to restrain or prevent a party from marrying [583] or which is a deterrent

to marriage in so far as it makes any person uncertain whether he may marry or not, [584] is against public policy. There appears to be no authority on contracts in partial restraint of marriage. Should such a contract come before the courts, the authorities concerning testamentary conditions in partial restraint of marriage would probably be applied. [585]

Contract not to revoke will

16-083

A man may validly bind himself or his estate to make certain dispositions by his will. [586] And a contract not to revoke a will or not to alter its contents is not necessarily against public policy. But probably no action could be brought upon its breach by reason of the covenantor's subsequent marriage, for the will is on that event revoked by operation of law [587] and to that extent the covenant is bad as being in restraint of marriage and against public policy; but it is divisible and will be construed as a covenant against revocation by any other mode of revocation. [588]

Parental responsibility

16-084

The Children Act 1989 confers automatic parental responsibility on parents of a child who are married to each other and on a child's unmarried mother. [589] The Act stipulates that:

> "… a person who has parental responsibility for a child shall not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf." [590]

An unmarried father may also acquire parental responsibility by agreement with the child's mother made in prescribed form and recorded in the Principal Registry of the Family Division. [591] The inherent jurisdiction of the court to make appropriate orders concerning the upbringing of children cannot be ousted by agreement between the parties. [592] Surrogacy agreements have been expressly declared to be unenforceable. [593] Although the courts have power to treat a financial settlement agreed between divorcing couples as final, this does not apply with respect to agreements regarding the maintenance of children. [594] An "absent parent" may be required to pay child support maintenance to a "qualifying child" under the Child Support Act 1991 irrespective of the terms of an existing agreement between the child's parents covering the matter.

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573. As to the invalidity of agreements between husband and wife providing for their future separation, see *Brodie v Brodie [1917] P. 271*.

574. *Wilson v Carnley [1908] 1 K.B. 729*; *Spiers v Hunt [1908] 1 K.B. 720*; *Siveyer v Allison [1935] 2 K.B. 403*.

575. *Wilson v Carnley [1908] 1 K.B. 729*.

576. *Spiers v Hunt [1908] 1 K.B. 720*.

577. *Prevost v Wood (1905) 21 T.L.R. 684*.

578. *Fender v Mildmay [1938] A.C. 1*; *Psaltis v Schultz (1948) 76 C.L.R. 547*.

579. Matrimonial Proceedings and Property Act 1970 s.37.

580. *Pettitt v Pettitt [1970] A.C. 777*; *Mossop v Mossop [1989] Fam. 77*.

581. *Hermann v Charlesworth [1905] 2 K.B. 123*. See also para.16-208.

582. Atiyah, *The Law of Contract*, 5th edn (1995), p.323 (this passage is not repeated in the 6th edition).

583. *Lowe v Peers (1768) 4 Burr. 2225*; affirmed Wilmot 364; and see *Baker v White (1690) 2 Vern. 215*; *Cock v Richards (1805) 10 Ves. 429, 437*; *Hartley v Rice (1808) 10 East 22*.

584. *Re Fentem [1950] 2 All E.R. 1073*. In *Cartwright v Cartwright (1853) 3 De G.M. & G. 382* it was held that a condition in an ante-nuptial agreement that the wife would forfeit her interest if she and her husband separated was against public policy since it contemplated the separation of husband and wife.

585. See Theobald on Wills, 17th edn (2010), pp.696 et seq.

586. *Dufour v Pereira (1769) Dick. 419*; *Hammersley v Baron De Biel (1845) 12 Cl. & F. 45*; *Re Brookman's Trusts (1869) L.R. 5 Ch. App. 182*.

587. Wills Act 1837 s.18 (as substituted by the Administration of Justice Act 1982 s.18); cf. *Re Marsland [1939] Ch. 820*. (In this case the covenant not to revoke was only held to apply to revocation under s.20 of the Wills Act 1837, and not to revocation by operation of s.18. Thus the issue of public policy was not directly faced and the court did not feel obliged to express any opinion on it.)

588. *Robinson v Ommanney (1883) 23 Ch. D. 285*; Theobald on Wills 17th edn (2010), Ch.8. As to the effects of an actionable breach, see *Synge v Synge [1894] 1 Q.B. 466*; *Central Trusts & Safe Deposit Co v Snider [1916] 1 A.C. 266*.

589. Children Act 1989 s.2(1), (2).

590. s.2(9).

591. s.4(1)(b); Parental Responsibility Agreement Regulations 1991 (SI 1991/1478) (as amended). Agreements relating to the upbringing and welfare of children are heavily regulated and specialist texts need to be consulted: see Bainham & Gilmore, *Children: The Modern Law*, 4th edn (2013), at 507–510 for a brief outline.

592. *A. v C. [1985] F.L.R. 4451*.

593. Human Fertilisation and Embryology Act 1990 s.36.

594. *Minton v Minton [1979] A.C. 593, 609*.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 2. - The Position at Common Law

(f) - Contracts in Restraint of Trade [595]

(i) - Scope of the Doctrine

General rule

16-085

All covenants [596] in restraint of trade [597] are prima facie unenforceable at common law [598] and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. Unless the unreasonable part can be severed [599] by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant [600] or the entire contract [601] unenforceable. A covenant in restraint of trade (if unreasonable) is void in the sense that courts will not enforce it, but if the parties wish to implement it they would not be acting illegally and the courts would not intervene to prevent them from doing so. [602] It has been held that "a covenant which is unenforceable ab initio should simply be disregarded unless and until it is subsequently and explicitly re-agreed". [603] A general acknowledgement that the previous terms of an agreement, which is being re-adopted by the parties, remain unchanged cannot be construed as reinstating a void term, the intention of the parties to do so must be unequivocally stated. [604] It also follows from this that where A and B enter into a contract which contains an unreasonable restraint and they deposit money with T for the purposes of the contract then neither could prevent T from dealing with the money on the terms set out in the contract. [605] The doctrine of restraint of trade is probably one of the oldest applications of the doctrine of public policy; cases go back to the second half of the sixteenth century [606] and as early as 1711 it was laid down in *Mitchel v Reynolds* [607] that a bond to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good, though if it be upon no reasonable consideration or to restrain a man from trading at all, it is void. The validity of a covenant in restraint of trade is assessed at the date when the contract is entered into. [608]

Competition law

16-086

❗ This section concentrates on the common law. It should, however, be kept in mind that contracts in restraint of trade or otherwise having a restrictive impact on trade, particularly horizontal or vertical agreements relating to the supply or acquisition of goods, will often have anti-competitive effects and are therefore potentially subject to domestic and European legislation dealing with this topic. [609] This matter is now dealt with by art.101 of the Treaty on the Functioning of the European Union.

Definition of restraint of trade

16-087

The definition of a covenant in restraint of trade presents peculiar conceptual difficulty. The reason for this is that to some extent all contracts are in restraint of trade by at least preventing the parties to them from trading with others, but there has been no suggestion that all contracts are or should be subject to the doctrine. [610] In the leading House of Lords case, *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [611] Lord Reid stated [612] that he "would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade"; and Lord Wilberforce said [613] that "no exhaustive test can be stated—probably no precise non-exhaustive test" but that that was not to be regretted since [614]:

> "… the common law has often (if sometimes unconsciously) thrived on ambiguity and it would be mistaken, even if it were possible, to try to crystallise the rules of this or any aspect of public policy into neat propositions. The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason."

16-088

In the same case Lord Hodson adopted [615] the test shortly before advanced by Diplock L.J. in the Court of Appeal in *Petrofina (Great Britain) Ltd v Martin* [616] who stated [617]:

> "A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses."

Lord Morris said [618] that that was a "helpful exposition", provided that it was used "rationally and not too literally" and that the same was true of the dicta of Lord Denning M.R. in the *Petrofina* case where he had said [619]:

> "Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful: with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest."

Finally, in the *Esso* case, Lord Pearce, on the basis that [620]:

> "… somewhere there must be a line between those contracts which are in restraint of trade … and those contracts which merely regulate the normal commercial relations between the parties,"

and said [621] that the doctrine of restraint of trade:

> "… does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilisation."

Criteria for application of doctrine

16-089

The following general principles have, with varying degrees of certainty, been laid down [622]:

16-090

(1) It has now long been established that there is no distinction in principle between partial and total restraints. [623]

16-091

(2) The doctrine is not confined to a limited number of kinds of contracts [624]; but there are certain categories of covenants to which the doctrine traditionally applies, in particular those by which an employee undertakes not to compete with his employer after leaving the employer's service [625] and those by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business [626]; and those categories will always be subjected, under the doctrine, to the test of reasonableness.

16-092

(3) the doctrine is capable of applying where the restraint relates to the use of a particular piece of property as well as where it relates to the activities of an individual. [627] Thus restraints in mortgages and leases are subject to the doctrine. The application of the doctrine to *Tulk v Moxhay* [628] covenants is not, however, without difficulties and this will be dealt with later.

16-093

(4) There is strong authority for the proposition that contracts of a kind which have gained general commercial acceptance and have not been traditionally subject to the doctrine will generally not be subjected to it so as to impose upon a plaintiff the burden of justifying as reasonable their terms, though special features may bring particular contracts of that kind within the ambit of the doctrine. [629] However, public policy is not immutable and no guarantee of absolute immunity for any restraint is possible. As was stated by Lord Wilberforce in *Esso*, "absolute exemption for any restriction or regulation is never obtained". [630] Thus, for example, a covenant whereby an employee on the termination of his employment agrees not to recruit former fellow employees is now probably subject to the restraint of trade doctrine. [631]

16-094

(5) The doctrine applies to restraints which operate during the continuance of the contract. This is well illustrated by *A. Schroeder Music Publishing Co Ltd v Macaulay*. [632] There the plaintiff, a young songwriter, agreed to work as such exclusively for the defendants, who were music publishers, for five years. He assigned to them full copyright of his existing works and in future works composed during the five years. The five years was extended to 10 years if the plaintiff's royalties exceeded £5,000. The defendants could determine the agreement at any time on one month's notice and could assign the benefit of it. Although the plaintiff's royalties depended upon whether the defendants exploited his compositions, there was no obligation on the defendants to exploit any composition of the plaintiff, and if the defendants failed to do so, the plaintiff could not do so even after the determination of the contract. Lord Reid held that the contract was unduly restrictive, it was not a commercially acceptable one "made freely by parties bargaining on equal terms", [633] "or moulded under the pressures of negotiation, competition and public opinion". [634] Lord Diplock, however, asked simply what was the relative bargaining power between the songwriter and publisher at the time of contracting and whether the publisher had used his superior bargaining power to exact from the songwriter promises that were unfairly onerous to him, i.e. "was the bargain fair?" There might be a presumption of fairness in cases of conventional commercial contracts established by long usage

between equal bargaining partners, but this was not such a case. Where the restraint operates to protect the legitimate interests of the employer and was not as one sided as that in the *Schroeder* decision, it will normally be upheld. However, the absence of reciprocal obligation may be a factor in determining whether a restraint is reasonable. [635]

16-095

(6) There is authority for the proposition that it is not possible to invoke the doctrine where the restraint relates to the use or disposition of property acquired by the covenantor under the very agreement under which he accepted the restraint. This proposition found favour with Lord Reid in the *Esso* case:

> "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had. A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to a negative restrictive covenant he gives up no right or freedom which he previously had." [636].

This test, however, is not free from difficulty and at least three principal objections can be levelled against it. [637] First, it can be easily evaded: for example, A could lease land to B which B could then lease back to A by means of a lease containing a covenant in restraint of trade. There is, however, authority for the proposition that if the transaction is a sham [638] the court will look at the reality of the transaction even though formally it appears that the covenantor is not curtailing an existing freedom. In *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [639] the Privy Council applied the restraint of trade doctrine to a transaction somewhat similar to the one previously outlined and treated the lease and underlease as part of a single transaction. A somewhat similar approach was adopted in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [640] where a lease by a company of its premises to its petrol suppliers who leased them back to the sole shareholders of the company, the lease-back containing a solus agreement, was held to be subject to the restraint of trade doctrine. The second objection to Lord Reid's test that the doctrine only applies where a covenantor curtails an existing freedom is that it is a test based on form rather than substance, as was illustrated by counsel in the course of argument in the *Esso* case. [641] Undoubtedly one of the reasons for the adoption of this test (or something like it) was to insulate *Tulk v Moxhay* [642] type covenants against the application of the restraint of trade doctrine. In *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* [643] the Australian High Court adopted the reasoning of Lord Reid and thus avoided having to deal with the application of the restraint of trade doctrine to a restrictive covenant which impinged on the commercial use to which land could be put. [644] Thirdly, even where a covenantor purportedly gives up an existing freedom but is insolvent and the restraint is part of a package enabling him to remain in business it is far from evident how such a constraint curtails in any significant sense an existing freedom. [645] It is submitted that as the restraint of trade doctrine is one founded on public policy its application should not be artificially curtailed. No doubt where the court is dealing with the type of restraint which has obtained widespread acceptance then this will be strong evidence of its reasonableness, but all restraints should be subject to the doctrine.

16-096

(7) There is authority for the principle that the doctrine does not apply to "ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract". [646] But this would appear to be founded on the theory that the doctrine does not apply during the contract, a theory which has been rejected by the House of Lords. [647]

16-097

(8) Whether a particular provision operates in restraint of trade is to be determined not by the form the stipulation takes but by its effect in practice. [648] Thus a covenant to share profits, or a levy/remission scheme of the traditional cartel type, may in certain circumstances of the case constitute restraint. Likewise, a provision that a salesman who had left his employment would forfeit the commission due to him if he obtained employment with a competitor of his ex-employer was held to be a restraint. [649]

In other words, what does or does not operate as a restraint is a matter of substance. It is also important to note that it is *trade* which must be restrained. While the courts have not given an exhaustive definition of what constitutes a trade, it is clear that it extends to a man's profession or calling. [650]

Time of application

16-098

Most authorities favour as the time for testing the validity of a restriction the date when the restriction was imposed. [651] Thus there is no requirement that the "Claimant have a continuing business interest at the time of trial in order to be able to enforce a restrictive covenant". [652] It has also been held that an enforceable restriction may become temporarily unenforceable where it operates unfairly in changed circumstances [653]; this is generally considered not to be correct.

Covenants by deed

16-099

A covenant in restraint of trade which is contained in a deed requires justification no less than such a covenant contained in a simple contract. [654]

Adequacy of consideration

16-100

Subject to the test of reasonableness of the restraint, the courts will not inquire into the adequacy of the consideration. [655]

Covenants against competition abroad

16-101

Doubts have been expressed whether the rule against covenants in restraint of trade applies to covenants against competition outside the United Kingdom. [656] But these doubts appear to be unfounded; the question was fully argued before the Court of Appeal in *Commercial Plastics Ltd v Vincent* [657] where a covenant was struck down inter alia on the ground that it was worldwide, whereas on the facts the plaintiffs did not require protection outside the United Kingdom. Although that decision related to a restraint on an ex-employee taking employment abroad, it is submitted that the same principle applies to covenants between traders since the courts ought to have the power to strike down unreasonable restraints on the British export trade. [658]

The test of reasonableness

16-102

While all restraints of trade to which the doctrine applies are prima facie unenforceable, [659] all, whether partial or total, [660] are enforceable if reasonable. As was said by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt & Co* [661]:

> "It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to

> afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

In determining reasonableness the court "*is* entitled to consider whether or not a covenant of a narrower nature would have sufficed for the convenantee's protection". [662]

Even if the restraint is unlimited in time [663] or in space [664] it will be upheld if it is reasonable, [665] although the absence of such a limit "is a remarkable feature prima facie needing justification". [666] Worldwide restrictions have passed muster in the courts, but only where the restrictions to be reasonably effectual had to be worldwide. [667] In determining reasonableness the court does not apply any doctrine of "proportionality", that is, an assessment of whether there is a substantial equivalence between the scope of the restraint and what the covenantor received for entering into it. [668] To introduce such a doctrine would be to revive the now discredited doctrine that in assessing the reasonableness of the restraint the court should also consider the adequacy of the consideration. [669]

Legitimate interests of the parties

16-103

In the case of the traditional categories of covenant to which the doctrine relates, the expression "the interest of the covenantee" connotes the proprietary or quasi-proprietary interest of an employer in his trade secrets and trade connections and of a purchaser of a business in the goodwill of the enterprise he has acquired. It is the protection of such interests which furnishes the sole justification for a restraint [670] and the restraint must therefore be no *more* than is reasonably necessary for that protection. Similarly, where an otherwise unreasonable restraint is contained in a mortgage, it can be justified by reference to the mortgage only if reasonably necessary to protect the mortgagee's interest in his security. [671] But with the recognition that the doctrine of restraint of trade applies generally and not only to the traditional categories of covenant, it is clear that a proprietary or quasiproprietary interest is not in every case necessary to support a covenant and the statement that the covenant must be reasonable in the interests of the parties must be taken to mean that the restraint must be reasonable from their point of view. Thus too, while the well-known phrase that a man is not entitled to protect himself against competition per se may be helpful in the context of the traditional categories of covenant, where the justification for the covenant is to be found, if at all, in the protection of the covenantee's "interest", the phrase cannot usefully be applied to other kinds of restrictive covenant. [672] For example, agreements to restrict the production or supply of goods or to fix prices can be justified if, by protecting themselves from competition, the parties are not only acting reasonably from their own point of view but are not injuring [673] or are even benefiting [674] the public, so that there is no ground of public policy for refusing to enforce the agreement.

16-104

Indeed, with the recognition that a "legitimate interest" in the sense of a proprietary or quasi-proprietary interest is not necessary in all cases, it could be argued that such an interest is not necessary even in the traditional categories of restraint; e.g. if a worker agreed for a million pounds not to work for the rest of his life it is difficult to see why such an agreement is not "reasonable" between the parties (as distinct from in the public interest) simply because the employer is protecting himself from competition simpliciter and not protecting some trade secret or customer connection. [675] Conversely, on present authority, once a "legitimate interest" is shown by the covenantee, the covenant is generally treated as reasonable; but the existence of such an interest need not be a sufficient condition for establishing reasonableness between the parties, since the covenant may in such a case be reasonable from the covenantee's point of view but impose undue hardship upon the covenantor. In recent cases the court has recognised the problem created by elaborate conceptualism in the past, and is tending to insist that the restraint be both reasonably necessary for protection of the legitimate interests of the promisee and also commensurate with the benefits secured to the promisor under the contract. [676] It has been held in an employment contract that, where the employer specifically states the interest to be protected, he is not entitled to "seek to justify the contract by reference to some separate and additional interest that has not been specified". [677] The

justification for this is that the employee may have sought legal advice and his legal advisers would be entitled to give him that advice on the basis of the stated purpose of the covenant. This reasoning would apply equally to other types of contracts.

Public interest and burden of proof [678]

16-105

The onus of establishing that a covenant is no more than is reasonable in the interests of the parties is on the person who seeks to rely on it [679]; if he establishes that it is no more than reasonable in the interests of the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it. [680] At least where the restraint relates to the traditional categories of employer-employee or vendor-purchaser restraints, this onus will not be a light one. [681] But once an agreement is before the court it is open to the scrutiny of the court in all its surrounding circumstances as a question of law [682] and a determination of the issue whether the covenant should be enforced requires, as a matter of public policy, that a balance should be struck between freedom of trade and freedom of contract. [683] For long, attention was concentrated predominantly on the question of reasonableness in the interests of the parties so that, for example, in 1913 the Privy Council stated that [684]:

> "… their Lordships are not aware of any case in which a restraint, though reasonable in the interests of the parties, has been held unenforceable because it involved some injury to the public."

But especially in cases falling outside the traditional categories of covenant to which most of the earlier authorities relate, the emphasis may well now have shifted from the interests of the parties to those of the public on the basis [685] that the doctrine is part of the wider doctrine of public policy and that, at any rate where the contract was freely entered into between traders, they are usually the best judges of their own interest. [686] But what is meant in this context by the public interest? [687] It could be taken to mean "the public welfare" or "general utility" to the public, a meaning which, though compelling the court to secure a difficult balance between this objective of public benefit and the other one of fairness to the individual trader, would be the modern equivalent of the "pernicious monopoly" of ancient times and would harmonise well with modern statutory philosophy against monopolistic practices that are inconsistent with welfare objectives. [688]

16-106

There is, however, now considerable authority for an alternate theory. Thus according to Ungoed-Thomas J. in *Texaco Ltd v Mulberry Filling Station Ltd*, [689] reasonableness with reference to the interests of the public "is part of the doctrine of restraint of trade which is based on and directed to securing the liberty of the subject and not the utmost economic advantage" and the:

> "… question which such reasonableness raises would thus not be whether the restraint might be less in a different organisation of industry or society, or whether the abolition of the restraint might lead to a different organisation of industry or society and thus, on balance of many considerations, to the economic or social advantage of the country, but whether the restraint is, in our industry and society as at present organised and with reference to which our law operates, unreasonable in the public interest as recognised and formulated in such principle or proposition of law. For my part, I prefer to decide that the restraints relied on in our case are reasonable in the interests of the public, not on balance of existing or possible economic advantages and disadvantages to the public but because there is, in conditions as they are, no unreasonable limitation of liberty to trade." [690]

The difficulty with this view is that the requirement of public interest adds nothing to the requirement

that the restraint be reasonable in the interests of the parties. Thus, if it is reasonable in their interest, then there is no undue interference with individual liberty and the public interest is satisfied; if it is not reasonable it must be because the liberty of one of the parties is unduly restricted and the agreement is ipso facto contrary to the public interest. [691] The two limbs of the traditional formula for assessing restraints are then simply tautologous. There may, however, be arguments of policy in favour of this alternate view: the court is dependent on the parties and their advisers to present the economic evidence on the question of the impact of the restraint upon general welfare; it might be thought that such a wide-ranging inquiry of fact should be subject rather to presentation by a representative of the public or to investigation by a public administrative agency, [692] although the American practice of "Brandeis briefs", if accepted by the English courts in this context, might meet the objection. It can also be argued that a common law court is not an appropriate forum for assessing economic evidence, making predictions upon it and balancing the interest of conflicting groups in society. [693] There is also the time and expense of litigation which may make it an inappropriate method for providing an answer to economic issues which may have to be decided expeditiously. The optimal solution may be to assign to a government department, for example, the Competition and Markets Authority, the primary responsibility for making economic decisions with a limited review being carried out by the courts.

Construction

16-107

In construing a covenant in restraint of trade, the same principles of construction apply as to the construction of any other written term. [694] For the purpose of "resolving the reasonableness of the covenant" the factual matrix is admissible. [695] Covenants in restraint of trade must be clear and definite. [696] In construing a covenant in restraint of trade between partners it has been held that:

> "(1) … the question of construction should be approached in the first instance without regard to the question of legality or illegality; (2) that the clause should be construed with reference to the object sought to be obtained; (3) that in a restraint of trade case the object is the protection of one of the partners against rivalry in trade; [and] (4) the clause should be construed in its context and in the light of the factual matrix when the agreement was made." [697]

The courts will attempt to construe a covenant so as to achieve the parties' intention where there has been a "mere want of accuracy of expression" with the consequence that the covenant will be upheld as not being too wide. [698] However, for this principle to apply it must be clear from the contract and the surrounding circumstances what exactly are the terms of the more limited covenant. [699] Reasonableness is a question of law, [700] that is, a question of the application by the court of a legal standard to the facts of the particular case. Therefore, although evidence of surrounding circumstances at the time the contract was made, such as the character of the business to be protected by the covenant, is admissible in the consideration of the requirements of that business, [701] evidence of the views, about reasonableness, of persons in the particular trade is inadmissible. [702] In construing covenants the courts have criticised arguments from "merely theoretical or fanciful possibilities". [703]

Factors determining unreasonableness

16-108

The considerations which arise in determining the reasonableness of a covenant in restraint of trade differ according to the nature of the contract in which the covenant occurs. [704] It is therefore convenient to consider separately the question of the validity of such covenants in a number of different situations, although since the doctrine is of general application [705] and the categories of restraint of trade are not closed, [706] such situations are not exhaustive. [707]

Covenant assignable

16-109

The benefit of a covenant in restraint of trade is assignable, unless it is clear from the terms of the covenant that it is intended to be personal to the covenantee. [708] Thus the purchaser of the goodwill of a business is entitled to enforce covenants entered into for the protection of that business. [709]

Repudiation of contract

16-110

If the party in whose favour a covenant in restraint of trade is entered into wrongly repudiates the agreement in which the covenant is contained, the covenantor is thereby discharged from his obligation. Wrongful dismissal, therefore, puts an end to any restrictive covenant in a contract of employment. [710] But payment of wages in lieu of notice is not a wrongful dismissal amounting to a repudiation of the contract which frees the employee from such a restraint, unless the contract of employment is one which obliges the employer to provide work for the employee. [711] It may also be possible to recover profits made by the covenantor from the breach. [712]

Restraints after repudiation by employer

16-111

In a number of recent cases the courts have held that a restraint in an employment contract, which applied no matter how the contract was terminated, was unreasonable in that it could apply even where the employer unlawfully terminated the contract. [713] The Court of Appeal recently held that these cases were misconceived. In *Rock Refrigeration Ltd v Jones* [714] it held, applying the reasoning in *General Billposting Co Ltd v Atkinson*, [715] that the effect of the acceptance by an employee of the repudiatory breach by the employer was to terminate the contract and with it the restraint clause. There therefore could be no question of construing the restraint to determine its reasonableness since it ceased to be binding on the employee. Phillips L.J. doubted whether the *General Billposting* case, decided in 1909, now reflected the law on the effect of repudiatory breach in the light of developments since that date. It is now clear that some clauses can survive the acceptance of a repudiatory breach and regulate the rights of the parties and he considered that in certain circumstances there was no good reason why this could not apply to a restraint of trade clause. Whether this is indeed the case will need to be decided in the future. What is clear, however, contrary to what Phillips L.J. considered, [716] is that the survival of such restraints is not necessary to protect the proprietary interests of the employer as these will be protected by normal common law doctrines. [717]

Injunctions

16-112

❗ If a covenant in restraint of trade is valid, a breach of it may be restrained by injunction, even though the contract in which the covenant is contained provides an alternative remedy [718]; but the plaintiff must elect which of the two remedies he will enforce. [719] The court, however, will normally not grant an injunction which would have the effect of a decree of specific performance of a contract for personal service [720] although the court will enforce negative covenants, e.g. not to perform services elsewhere, [721] but not one which would deprive the defendant of his means of livelihood. [722] A restrictive covenant may be enforceable by injunction even though the covenantor is a minor [723] or the covenant is contained in a deed of apprenticeship. [724] No injunction will be granted to a plaintiff who is unable or unwilling to fulfil his obligations under the contract. [725] In deciding whether or not to grant an injunction the court is sensitive to the fact that a failure to grant such a remedy to a claimant who was entitled to it would be “to permit the defendant to buy himself out of his contractual obligations”. [726] An

injunction may also be refused if there has been unreasonable delay in seeking an order. [727]

Interlocutory injunction

16-113

There are no special rules relating to the granting of an interlocutory injunction in connection with covenants in restraint of trade. [728] This can give rise to problems particularly with respect to restraints in employment contracts. Since to be valid the restraint will inevitably be of limited duration, the granting of an interlocutory injunction may have the effect of disposing of the matter in that the delays associated with litigation will entail that a reasonable time will have expired by the time the matter comes on for trial on the merits. To deal with this, the courts have held that matters involving restraint of trade in employment contracts are "singularly appropriate for a speedy trial". [729] Where this is not possible, it is then proper for the judge to go on to consider the chances of the plaintiff succeeding in the action. [730] The court had jurisdiction to grant an injunction on limited terms, for example, that an employee on "garden leave" may not accept employment with a named firm. [731] The court can also grant an injunction to "prevent the defendants from taking unfair advantage of the springboard which … they must have built up by their misuse" of the confidential information. [732] This is referred to as "springboard" relief. Such relief is not confined to cases of abuse of confidential information and extends to former staff members taking unfair advantage or gaining an unfair start by serious breaches of their contract of employment. [733] The unfair advantage must still exist at the time the injunction is sought. [734]

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

596. As to the rules of trade associations and kindred bodies, see below, paras 16-142—16-143; cf. paras 16-146—16-150.

597. If the contract is to be performed in England, the fact that its proper law is foreign will not prevent the application of the English rules of public policy: *Rousillon v Rousillon (1880) 14 Ch. D. 351*. As to covenants against competition abroad, see para.16-101.

598. An agreement in restraint of trade is generally not unlawful at common law if the parties choose to abide by it; it is only unenforceable if a party chooses not to abide by it: *Mogul S.S. Co Ltd v McGregor, Gow & Co [1892] A.C. 25*; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 297*; *Brekkes Ltd v Cattel [1972] Ch. 105*; cf. *Cooke v Football Association [1972] C.L.Y. 516*; *Boddington v Lawton [1994] I.C.R. 478*. But a third party injured by the operation of an agreement in restraint of trade may, it appears, obtain a declaration (*Eastham v Newcastle United F.C. Ltd [1964] Ch. 413*; *Greig v Insole [1978] 1 W.L.R. 302*) or an injunction (*Nagle v Feilden [1966] 2 Q.B. 633*).

599. See below, paras 16-211—16-215.

600. e.g. see *Goldsoll v Goldman [1914] 2 Ch. 603, [1915] 1 Ch. 292*. See below, para.16-205.

601. e.g. see the *Esso case [1968] A.C. 769*. See below, paras 16-211 et seq.

602. *Boddington v Lawton [1994] I.C.R. 478*. Where the restraint has third party effects, the third party affected may be able to challenge its validity: see para.16-145.

603. *Pat Systems Ltd v Neilly [2012] EWHC 2609 (QB), [2012] I.R.L.R. 979*, at [39].

604. *[2012] EWHC 2609 (QB)* at [36].

605. *Boddington v Lawton [1994] I.C.R. 478*.

606. Holdsworth, *History of English Law*, Vol.III, pp.56, 57; Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies*, 2nd edn (1966), paras 130, 135, 141–144.

607. *(1711) 1 P.Wms. 181*.

608. *Ashcourt Rowan Financial Planning Ltd v Hall [2013] EWHC 1185 (QB), [2013] I.R.L.R. 637* at [12].

609. See Whish and Bailey, *Competition Law*, 8th edn (2015), Ch.1; see, for example, *Cutsforth v Mansfield Inns Ltd [1986] 1 W.L.R. 558*; below, paras 16-141 et seq.

610. See, e.g. *British Motor Trade Association v Gray (1951) S.C. 586*.

611. *[1968] A.C. 269*.

612. *[1968] A.C. 269, 298*.

613. *[1968] A.C. 269, 332*.

614. *[1968] A.C. 269, 331*.

615. *[1969] A.C. 269, 317*.

616. *[1966] Ch. 146*.

617. *[1966] Ch. 146, 180*; Diplock L.J.'s test probably requires a distinction to be drawn between obligations on the part of the covenantor which are in substance "positive", e.g. to sell to A 100 tons of cast iron of the covenantor's manufacture, and obligations which are in substance "negative", e.g. not to sell his cast iron to anyone other than A or to sell to A some percentage of his production (which is an obligation not to sell to others more than the remaining percentage thereof). The difficulty arises that, if the covenantor's production is unlikely to exceed 100 tons, the positive obligation to sell to A 100 tons may be more restrictive of the covenantor's economic liberty to trade with others than would be a negative obligation to sell to A 50 per cent of his production.

618. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 307*.

619. *[1966] Ch. 146, 169*.

620. *[1968] A.C. 269, 327*.

621. *[1968] A.C. 269, 328*.

622. See *Cavendish Square Holdings BV v Makdessi [2012] EWHC 3582 (Comm), [2013] 1 All E.R. 787 (Comm)* at [15], where the court sets out "a list of Propositions of law with regard to restraint of trade" (there were eight propositions) which succinctly summarise the law. The case was reversed on other grounds *[2013] EWCA Civ 1539*. See also *Merlin Financial Consultants Ltd V Cooper [2014] EWHC 1196* at [60]–[61].

623. See above, para.16-085.

624. *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co [1894] A.C. 535*. *Esso case [1968] A.C. 269, 295, 306, 337*; *Bridge v Deacons [1984] A.C. 705*.

625. See below, para.16-113.

626. See below, para.16-126.

627. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269* where the principle was established in the case of land; and it would seem that similar considerations apply to other kinds of property.

628. *(1848) 2 Ph. 774*.

629. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*, per Lord Wilberforce, at 332–333, to some extent supported by Lord Reid, at 295 and by Lord Pearce, at 328. There is some authority for the alternative approach under which contracts if they contain restrictive elements are always subject to the doctrine but some are "prima facie" reasonable. See per Diplock L.J. in *Petrofina (Great Britain) Ltd v Martin [1966] Ch. 146, 185*.

630. *[1968] A.C. 269, 333*.

631. *Office Angels Ltd v Rainer-Thomas and O'Connor [1991] I.R.L.R. 214* (employment agency could protect pool of temporary secretaries); Sales (1988) 104 L.Q.R. 600.

632. *[1974] 1 W.L.R. 1308*; see also *Clifford Davis Ltd v W.E.A. Records Ltd [1975] 1 W.L.R. 61*; Cartwright, *Unequal Bargaining* (1991), pp.205–206; *Watson v Prager [1991] 1 W.L.R. 726* (restraint of trade doctrine applied to contract between a boxer and manager and held to be against public policy because of the unreasonable imbalance between the rights and duties of the parties).

633. per Lord Pearce in the *Esso case [1968] A.C. 269, 323*.

634. per Lord Wilberforce in the *Esso case [1968] A.C. 269, 332–333*.

635. *Societa Explosivi Industriali SpA v Ordnance Technologies (UK) Ltd [2004] EWHC 48 (Ch), [2004] 1 All E.R. (Comm) 619*.

636. *[1968] A.C. 269, 298*. See also at 309 (Lord Morris) and at 325 (Lord Pearce) for somewhat similar views. This principle was adopted in *Cleveland Petroleum Co Ltd v Darstone [1969] 1 W.L.R. 116*; see also *Stephens v Gulf Oil Canada Ltd (1976) 11 O.L.R. (2d) 229*; *Re Ravenseft Properties Ltd's Application [1978] Q.B. 52, 67*. A similar type of reasoning has been applied to a contract settling a dispute for infringement of an intellectual property right. Before the restraint of trade doctrine can apply, the restrainee must show that the restraint overreaches the extent of the intellectual property right concerned: *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2002] EWCA Civ 196, [2002] F.S.R. 32*

637. Heydon, *The Restraint of Trade Doctrine* (1971), pp.55–59.

638. On the nature of sham transactions, see *Chase Manhattan Equities Ltd v Goodman [1991] B.C.L.C. 997*; *Welsh Development Agency v Export Finance Co Ltd [1992] B.C.L.C. 148, 185–188*.

639. *[1975] A.C. 561, PC*.

640. *[1985] 1 W.L.R. 173*.

641. *[1968] A.C. 269, 289–290*.

642. *(1848) 2 Ph. 774* (although many such covenants will not actually restrain trade).

643. *(1976) 8 A.L.R. 555*. See also *Aberdeen Varieties Ltd v James F. Donald (Aberdeen Cinemas) Ltd (1940) S.L.T. 58*.

644. See also *Irish Shell Ltd v Elm Motors Ltd [1984] I.R. 200*. As to whether a restrictive covenant affecting the commercial user of land touches and concerns it see *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd [1952] Ch. 286*.

645. *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1983] 1 W.L.R. 87, 164F* (at first instance).

646. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 328*. Lord Pearce also opined that the doctrine only applies where a restraint is directed towards the "sterilisation" of the covenantor's services. On this see Heydon, *The Restraint of Trade Doctrine* (1971), pp.61–63; and cf. *Watson v Prager [1991] 1 W.L.R. 726*.

647. *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308*.

648. *Stenhouse Australia Ltd v Phillips [1974] A.C. 391*; *McIntyre v Cleveland Petrol Co Ltd (1967) S.L.T. 95, 100*.

649. *Sadler v Imperial Life Insurance Co of Canada Ltd [1988] I.R.L.R. 388*.

650. *Hepworth Manufacturing Co Ltd v Ryott [1920] Ch. 1, 29*.

651. *Gledhow Autoparts Ltd v Delaney [1965] 1 W.L.R. 1366, 1377*; *Home Counties Dairies Ltd v Skilton [1970] 1 W.L.R. 526, 533, 536*; *Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623, 644*; *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308, 1309*; *Watson v Prager [1991] 1 W.L.R. 726, 738* ("The question of whether the … agreement is unenforceable on restraint of trade grounds must be tested by reference to the state of affairs at the date of the agreement").

652. *Towry EJ Ltd v Bennett [2012] EWHC 224 (QB)* at [412].

653. *Shell (UK) Ltd v Lostock Garage Ltd [1976] 1 W.L.R. 1187, 1198* (this was a minority view of Lord Denning M.R.).

654. *Mallan v May (1843) 11 M. & W. 653, 655*; cf. *Homer v Ashford (1825) 3 Bing. 322*.

655. *Hitchcock v Coker (1837) 6 A. & E. 438*; *Gravely v Barnard (1874) L.R. 18 Eq. 518*; *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] A.C. 535, 565*; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 W.L.R. 173, 179*. cf. *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308*.

656. See *Leather Cloth Co v Lorsont (1869) L.R. 9 Eq. 345, 351*; *Maxim Nordenfelt Guns & Ammunition Co v Nordenfelt [1893] 1 Ch. 639, 651, [1894] A.C. 535, 554, 574*; contrast *Dowden and Pook Ltd v Pook [1904] 1 K.B. 45*; and see *Lamson Pneumatic Tube Co v Phillips (1904) 91 L.T. 363* where the Court of Appeal's judgments suggested that the matter was still open; cf. *Goldsoll v Goldman [1915] 1 Ch. 292* where the plaintiff was able to succeed without taking the point; and dicta in *Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] A.C. 181, 191*, which were obiter since the covenant in question was, it would seem, unreasonable in so far as it related to the whole of Canada, where it had been made so that its worldwide application was irrelevant. See also *Cooke v Football Association [1972] C.L.Y. 516*.

657. *[1965] 1 Q.B. 623, 630–631, 645*. See also the decision of the New Zealand Court of Appeal in *Blackler v New Zealand Rugby Football League (Incorporated) [1968] N.Z.L.R. 547, 569*, per McCarthy J. expressing the views of the majority: "My view of the law … is that any restraint on employment, wheresoever, whether it is intended to operate in New Zealand, or only overseas, or both, is prima facie void".

658. cf. *Bull v Pitney-Bowes Ltd [1967] 1 W.L.R. 273, 276–277*. If it produces effects in other Member States of the EU, then it may be subject to art.85 of the Treaty: see Vol.II, paras 43-004 et seq.

659. But see also above, para.16-087.

660. *Nordenfelt v The Maxim Nordenfelt Guns & Ammunition Co [1894] A.C. 535, 565*; *Mason v Provident Clothing & Supply Co [1913] A.C. 724*; these authorities abolished the old distinction

between total and partial restraints to be found in, e.g. *Mills v Dunham [1891] 1 Ch. 576, 586*; *Haynes v Doman [1899] 2 Ch. 13, 30*.

661. *[1894] A.C. 535, 565*; and see *Esso case [1968] A.C. 269, 299*. Restraints normally operate as to time, area, and activity, and must be reasonable with respect to these factors. The onus is on the claimant to establish the reasonableness of the restraint and in the case of a "vendor-purchaser covenant … such onus is not a heavy one", see *Cavendish Square Holdings BV v Makdessi [2012] EWHC 3582, [2013] 1 All E.R. (Comm) 787* at [16] (reversed on other grounds *[2013] EWCA Civ 1539, [2014] 2 All E.R. (Comm) 125*).

662. *Office Angels Ltd v Rainer-Thomas and O'Connor [1991] I.R.L.R. 214, 220* (emphasis in the original, a master and servant case).

663. *Hitchcock v Coker (1837) 6 A. & E. 438*; *Haynes v Doman [1899] 2 Ch. 13*; *Fitch v Dewes [1921] 2 A.C. 158*.

664. *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co [1894] A.C. 535*; *Lamson Pneumatic Tube Co v Phillips (1904) 91 L.T. 363*; *Caribonum Co Ltd v Le Couch (1913) 109 L.T. 385, 587*.

665. *Peters American Delicacy Co Ltd v Patricia's Chocolates & Candies Pty Ltd (1947) 77 C.L.R. 574*.

666. *Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623, 644*. In *Bridge v Deacons [1984] A.C. 705, 717E–F* (dealing with a restraint of five years' duration which was upheld) the court stated that "there appears to be no reported case where a restriction which was otherwise reasonable has been held to be unreasonable solely because of its duration"; see, however, *Scully (UK) Ltd v Lee [1998] I.R.L.R. 259* where the court held that a non-solicitation clause of two years in an employment contract was unreasonable because of excessive duration. cf. Heydon, *The Restraint of Trade Doctrine* (1971) at pp.158–162.

667. *Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] A.C. 181, 191*.

668. *Allied Dunbar (Frank Weisenger) Ltd v Weisinger [1988] I.R.L.R. 60*.

669. *Allied Dunbar (Frank Weisenger) Ltd v Weisinger [1988] I.R.L.R. 60* "Proportionality", however, may be a factor in obtaining an *Anton Piller* order (see now CPR Pt 25 PD–007) against an ex-employee: see *Lock International Plc v Beswick [1989] 1 W.L.R. 1268, 1281* ("there must be proportionality between the perceived threat to the plaintiff's rights and the remedy granted").

670. See *British Concrete Co Ltd v Schelff [1921] 2 Ch. 563, 574–575*; *Countryside Assured Financial Services Ltd v Deanne Smart [2004] EWHC 1214*.

671. See below, para.16-140.

672. See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 301, 329*; *McEllistrim v Ballymacelligott Co-operative Agriculture and Dairy Society Ltd [1919] A.C. 548, 563–564*; *Daunay Day & Co Ltd v D'Alfhen [1997] T.L.R. 334*.

673. cf. *Att-Gen of Commonwealth of Australia v Adelaide Steamship Co [1913] A.C. 781*.

674. cf. Vol.II, paras 43-081 et seq.

675. cf. *Higgs v Olivier [1952] Ch. 311*; *Wyatt v Kreglinger and Fernau [1933] 1 K.B. 793*.

676. *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308*.

677. *Office Angels Ltd v Rainer-Thomas and O'Connor [1991] I.R.L.R. 214, 219* (where the contract does not state the interest to be protected, the employer is entitled to look to the contract and the surrounding circumstances for the purpose of ascertaining the purpose which is to be

protected).

678. See above, paras 16-089 et seq.

679. *Morris Ltd v Saxelby [1916] 1 A.C. 688, 700, 706*; *Attwood v Lamont [1920] 3 K.B. 571, 587, 588*; *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] Ch. 108*.

680. *Morris v Saxelby [1916] 1 A.C. 688, 700, 707*.

681. *Att-Gen of Commonwealth of Australia v Adelaide S.S. Co Ltd [1913] A.C. 781, 797*. See, however, *Sherk v Horwitz [1972] 2 O.R. 451; affirmed [1973] 1 O.R. 160*.

682. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 318*, per Lord Hodson; see below, para.16-117.

683. *Morris v Saxelby [1916] 1 A.C. 688, 716*; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 296, 304–305*.

684. *Att-Gen of Commonwealth of Australia v Adelaide S.S. Co [1913] A.C. 781, 785*.

685. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*; *Bull v Pitney-Bowes Ltd [1967] 1 W.L.R. 273*.

686. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 296*; and see *North Western Salt Co v Electrolytic Alkali Co [1914] A.C. 461, 471*; *English Hop Growers v Dering [1928] 2 K.B. 174, 180*.

687. In *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd [1985] 1 W.L.R. 173, 191E*. Waller L.J. considered it to be in the public interest to save a firm from bankruptcy.

688. e.g. Competition Act 1998; arts 81 and 82 EC.

689. *[1972] 1 W.L.R. 814, 827, 828*.

690. cf. *Dickson v Pharmaceutical Society of Great Britain [1970] A.C. 403, 441*, per Lord Wilberforce: "I would … hold [that the restraints do not survive the test] on the simple ground, which I think is the relevant ground in this connection, that there is nothing here to displace the normal proposition that the public has in the absence of countervailing considerations an interest in men being able to trade freely in the goods which they judge the public wants and that these restraints clearly, severely and arbitrarily restrict this freedom. More special arguments to the effect that the restraints might cause a reduction in the number of pharmacies I would regard as less secure: before I could accept them I should require persuasion, first, that this type of consideration may properly be taken into account in relation to the common law doctrine of restraint of trade (as contrasted with proceedings in the Restrictive Practices Court)." See also *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308, 1315*, per Lord Diplock.

691. It is not inconceivable that an extremely onerous restraint contractually imposed upon an individual might secure enormous utility to the public. But, on the above theory, the restraint must be contrary to the "public interest"; sed quaere.

692. cf. the Competition and Markets Authority and the European Commission under arts 81 and 82 EC. See *Texaco v Mulberry Filling Station Ltd [1972] 1 W.L.R. 814, 826*.

693. See Stevens and Yamey, *The Restrictive Practices Court* (1965), Ch.3 and *Texaco v Mulberry Filling Station Ltd [1972] 1 W.L.R. 814, 827*.

694. *Beckett Investment Management Group Ltd v Hall [2007] EWCA Civ 613, [2007] I.R.L.R. 793* at [11].

695. *Cavendish Square Holdings Ltd v Madessi [2012] EWHC 3582, [2013] 1 All E.R. (Comm) 787* at [10] (reversed on other grounds *[2013] EWCA Civ 1539, [2014] 2 All E.R. (Comm) 125*).

696. *Davies v Davies (1887) 36 Ch.D. 359*, where a covenant to retire from business "so far as the law allows" was held to be too vague to be enforceable. cf. *Express Dairy Co v Jackson (1930) 99 L.J.K.B. 181*.

697. *Clarke v Newland [1991] 1 All E.R. 397, 402*. These principles were put forward in connection with a restraint in the contract of a salaried partner, a status that can often be equated with that of an employee: see Lindley & Banks on Partnership, 19th edn (2010), pp.108 et seq. However, in the light of the courts' disfavour of restraints in employment contracts, these principles will be applied in that context with greater rigour.

698. The phrase is that of Lindley M.R. in *Haynes v Dorman [1899] 2 Ch. 13, 26*. For recent examples of this, see *Business Seating (Renovations) Ltd v Broad [1989] I.C.R. 729*; *Clarke v Newland [1991] 1 All E.R. 397*; *Hollis & Co v Stokes [2000] I.R.L.R. 712*.

699. *Mont v Mills [1993] I.R.L.R. 172*. It has been suggested that there is a difference of approach by the Court of Appeal in this case to that of the Court of Appeal in *Littlewoods Organisation Ltd v Harris [1978] 1 W.L.R. 1472*: see *Hanover Insurance Brokers Ltd v Schapiro [1994] I.R.L.R. 82*; *Advantage Business Systems Ltd v Hopley [2007] EWHC 1783 (QB), [2007] All E.R. (D) 339 (Jul)*.

700. *Dowden & Pook Ltd v Pook [1904] 1 K.B. 45*; *Mason v Provident Clothing Co Ltd [1913] A.C. 724, 732*; *Stenhouse Australia Ltd v Phillips [1974] A.C. 391, 402*.

701. *Routh v Jones [1947] 1 All E.R. 758*; *Jenkins v Reid [1948] 1 All E.R. 471*; *Lyne-Pirkis v Jones [1969] 1 W.L.R. 1293*; *Peyton v Mindham [1972] 1 W.L.R. 8*. cf. *Rogers v Maddocks [1892] 3 Ch. 346*.

702. *Haynes v Dorman [1899] 2 Ch. 13*; *North Western Salt Co v Electrolytic Alkali Co [1914] A.C. 461, 471*; *Mason v Provident Clothing Co [1913] A.C. 724, 732*.

703. *Coppage v Safety Net Security Ltd [2013] EWCA Civ 1176, [2013] I.R.L.R. 970* at [23]. The court was critical of the judgment in *Arbuthnot Fund Managers Ltd v Rawlings [2003] EWCA Civ 518*, which Sir Stanley Burnton considered should be confined "to the particular facts of that case" (at [38]).

704. *Jenkins v Reid [1948] 1 All E.R. 471*.

705. See above, para.16-089.

706. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*; *Petrofina (Great Britain) Ltd v Martin [1966] Ch. 146, 169*.

707. e.g. see above, para.16-006 n.31.

708. As in *Davies v Davies (1887) 36 Ch. D. 359*; see also *Berlitz School of Languages Ltd v Duchêne (1903) 6 F. 181*.

709. *Elves v Crofts (1850) 10 C.B. 241*; *Jacoby v Whitmore (1883) 49 L.T. 335*; *Townsend v Jarman [1900] 2 Ch. 698*; *Welstead v Hadley (1904) 21 T.L.R. 165*; *Automobile Carriage Builders Ltd v Sayers (1909) 101 L.T. 419*.

710. *General Billposting Co Ltd v Atkinson [1909] A.C. 118*; *Measures Bros v Measures [1910] 2 Ch. 248*; *S. W. Strange Ltd v Mann [1965] 1 W.L.R. 629, 637*; *Briggs v Oates [1991] 1 W.L.R. 407*.

711. *Konski v Peet [1915] 1 Ch. 530*, distinguishing *General Billposting Co Ltd v Atkinson [1909] A.C. 118*. See also para.16-111; *Rock Refrigeration Ltd v Jones [1997] 1 All E.R. 1 (noted (1997) 113 L.Q.R. 377)*.

712. See Birks [1987] L.M.C.L.Q. 421: cf. Gurry, *Breach of Confidence*, Ch.XXII. See *Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830* at [32].

713. See, e.g. *D. v M. [1996] I.R.L.R. 192*.

714. *[1997] 1 All E.R. 1 (noted (1997) 113 L.Q.R. 377)*.

715. *[1909] A.C. 118*.

716. *Rock Refrigeration Ltd v Jones [1997] 1 All E.R. 1, 20*.

717. *Rock Refrigeration Ltd v Jones [1997] 1 All E.R. 1, 14*, per Morritt L.J.

718. *National Provincial Bank v Marshall (1888) 40 Ch. D. 112*; *Texaco Ltd v Mulberry Filling Station [1972] 1 W.L.R. 814*.

719. *General Accident Assurance Corp v Noel [1902] 1 K.B. 377*. This was a claim for both an injunction and liquidated damages. Where, however, the damages relate to past breaches there is no reason in principle why the plaintiff should not obtain both damages and an injunction as they clearly relate to different heads of loss.

720. See *Whitwood Chemical Co v Hardman [1891] 2 Ch. 416*; *Ehrman v Bartholomew [1898] 1 Ch. 671*; *Rely-a-Bell Burglar and Fire Alarm Co Ltd v Eisler [1926] Ch. 609*; cf. *Irani v Southampton and S.W. Hampshire Area Health Authority [1985] I.C.R. 590*; *Evening Standard Co Ltd v Henderson [1987] I.C.R. 588* where injunctions were granted to prevent breach of employment contracts. See further below, paras 27-065 and 27-066. *Brazier v Bramwell Scaffolding Ltd [2001] UKPC 59*; *Beckett Financial Services v Atkinson Unreported November 6, 2001* (court would not grant an injunction where credible undertaking to comply with a covenant in restraint of trade was given); *Ace London Services Ltd v Charman Unreported October 1, 2001* (injunctions granted where no undertakings were given).

721. *Catt v Tourle (1869) L.R. 4 Ch. App. 654*; *Warner Bros v Nelson [1937] 1 K.B. 209*; *Rely-a-Bell Burglar and Fire Alarm Co v Eisler [1926] Ch. 609*. cf. *Lumley v Wagner (1852) 1 De G.M. & G. 604, 619*; *Page One Records Ltd v Britton [1968] 1 W.L.R. 157*; *Evening Standard Co Ltd v Henderson [1987] I.C.R. 588*; *Warren v Mendy [1989] 1 W.L.R. 853*.

722. *Palace Theatre Ltd v Clensy (1909) 26 T.L.R. 28* (interim injunction).

723. *Bromley v Smith [1909] 2 K.B. 235*; *Trevor André v Bashford [1965] C.L.Y. 1984*; provided, of course, that the contract is beneficial to the minor; cf. *Corn v Matthews [1893] 1 Q.B. 310, 314*.

724. *Gadd v Thompson [1911] 1 K.B. 304*.

725. *Measures Bros Ltd v Measures [1910] 2 Ch. 248*.

726. *deVere Group Ltd GmbH v Pearce [2011] EWHC 1240 (QB)* at [38].

727. ❗*Legends Live Ltd v Harrison [2016] EWHC 1938 (QB)*.

728. *Lawrence David Ltd v Ashton [1991] 1 All E.R. 385* (it appears that the profession did consider that the *American Cyanamid* principles did not apply to restraint of trade covenants in employment contracts: 392).

729. *Lawrence David Ltd v Ashton [1991] 1 All E.R. 385, 395*.

730. ❗*Lawrence David Ltd v Ashton [1991] 1 All E.R. 385, 396*; *Lansing Linde Ltd v Kerr [1991] 1 All E.R. 418*; *Business Seating (Reservations) Ltd v Broad [1987] I.C.R. 729* (in both cases merits were considered and an interlocutory injunction refused); *Egon Zehnder Ltd v Tillman [2017]*

EWHC 1278 (Ch).

731. *Symbian Ltd v Christensen [2001] I.R.L.R. 77*; *SG&R Valuation Service Co LLC v Boudrais [2008] EWHC 1340 (QB)*.

732. *Roger Bullivant Ltd v Ellis [1987] I.R.L.R. 491, 496*.

733. *UBS Wealth Management (UK) Ltd v Kestra Wealth LLP [2008] EWHC 1974 (QB), [2008] I.R.L.R. 965* at [4].

734. *[2008] EWHC 1974 (QB)* at [4].

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Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 2. - The Position at Common Law

(f) - Contracts in Restraint of Trade [595]

(ii) - Employer and Employee

Employee's activities after determination of employment

16-114

The doctrine of restraint of trade has always been applied to covenants contained in contracts of employment [735] which limit the freedom of the employee to work after the termination of the employment. [736] An employer is entitled to protect the "general goodwill of the business including potential clients", [737] as the prospect of obtaining new clients from recommendations is an intrinsic part of a business. [738] Post-termination restraints if reasonable are enforceable. [739] In some situations it will be difficult to categorise a restraint as relating to an employment contract as opposed to a contract between a vendor and purchaser of business, and what appears to be an employment contract may in substance be a vendor and purchaser contract. For example, where a company bought out its "sales associates" practices the court held that the covenant in the contract of sale was to be "tested by the principles applicable as between vendor and purchaser" since the covenant had been:

> "… taken for the protection of the goodwill of the business sold to the plaintiffs by the defendant, rather than for the protection of the plaintiffs' present and future business as employer." [740]

Covenants in employment contracts are viewed by the courts much more jealously than the other of the principal traditional categories of covenant to which the doctrine applies, namely, covenants between the vendor and purchaser of a business. [741] The courts, however, clearly accept the enforceability of such covenants provided they satisfy the test of reasonableness and more recent authorities indicate that they will not adopt extravagant interpretations to render them void:

> "If a clause is valid in all ordinary circumstances which can have been contemplated by the parties, it is equally valid notwithstanding that it might cover circumstances which are so 'extravagant,' 'fantastical,' 'unlikely or improbable' that they must have been entirely outside the contemplation of the parties." [742]

Where a covenant is capable of two constructions, one of which would lead it to being held unreasonable and the alternative producing the opposite result, the latter construction should be adopted "on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest". [743] Thus in *Home Counties Dairies Ltd v Skilton* [744]

the defendant employee, a milkman, entered into a covenant whereby he agreed that for a period of one year from the termination of his employment that he would not serve or sell "milk or dairy produce" to any customer of his ex-employer. It was argued that the restraint relating to dairy produce resulted in the covenant being too wide, as it would preclude the employee from working for a grocery shop selling butter and cheese where there was a likelihood that the shop might be patronised by his ex-employer's customers. The Court of Appeal, reversing the trial judge, rejected this interpretation as being commercially unreasonable. From the obvious intentions of the parties, it was clear that the restraint was [745] "intended to restrict the employee's activities only when engaged in the same type of business as the employer's". On this interpretation the clause was valid as being reasonable to protect the customer-connection of the employer. Whether a particular contractual provision operates in restraint of trade is "to be determined not by the form the stipulation wears but … by its effect in practice". [746] What is reasonable in one type of relationship may not be reasonable in another. [747] Thus a provision which provides that an employee will be deprived of a pension if, on the cessation of his employment, he competed with his ex-employer will not be viewed as merely setting out the terms of his entitlement to the pension but will be treated as a provision designed to restrict competition and therefore subject to the restraint of trade doctrine. [748] Also, it is on this basis that a covenant restraining an ex-employee from approaching other members of the employer's workforce would be subject to the restraint of trade doctrine. [749]

Relevant time

16-114A

In determining reasonableness, the court does not only look "at the actual position as at the date the payment started" as to do so would result in few covenants being valid since "the employee will not have engaged fully enough with the business to justify it". [750] The court has to go further and "look at what was in contemplation of both parties". [751]

16-115

It is for the employer who seeks to enforce such a covenant against an employee to show that it is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest owned by the employer for which the restraint is reasonably necessary. [752] The court will not interpret a covenant which is too broad so as "to save an employer who has stipulated for unduly wide protection". [753] It has been said that the restraint must be reasonable not only in the interests of the covenantee but in the interests of both the contracting parties. [754] But provided that the covenant affords adequate, and no more than adequate, protection to the covenantee, [755] it seems that the requirement that the restraint must be reasonable in the interests of the parties is satisfied, for the court will not now inquire into the adequacy of the consideration for the covenant. [756] Yet a restraint which is reasonably necessary for the protection of the employer may be oppressive and fatal to the chance of the employee earning his living in this country. Probably the true view is that such a restraint, whether or not it be reasonable in the interests of the parties, is unreasonable in the interests of the public, which require that a man shall not be prevented from supporting himself by disposing of his labour in this country [757] and that the national economy should not be deprived of the services of experienced men. [758] Thus, in *Wyatt v Kreglinger & Fernau* [759] a retired employee was granted a pension on condition that after retirement from the employment he should be at liberty to engage in any other trade than the wool trade, otherwise the pension would cease. There was no covenant by the employee not to engage in the wool trade nor any limit of time or space. The Court of Appeal rejected the former employee's claim for arrears of the pension, holding that, assuming a contractual relationship was established, the contract was in restraint of trade and therefore void. The decision has been criticised [760] and is explicable, if at all, only on the ground than an otherwise gratuitous promise is not made enforceable by adding to it a condition, the substance of which is such that, had the promisee covenanted to comply with it, the promisor could

not, on the ground of the covenant's unreasonable restraint of trade, have held him to it. The courts will grant, as a matter of independent relief, a declaration that such a condition is void. [761] A restraint otherwise unreasonable does not become reasonable merely because provision is made that the consent of the employer shall not be unreasonably withheld. [762] The court will not imply a term in order to save a covenant restraining an employee's post-employment conduct. [763] Nor will the court rewrite a covenant in restraint of trade where the contract provides that the covenant, if unenforceable, should be rewritten with such minimum amendment as renders it enforceable. [764] A provision that the restraint should apply "for as long as permitted by law" was too uncertain to have effect. [765]

Competition

16-116

Whether the restraint sought to be enforced in a particular case affords more than adequate protection to the business of the employer depends to some extent upon the requirements of that business. [766] Certain principles of general application, however, may be laid down. An employer is not entitled to protect himself against mere competition on the part of a former employee. [767] In the course of his employment the employee may have acquired additional skill in and knowledge of the trade or profession in which he has been engaged, so as to be a more formidable competitor upon the termination of a service; but that additional skill and knowledge belong to him and their exercise cannot lawfully be restrained by the employer. [768] So, where a film actor in the course of his employment acquired a reputation under a pseudonym it was held that a term of his contract of service restraining him from using the pseudonym after the termination of his employment was invalid as a partial restraint of trade. [769] Similarly, an employer cannot enforce a covenant requiring an ex-employee to disclose and assign inventions discovered after he has ceased to be an employee. [770] An anti-solicitation restraint in an employment contract which extended to dealing with anyone in the district where the employee has operated was considered "an anti-competition rather than a non-solicitation clause". [771]

Protection by general law and by covenant

16-117

The general law relating to breach of confidence [772] prohibits ex-employees from using information which:

> "… can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with." [773]

It is also impermissible for any employee to copy customer lists or deliberately memorise such information even though it may be in the public domain as he would be saved the expense and effort of bringing the information together. [774] An employer can only protect by means of a covenant, information that constitutes a trade secret and cannot protect information that is merely confidential and which the employee would be precluded by his duty of fidelity [775] from disclosing during his employment. [776] Thus there is considerable overlap between the protection afforded by the general law and that which can be acquired by a restraint of trade covenant. However, there is no basis for holding that the duty of confidentiality should be "trumped" by the public policy which underlies the law relating to covenants in restraint of trade. [777] However, a covenant can afford wider protection than the general law in a number of respects. First, the use of a covenant is evidence of the attitude of the employer that the information is a trade secret. While an employer cannot turn confidential information into a protectable trade secret merely by characterising it as a trade secret,

the attitude of an employer towards the information is a factor relevant to the court's determination of whether it is a trade secret. [778] Secondly, even where the employer's interest, for the protection of which a covenant is taken, is in trade secrets, a covenant relieves the employer of the need to prove that the employee subjectively appreciated the confidentiality of the information in question, or that the information was separable from the employee's general stock of trade knowledge or indeed that the employee has actually used the information, it being sufficient to frame the covenant to cover, to a reasonable degree, clearly defined activities in which the employee would be likely to use the information. [779] Thirdly, the courts may be reluctant to imply a term as the employee will have had no opportunity of rejecting it [780] and this may have the effect of making the protection afforded by the law slightly narrower than that which can be acquired by covenant. Fourthly, the protection provided by the law will normally be unlimited as to time whereas that under a covenant is more likely than not to be limited as to time. [781] Lastly, a carefully drafted covenant will make it easier for an employer to obtain injunctive relief since it will facilitate the framing of an order in "sufficient detail to enable the [employee] to know exactly what information he is not free to use on behalf of his new employer". [782] A covenant in a contract of service whereby an employee agreed that, on the termination of his service, he could not for a period of 12 months deal with a company with which his employer had negotiated was not void for uncertainty. [783] An employer can protect his interests by a non-solicitation clause but, in many situations, a non-competition clause provides a more secure protection for the employer, as has been accepted by the courts. A non-competition clause is easier to apply and it avoids difficulties of what constitutes confidential information as to who was the employer's client. [784] It may be that a person possesses a particular status and this precludes competition by that person. For example, a director must act in the best interests of the company and must not enter into a transaction in which his interests conflict with those of the company. Where these duties are applicable, thus restricting the competitive activities of the director against the company, the rules of public policy as to restraint of trade do not "trump" these duties. [785]

Trade secrets and connection with customers

16-118

An employer can by covenant lawfully prohibit an employee from accepting, after determination of his employment, a position in which he would be likely to utilise information as to secret processes or other trade secrets which have been acquired in the course of his employment. [786] Depending on the nature of the employment [787] he may also be able by covenant lawfully to prohibit the employee: (i) from setting up on his own, or accepting a position with one of the employer's competitors, [788] so as to be likely to destroy the employer's trade connection by a misuse of his acquaintance with the employer's customers or clients [789]; or (ii) at least from soliciting the former employer's customers [790]:

> "In fact the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary." [791]

In determining whether a particular item of information is capable of protection, the court will take into consideration such matters as the nature of the employment and the information and whether the "employer impressed on the employee the confidentiality of the information". [792] Another factor of importance is the "separability" of the information from other non-confidential information that the employee possesses, although this is not "conclusive". [793] Where there are difficulties in identifying what constitutes confidential information, "a non-competition clause may be the satisfactory form of restraint, provided it is reasonable in time and space". [794] It is important to re-emphasise that it is not all confidential information that an employer can protect but only that which amounts to a "trade secret" or which prevents "some personal influence over customers being abused in order to entice them away". [795] In *Faccenda Chicken Ltd v Fowler* [796] it was held that the duty of fidelity which an employee owes to an employer during the continuance of the employment obliges an employee to maintain confidential information which could not be made the subject of a valid restraint on the termination of the employment relationship. [797] At first glance this appears anomalous as the restraint of trade doctrine applies equally during the continuance of the contract as on its termination, and one would have expected that what was protectible during the contract would also be protectible on its

termination. It may be that an employee's duty of fidelity is designed to produce a harmonious working relationship and this may be the justification for a wider restraint as long as the employee remains in employment. [798]

16-119

The limitations on the permissible scope of a post-employment restrictive covenant with respect to confidential information put forward in *Faccenda Chicken* were considered "improbable as being the law" by Harman J. in *Systems Reliability Holdings v Smith*. [799] Although *Faccenda Chicken* is a judgment of the Court of Appeal, there is much to commend the judgment of Harman J. As a matter of public policy it is difficult to see why an employer should not be free by agreement to restrain the disclosure of confidential information. The principle in *Faccenda Chicken* will have a very limited scope if the definition of "trade secret" is extended to include information which might in "common parlance" not be considered trade secrets. Thus if the names of customers and the goods that they buy or other non-technical information are classified as trade secrets, [800] post-employment restraints could validly embrace a wide category of confidential information. A matter on which the law is undecided is whether an employer is entitled to protection where an employee is not seeking to earn his living but is "selling to a third party information which he acquired in confidence in the course of his former employment". [801] Given that the principal justification for the restraint of trade doctrine as applied to employment contracts is to enable an employee to earn his livelihood, there is much to be said for not permitting an employee to sell confidential information unconnected with the need for him to earn a living.

Nature of connection with customers

16-120

The validity of restrictive covenants by employees frequently depends upon the question whether their employment is of a confidential nature, so that, for example, the necessity of protecting the employer's trade connection has caused restrictive covenants by canvassers and travellers generally to be upheld. [802] Each case must be decided upon its own facts. [803] The courts have considered the reasonableness of restraints relating to solicitors and legal executives, [804] medical and dental practitioners, [805] actors, [806] commercial managers and agents, [807] canvassers and travellers, [808] shop assistants and salesmen, [809] bookmaker's assistants, [810] estate agents, [811] designers [812] and technicians. [813]

Limits on scope of restraint

16-121

A covenant not to solicit [814] customers is valid even if it extends to people who, although customers at the beginning of the employee's employment, ceased to be so before its determination, [815] though not if it extends to those who become customers after the determination of the employment. [816] It is no objection to a covenant restraining dealings with customers of the employer that the identity of all the employer's customers may not be known to the covenantor, for the court would not grant an injunction against him or commit him for contempt for the breach of any injunction already granted if he could show that what he had done he had done inadvertently and would not be repeated. [817] Similarly a covenant ought not to be held invalid because hypothetical cases can be suggested when it might be unreasonable to apply it, if those circumstances were outside the contemplation of the parties to such an extent that they are to be excluded from its operation. [818] It is no objection to the enforcement of a non-solicitation covenant with respect to a particular customer that that customer has no intention of doing any further business with the employer: this is:

> "… the very class of case against which the covenant is designed to give protection … the plaintiff does not need protection against customers who are faithful to him." [819]

Type of business in which employee was engaged

16-122

The employer is not entitled to protect by a restrictive covenant of any description any business except the business in which he employed the covenantor [820] (though a covenant which might appear unduly wide with regard to the business to be protected may, on its proper construction, be subject to an implied limitation as a result of which it is valid [821]). Thus a covenant by a tailor's assistant not to carry on any business within certain limits of space and time is therefore invalid, even though it would be valid were it confined to the business of a tailor. [822] So, too, a covenant by an employee of a company intended to protect not merely the business of that company but also the business of associated or subsidiary companies in which he does not serve is an unreasonable restraint. [823] It has been held that a covenant that extends to new services introduced by an employer is enforceable provided it is otherwise enforceable as regards time and territorial scope. [824]

Limits of space and time

16-123

In considering whether or not a restraint is reasonable, limitations of space or time imposed upon it are usually of the greatest relevance. [825] The longer the duration of restriction and the greater the area over which it operates, the more difficult it is to prove that the restriction is reasonable. [826] Area restraints "will always be approached with caution by the courts since such restraints amount to a covenant against competition". [827] It has been said that:

> "… to preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification" [828];

a fortiori where the restraint is worldwide. [829] In determining the validity of an area restraint the court is entitled to consider (a) whether or not a covenant of a narrower nature would have protected the covenantee's interests [830] and (b) that in defining the restricted area there is "a real functional correspondence between the prescribed area and the area in which the claimant operates". [831] It has been held reasonable to impose a worldwide restraint on disclosing confidential information on an employee employed in the United Kingdom, the reasoning of the court being that business has become global and that national boundaries did not constrain the dissemination of confidential information. [832] On the other hand, covenants against solicitation, especially if taken from canvassers and travellers, are generally not invalidated by reason of the absence of any limit of space [833] or even, it would seem, of any limit of space or time. [834] But where the employer's business is exclusively for credit, the customer not dealing directly with an employee, it will often be difficult to establish the reasonableness of any area restriction since a mere covenant not to deal with customers on the books of the employer is likely to be sufficient. [835] In considering whether a particular restraint is reasonable in point of time the limit of space imposed shall be considered, and vice versa. [836] In reckoning a spatial limitation the distance will be measured on the map (as the crow flies) [837] unless the parties have adopted some other measurement. The courts have recognised that because of the difficulties of recognising what is and what is not confidential, or who may or may not have been a customer of the employer, an anti-competition covenant which is reasonable as to space and time may be the "most satisfactory form of restraint". [838]

Breach

16-124

In considering whether a particular act constitutes a breach of such a restrictive covenant, it is

important to note the exact terms in which the covenant is framed, and this is a question of construction. Thus, a covenant not to practise as a solicitor in a defined area is not broken by writing letters to persons resident in that area, [839] though a covenant not to do acts usually done by a solicitor is. [840] A covenant by a doctor not to practise within an area is broken by attendance on patients in that area, even though he does not solicit such patients, [841] but he does not "set up in practice", though he does "practise", by attending a few patients within the prohibited area at their own request, he having no residence or premises within the area [842]; a similar covenant by a house agent is broken by letting houses in the area, though his office is outside. [843] Nor was a covenant not to carry on business as an auctioneer and estate agent broken by the employee, after the employment had terminated, setting up in business as an "Estate Agent, A.A.I." (Associate of the Auctioneers' Institute). He held himself out as an estate agent only and the addition of "A.A.I." did not mean that he held himself out as an auctioneer. [844] An employee has been held to be concerned in [845] and engaged in the business which he serves [846] but not to carry it on or be concerned in carrying it on. [847] The creditor of a business is not concerned or interested in it. [848] An "interest" in a business means a pecuniary or proprietary interest. A covenant by a man not to carry on or be in anywise interested in a business does not prevent the business being carried on by his wife as a separate trader and in which he takes no part, [849] but he will not be allowed to evade his covenant by the device of carrying on business under a title, [850] or by means of the formation of a limited company, [851] which is a mere cloak for his own activities. A covenant not to practise as a solicitor is not broken by acting as managing clerk to a solicitor, the test being whether in the work he does the relationship of solicitor and client is constituted between himself and the person for whom he acts. [852] Generally, however, to act as assistant to a professional man such as a surgeon [853] or an architect [854] amounts to carrying on that profession. Covenants often preclude an employee from "soliciting" the customers of his ex-employer. This prohibition obviously covers direct approaches and probably also extends to advertisements by the employee designed to bring his availability for business to the notice of the customers of his ex-employer. [855] This would be so even where the customers are a sub-group of a larger group of potential customers to whom the advertisement is directed. [856] There is, however, a distinction between soliciting and doing business, and an anti-solicitation clause would not preclude the employee from doing business with customers of his ex-employer who unprompted seek out his services.

The position of a subordinate in a commercial house is very different; and it has therefore been held that a salaried manager to a rag merchant does not carry on that business [857] nor is a salaried assistant to a jeweller interested either directly or indirectly in the jewellery business. [858] A manufacturer of margarine, who sells the margarine which he manufactures, does not carry on the business of provision merchant. [859] A covenant not to solicit the customers of a particular shop does not extend to the customers of the same business at a different shop. [860]

Restraints during currency of employment

16-125

It now appears probable that even restraints which operate only during the currency of employment are subject to the doctrine of restraint of trade, at any rate if they have as their objects the sterilising rather than the absorption of a man's capacity for work, [861] or perhaps are such that one of the parties is so unilaterally fettered that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade. [862] The doctrine was also applied during the currency of the contract in *Proactive Sports Management Ltd v Rooney*. [863] In that case a football player ("WR") entered into a contract whereby the other party had exclusive control of the exploitation of what were referred to as his "image rights" (the use of his name in connection with sponsorship and other off-field promotional activities). [864] There were a range of factors that led the court to apply the restraint of trade doctrine to strike down the restraint: (a) the relative youth of WR (he was only 17 when the contract was entered into), (b) the duration of the contract, which was for eight years only terminable for material breach, a duration which the court found to be "unique" [865] and which would probably cover half of WR's playing career, [866] (c) payment was to be by way of 20 per cent of WR's earnings from the exploitation of his image rights irrespective of their size and there was no provision for tapering, and (d) WR had received no independent legal advice, the contract being "effectively dictated" to him. [867] It is also clear that a restraint of trade which applies when an employee is on garden leave is subject to the public policy in connection with

restraints applying on termination. [868] When a contract ties the parties only during the continuance of the contract and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims even though those ties exclude all dealings with others, there is probably no restraint of trade within the meaning of the doctrine and no question of reasonableness arises [869]; indeed in appropriate circumstances the courts will even imply a restraint, for example that employees, engaged in skilled work and having knowledge of their employers' manufacturing data, shall not in their spare time carry out similar work for competitors. [870]

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

735. As to contracts between employers as to whom they will employ and on what terms, see below, paras 16-143 et seq. Although agreements "in gross" cannot be justified as reasonable, the doctrine applies in the ordinary way to contracts made on the determination of the employee's employment if the contract was related to a subsisting contract of employment: *Stenhouse Australia Ltd v Phillips*

736. As to contracts which tie the employee only during the continuance of his employment, see below, para.16-125.

737. *One Step (Support) Ltd v Morris-Garner [2016] EWCA Civ 180, [2016] I.R.L.R. 435* at [32].

738. *Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] I.R.L.R. 60* at [26].

739. *Leeds Rugby Ltd v Harris [2005] EWHC 1591 (QB), [2005] All E.R. (D) 286 (Jul)*.

740. *Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988] I.R.L.R. 60, 64*. See also *Systems Reliability Holdings Plc v Smith [1990] I.R.L.R. 377*.

741. *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co [1894] A.C. 535, 566*; *Morris Ltd v Saxelby [1916] 1 A.C. 688, 701*; *Attwood v Lamont [1920] 3 K.B. 571, 586, 587*.

742. *Home Counties Dairies Ltd v Skilton [1970] 1 W.L.R. 526, 536*, per Salmon L.J. See also 537, per Cross L.J. "the validity of a covenant is not to be tried by the improbabilities that might fall within its wording": *Edwards v Worboys [1984] A.C. 724, 727 H*, per Dillon L.J.; *Scully (UK) Ltd v Lee [1998] I.R.L.R. 259*. See also below, para.16-124.

743. *TFS Derivatives Ltd v Morgan [2004] EWHC 3181 (QB)* at [43], cited with approval in *Egon Zehnder Ltd v Tillman [2017] EWHC 1278 (Ch)* at [33].

744. *Scully (UK) Ltd v Lee [1998] I.R.L.R. 259*; see also *Business Seating (Renovations) Ltd v Broad [1989] I.R.L.R. 729*.

745. *[1970] 1 W.L.R. 526, 535*. In adopting this approach to the construction of the restraint the court followed Lord Lindley M.R. in *Haynes v Dorman [1899] 2 Ch. 13, 24–25*. See also *Littlewoods Organisation Ltd v Harris [1977] 1 W.L.R. 1472* in which Lord Denning M.R. criticised the literalist approach of the court in *Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623*. For authorities which would probably not be adhered to in light of the Skilton and *Littlewood* cases see Heydon, *The Restraint of Trade Doctrine* (1971), pp.129–131.

746. *Stenhouse Australia Ltd v Phillips [1974] A.C. 391, 402*.

747. *Allan Janes LLP v Jahal [2006] EWHC 286 (Ch), [2006] I.C.R. 742* (a covenant unreasonable for a milk roundsman may not be unreasonable for a solicitor).

748. *Bull v Pitney-Bowes Ltd [1967] 1 W.L.R. 273*; *Sadler v Imperial Life Assurance Co of Canada*

Ltd [1988] I.R.L.R. 388 (commission payable to an agent after the termination of his employment ceased to be payable if he competed with his ex-employer held to be an unlawful restraint of trade).

749. See generally, Sales (1988) 104 L.Q.R. 600.

750. *Egon Zehnder Ltd v Tillman [2017] EWHC 1278 (Ch)* at [27].

751. *[2017] EWHC (Ch)* at [27] where the court held that such contemplation could include promotion.

752. *Attwood v Lamont [1920] 3 K.B. 57; [1916] 1 A.C. 688, 710*; *Jenkins v Reid [1948] 1 All E.R. 471*; *Eastham v Newcastle United F.C. Ltd [1964] Ch. 413, 431*; *Greig v Insole [1978] 1 W.L.R. 302*; *Gordian Knot Ltd v Kenneth Towers Unreported December 6, 2001*.

753. *Basic Solutions Ltd v Sands [2008] EWHC 1388 (QB)* at [22].

754. *Attwood v Lamont [1920] 3 K.B. 571, 589*.

755. *Morris v Saxelby [1916] 1 A.C. 688, 707*.

756. *Morris v Saxelby [1916] 1 A.C. 688*.

757. per Neville J. in *Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch. 189, 194*.

758. *Bull v Pitney-Bowes Ltd [1967] 1 W.L.R. 273, 277*; *Mont v Mills [1993] I.R.L.R. 173, 177* ("public policy clearly has regard too to the public interest in competition and in the proper use of an employee's skills"). It is on this basis that so-called "garden leave" arrangements can be challenged. These are arrangements whereby an employee is given paid leave normally ending in the termination of the employment relationship and in this way the employer can protect his interests against the disclosure of confidential information, as during the period of paid leave the employee would be under a contractual duty not to disclose any confidential information relating to his employer's business.

759. *[1933] 1 K.B. 793*; applied in *Bull v Pitney-Bowes Ltd [1967] 1 W.L.R. 273*. See also *Howard F. Hudson Pty Ltd v Ronayne (1971) 46 A.L.J.R. 173*.

760. See (1933) 49 L.Q.R. 465.

761. *Bull v Pitney-Bowes Ltd [1967] 1 W.L.R. 273*. cf. *Howard F. Hudson Pty Ltd v Ronayne (1971) 46 A.L.J.R. 173*.

762. *Chafer Ltd v Lilley [1947] L.J.R. 231*.

763. *Townends Group Ltd v Cobb [2004] All E.R. (D) 421 (Nov)*.

764. *Townends Group Ltd v Cobb [2004] All E.R. (D) 421 (Nov)*.

765. *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd [2004] EWHC 44 (Comm), [2004] 4 All E.R. (Comm) 95*.

766. See *Mason v Provident Clothing Co [1913] A.C. 724, 732*; *Wincanton Ltd v Grammy [2000]*

I.R.L.R. 716; *Dranez Anstalt v Hayek [2002] EWCA Civ 1729, [2003] 1 B.C.L.C. 278*.

767. *Bowler v Lovegrove [1921] 1 Ch. 642*; *Attwood v Lamont [1920] 3 K.B. 571, 589*.

768. *Leng & Co v Andrews [1909] 1 Ch. 763, 773*; *Mason v Provident Clothing Co [1913] A.C. 724*; *Stevenson Jordan and Harrison Ltd v Macdonald and Evans [1952] 1 T.L.R. 101*; *Axiom Business Computers Ltd v Jeannie Frederick Unreported, November 20, 2003, Ct of Session*.

769. *Hepworth Manufacturing Co v Ryott [1920] 1 Ch. 1.*

770. *Electric Transmission Ltd v Dannenberg (1949) 66 R.P.C. 183*.

771. *Coppage v Safety Net Security Ltd [2013] EWCA Civ 1176, [2013] I.R.L.R. 970*, at [13].

772. North [1968] J.B.L. 32; Jones (1970) 86 L.Q.R. 463; Gurry, *Breach of Confidence* (1984).

773. *Printers & Finishers Ltd v Holloway [1965] 1 W.L.R. 1, 5*; *Under Water Welders & Repairers Ltd v Street and Longthorne [1968] R.P.C. 498, 507*; *Roger Bullivant Ltd v Ellis [1987] I.C.R. 464*. cf. *Schering Chemicals Ltd v Falkman Ltd [1982] 2 Q.B. 1*; *Thomas Marshall (Exports) Ltd v Guinie [1979] Ch. 227*; *Brooks v Olyslager Oms (UK) Ltd [1998] I.R.L.R. 590* (information in the public domain not confidential); *CWS Dolphin Ltd v Simonet [2001] 2 B.C.L.C. 704*; *MVF3 APS (formerly Vestegaard Frandsen A/S) v Bestnet Europe Ltd [2011] EWCA Civ 424*.

774. *Robb v Green [1985] 2 Q.B. 1*; *Crowson Fabrics Ltd v Rider [2007] EWHC 2942 (Ch), [2008] I.R.L.R. 288*.

775. This duty of fidelity ("good faith and loyalty") must be distinguished from a "fiduciary duty" which an employee does not necessarily owe because of his status: see *Customs Systems Plc v Ranson [2011] EWHC 3304 (QB)*.

776. *Faccenda Chicken Ltd v Fowler [1987] Ch. 117* (this case will be analysed in greater detail below, para.16-119); *Capita Plc v Darch [2017] EWHC 1248 (Ch)*. On when information ceases to be confidential by publication, see *Speed Seal Products Ltd v Paddington [1985] 1 W.L.R. 1327*; and on the measure of damages see *Dawson & Mason Ltd v Potter [1986] 1 W.L.R. 1419* .

777. *Shepherds Investments Ltd v Walters [2006] EWHC 866 (Ch), [2007] 2 B.C.L.C. 202* at [107].

778. *Faccenda Chicken Ltd v Fowler [1987] Ch. 117, 138*.

779. cf. *Printers & Finishers Ltd v Holloway [1965] 1 W.L.R. 1*; *Littlewoods Organisation Ltd v Harris [1977] 1 W.L.R. 1472*.

780. *Balston Ltd v Headline Filters Ltd (1987) F.S.R. 330, 352*.

781. *Balston Ltd v Headline Filters Ltd (1987) 13 F.S.R. 330, 347–348*.

782. *Lock International Plc v Beswick [1989] 1 W.L.R. 1268, 1274* (grounds on which an *Anton Piller* order was sought not sufficiently particularised).

783. *International Consulting Services (UK) Ltd v Hart [2000] I.R.L.R. 277*.

784. *Thomas v Farr Plc [2007] EWCA Civ 18, [2007] I.R.L.R. 419*; see also *Extec Screens & Crushers Ltd v Rice [2007] EWHC 1043 (QB)*.

785. *Shepherds Investments Ltd v Walters [2006] EWHC 836 (Ch), [2006] All E.R. (D) 213 (Apr)*.

786. *Haynes v Doman [1899] 2 Ch. 13*; *Caribonum Co v Le Couch (1913) 109 L.T. 385*; *Clark v Electronic Applications (Commercial) Ltd [1963] R.P.C. 234*; *Brunning Group v Bentley [1966] C.L.Y. 4489*; *Littlewoods Organisation Ltd v Harris [1977] 1 W.L.R. 1472*; *Voaden v Voaden*

Unreported February 21, 1997, Lindsay J.; *Polymasc Pharmaceutical Plc v Stephen Alexander Charles [1999] F.S.R. 711*. On what constitutes a trade secret see: *Pennwell Publishing (UK) Ltd v Ornstein [2007] EWHC 1570 (QB), [2008] 2 B.C.L.C. 246*.

787. See below, para.16-120 and see *S. W. Strange Ltd v Mann [1965] 1 W.L.R. 629*.

788. *Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623, 640*. The presence of an enforceable nonsolicitation clause diminishes the need for a wider clause against doing business or, at least, increases the burden of justifying the wider clause: *Stenhouse Australia Ltd v Phillips [1974] A.C. 391*. But if a non-solicitation clause would clearly suffice it may be as hard to justify a clause against doing business that stands alone as it would be to justify a clause against doing business that stands alongside a non-solicitation clause. See also *Office Angels Ltd v Rainer-Thomas and O'Connor [1991] I.R.L.R. 214*; *Brake Bros Ltd v Ungless [2004] EWHC 2799 (QB), [2004] All E.R. (D) 686 (Jul)*; *Kynixa v Hynes [2008] EWHC 1495 (QB)*; *Ashcourt Rowan Financial Planning Ltd v Hall [2013] EWHC 1185 (QB), [2013] I.R.L.R. 637*.

789. *Baines v Geary (1887) 35 Ch. D. 154*; *Ropeways v Hoyle (1919) 88 L.J. Ch. 446*; *Fitch v Dewes [1921] 2 A.C. 158*; *Marion White Ltd v Francis [1972] 1 W.L.R. 1423*. Contrast *Lucas & Co Ltd v Mitchell [1974] Ch. 129* (anti-solicitation covenant was severable from a trading covenant and enforceable).

790. *S.W. Strange Ltd v Mann [1965] 1 W.L.R. 629*; *Lucas & Co Ltd v Mitchell [1974] Ch. 129*. Contrast *Spafax (1965) Ltd v Dommett (1972) 116 S.J. 711* (where the word "customers" was said to be impossibly vague); *S.B.J. Stephenson Ltd v Mandy [2000] I.R.L.R. 233*.

791. *Morris v Saxelby [1916] A.C. 688, 710*; *Faccenda Chicken Ltd v Fowler [1987] Ch. 117, 137*; *Fibrenetix Storage Ltd v Davis [2004] EWHC 1359 (QB), [2004] All E.R. (D) 99 (Jun)* (protection of pricing policies). A covenant restraining a senior employee such as a managing director from dealing with his employer's customers with whom he has not dealt may be valid: see *Landmark Brickwork Ltd v Sutcliffe [2011] EWHC 1239 (QB)*.

792. *Faccenda Chicken Ltd v Fowler [1987] Ch. 117, 137–138*.

793. *Faccenda Chicken Ltd v Fowler [1987] Ch. 117*.

794. *Thomas v Farr Plc [2007] EWCA Civ 18, [2007] I.R.L.R. 419* at [42].

795. *Faccenda Chicken Ltd v Fowler [1987] Ch. 117, 137*; *Poly Lina Ltd v Finch [1996] F.L.R. 75*; *A.T. Poeton (Gloucester) Plating Ltd v Horton [2001] I.C.R. 1208*; *Dranez Anstalt v Hayek [2002] 1 B.C.L.C. 693*.

796. *[1987] Ch. 117*.

797. *Faccenda Chicken Ltd v Fowler [1987] Ch. 117*.

798. *Mont v Mills [1993] I.R.L.R. 172, 177* ("[o]nce the employment relationship ceases, there is no continuing occasion for loyalty" per Simon Brown L.J.).

799. *[1990] I.R.L.R. 377, 384*. Harman J. considered that the dictum was obiter in that in *Faccenda Chicken [1987] Ch. 117* the court was dealing with implied covenants. His own observation was also strictly obiter since he found that the restraint before him related to the sale of a business. See also *Balston Ltd v Headline Filters Ltd [1987] F.S.R. 330, 347–348* (Scott J. had reservations about the judgment of Neill L.J. in the *Faccenda Chicken* case). See also *Lock International Plc v Beswick [1989] 1 W.L.R. 1268*; *Dranez Anstalt v Hayek [2002] 1 B.C.L.C. 693*. Faccenda Chicken was followed in *Roger Bullivant Ltd v Ellis [1987] I.C.R. 464* and *Mammet Holdings Plc v Austin [1991] F.S.R. 538*.

800. As two judges were willing to do in *Lansing Linde Ltd v Kerr [1991] 1 W.L.R. 251, 260* (Staughton L.J.), 270 (Butler-Sloss L.J.). See also *TSB Bank Plc v Conmell (1997) S.L.T. 1254, 1260*; *FSS Travel and Leisure Systems Ltd v Johnson [1998] I.R.L.R. 382*. See also *WRH Ltd v Ayris [2008] EWHC 1080 (QB)* (business cards ordered to be handed back pursuant to

provision in contract of employment that “documents” belonging to employer be returned by ex-employee).

801. *Faccenda Chicken Ltd v Fowler [1987] Ch. 117, 139*.

802. Absence of control, by professional rules, over an unqualified employee may go to support the maintenance of a restraint: *Scorer v Seymour Jones [1966] 1 W.L.R. 1419*.

803. What is acceptable for a senior manager may be held to be unenforceable against a more junior employee: see *Ginsberg v Parker [1988] I.R.L.R. 483*.

804. *Whittaker v Howe (1841) 3 Beav. 383*; sed quaere; contrast *S. Nevanas Ltd v Walker and Foreman [1914] 1 Ch. 413, 425*; see above, para.16-111; *Dendy v Henderson (1855) 11 Ech. 194*; *May v O'Neill (1875) 44 L.J. Ch. 660*; but see the *Nordenfelt case [1894] A.C. 535, 563–564, 572–573*; *Fitch v Dewes [1921] 2 A.C. 158, 167* and the comments thereon in *S.W. Strange Ltd v Mann [1965] 1 W.L.R. 629, 640*.

805. *Horner v Graves (1831) 7 Bing. 735*; *Mallan v May (1843) 11 M. & W. 653*; *Ballachulish Slate Quarries Co Ltd v Grant (1903) 5 F. 1105*; *Eastes v Russ [1914] 1 Ch. 468* (pathologist); *Whitehill v Bradford [1952] Ch. 236*; *Macfarlane v Kent [1965] 1 W.L.R. 1019*; *Lyne-Pirkis v Jones [1969] 1 W.L.R. 1293*; *Peyton v Mindham [1972] 1 W.L.R. 8*.

806. *Tivoli (Manchester) Ltd v Colley (1904) 20 T.L.R. 437*.

807. *Lamson Pneumatic Tube Co v Phillips (1904) 91 L.T. 363*; *Millers Ltd v Steadman (1915) 84 L.J.K.B. 2057*; *S. Nevanas Ltd v Walker and Foreman [1914] 1 Ch. 413*.

808. *Rousillon v Rousillon (1880) 14 Ch. D. 351* (champagne trade); *Rogers v Maddocks [1892] 3 Ch. 346* (malt liquors and, if required by his employer, aerated waters); *Underwood & Son v Barker [1899] 1 Ch. 300* (hay and straw merchants); *Haynes v Dorman [1899] 2 Ch. 13*; *Barr v Craven (1904) 89 L.T. 574* (insurance agency); *Continental Tyre Co v Heath (1913) 29 T.L.R. 308*; *Mason v Provident Clothing Co Ltd [1913] A.C. 724*.

809. *S. Nevanas Ltd v Walker and Foreman [1914] 1 Ch. 413*; *Pearks Ltd v Cullen (1912) 28 T.L.R. 371*; cf. *Perls v Saalfeld [1892] 2 Ch. 149*; *Great Western and Metropolitan Dairies Ltd v Gibbs (1918) 34 T.L.R. 344*; *Whitmore v King (1918) 87 L.J. Ch. 647*; *Vincents of Reading v Fogden (1932) 48 T.L.R. 613*; *Attwood v Lamont [1920] 3 K.B. 571*; *Putsman v Taylor [1927] 1 K.B. 741* ; *Home Counties Dairies Ltd v Skilton [1970] 1 W.L.R. 526*; *Lucas & Co Ltd v Mitchell [1974] Ch. 129*; *Spafax (1965) Ltd v Dommett (1972) 116 S.J. 711*; *Dairy Crest Ltd v Pigott [1989] I.C.R. 92*.

810. *S.W. Strange Ltd v Mann [1965] 1 W.L.R. 629*.

811. *Scorer v Seymour Jones [1966] 1 W.L.R. 1419*.

812. *John Michael Design Plc v Cooke [1987] 2 All E.R. 332*.

813. *Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623.*

814. As to the meaning of solicitation see *Cullard v Taylor (1887) 3 T.L.R. 698*; cf. *Horton v Mead [1913] 1 K.B. 154* and cases there cited in argument.

815. *Plowman & Son Ltd v Ash [1964] 1 W.L.R. 568*; *Home Counties Dairies Ltd v Skilton [1970] 1 W.L.R. 526*.

816. *Konski v Peet [1915] 1 Ch. 530*; *Express Dairy Co v Jackson (1930) 99 L.J.K.B. 181*; *Rayner v Pegler (1964) 189 E.G. 967*; *Gledhow Autoparts Ltd v Delaney [1965] 1 W.L.R. 1366*; *Business Seating (Renovations) Ltd v Broad [1989] I.C.R. 79*; *Austin Knight (UK) v Heinz [1994] F.S.R. 52*; *Anamark Plc v Sommerville (1995) S.L.T. 749*.

817. *Gilford Motor Co v Horne [1933] Ch. 935, 964*; *Plowman & Son Ltd v Ash [1964] 1 W.L.R. 568*.

818. *Clark v Electronic Applications (Commercial) Ltd [1963] R.P.C. 234, 237*; *Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623, 644*; above, para.16-114.

819. *John Michael Design Plc v Cooke [1987] 2 All E.R. 332, 334* (the unwillingness of the customer to deal with the employer is something that goes to damages).

820. *Bromley v Smith [1909] 2 K.B. 235*; *Vandervell Products Ltd v McLeod [1957] R.P.C. 185*; *Rayner v Pegler (1964) 189 E.G. 967*; *Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623, 640*. On *Commercial Plastics Ltd v Vincent* see *Littlewoods Organisation Ltd v Harris [1977] 1 W.L.R. 1472, 1480-1482, 1488-1489*; above, para.16-114.

821. *Plowman & Son Ltd v Ash [1964] 1 W.L.R. 568*; *Home Counties Dairies Ltd v Skilton [1970] 1 W.L.R. 526*. See above, para.16-114.

822. *Baker v Hedgecock (1888) 39 Ch. D. 520*; *Perls v Saalfeld [1892] 2 Ch. 149*; *Ehrman v Bartholomew [1898] 1 Ch. 671*; cf. *Mills v Dunham [1891] 1 Ch. 576*.

823. *Leetham & Sons Ltd v Johnstone-White [1907] 1 Ch. 322*; *Business Seating (Renovations) Ltd v Broad [1989] I.C.R. 729*. Contrast *Stenhouse Australia Ltd v Phillips [1974] A.C. 391* where the employer's business was to some extent transacted for it by its subsidiaries as its agencies or instrumentalities and a covenant which protected the business so transacted for it was held to be reasonable.

824. *PSG Franchising Ltd v Lydia Darby Ltd [2012] EWHC 3707 (QB)* at [45].

825. See above, para.16-102.

826. *Herbert Morris Ltd v Saxelby [1916] 1 A.C. 688, 715*; *M. & S. Drapers v Reynolds [1957] 1 W.L.R. 9*; *Lucas & Co Ltd v Mitchell [1974] Ch. 129*; *Financial Collection Agencies (UK) Ltd v Batey (1973) 117 S.J. 416*; *Luck v Davenport-Smith (1977) 242 E.G. 455*.

827. *Office Angels Ltd v Rainer-Thomas and O'Connor [1991] I.R.L.R. 214, 221*. A frequently advanced justification for area constraints is that breaches of non-solicitation or non-dealing restraints are difficult to detect: see *Landmark Brickwork Ltd v Sutcliffe [2011] EWHC 1239 (QB)* at [36].

828. *S. Nevanas Ltd v Walker and Foreman [1914] 1 Ch. 413, 425*; *Spencer v Marchington [1988] I.R.L.R. 372*. cf. *George Silverman v Silverman Ltd (1969) 113 S.J. 563*.

829. See above, para.16-102 n.577.

830. *Office Angels v Rainer-Thomas [1991] I.R.L.R. 214* at [50]; *Landmark Brickwork Ltd v Sutcliffe [2011] EWHC 1239 (QB)* at [35].

831. *Office Angels v Rainer-Thomas [1991] I.R.L.R. 214* at [59]; *Landmark Brickwork Ltd v Sutcliffe [2011] EWHC 1239 (QB)* at [35].

832. *Scully (UK) Ltd v Lee [1998] I.R.L.R. 259*.

833. *Plowman & Son Ltd v Ash [1964] 1 W.L.R. 568, 572*; *Home Counties Dairies Ltd v Skilton [1970] 1 W.L.R. 526*: cf. *Marley Tiles Ltd v Johnson, The Times, October 16, 1981* (area restraint held to be unreasonable).

834. *Dubowski v Goldstein [1896] 1 Q.B. 478*; *Mason v Provident Clothing Co [1913] A.C. 724, 734, 741*.

835. *S.W. Strange Ltd v Mann [1965] 1 W.L.R. 629*; cf. *Macfarlane v Kent [1965] 1 W.L.R. 1019, 1024*; *Scorer v Seymour Jones [1966] 1 W.L.R. 1419*; *Lucas & Co Ltd v Mitchell [1974] Ch. 129*

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836. *Fitch v Dewes [1921] 2 A.C. 158, 163, 168*.

837. *Mouflet v Cole (1872) L.R. 8 Ex. 32*. See *Atkyns v Kinnier (1850) 4 Ex. 776* for a case where the parties adopted their own unit of measurement.

838. *Turner v Commonwealth & British Minerals Ltd [2000] I.R.L.R. 14, 117*. Although the courts have also cautioned that an area constraint may be wider than is needed and that "focussed covenants", that is, anti-solicitation and confidentiality covenants, might be more appropriate: *Russ v Robertson [2011] EWHC 3470 (Civ)*.

839. *Woodbridge & Sons v Bellamy [1911] 1 Ch. 326*; *Freeman v Fox (1911) 55 S.J. 650*.

840. *Edmundson v Render [1905] 2 Ch. 320*.

841. *Rogers v Drury (1887) 57 L.J. Ch. 504*.

842. *Robertson v Buchanan (1904) 73 L.J. Ch. 408*.

843. *Hadsley v Dayer-Smith [1914] A.C. 979*.

844. *Bowler v Lovegrove [1921] 1 Ch. 642*.

845. *Hill & Co v Hill (1886) 55 L.T. 769*.

846. *Pearks Ltd v Cullen (1912) 28 T.L.R. 371*.

847. *Ramoneur & Co Ltd v Brixey (1911) 104 L.T. 809*.

848. *Cory & Son v Harrison [1906] A.C. 274*.

849. *Smith v Hancock [1894] 2 Ch. 377*; cf. *Scheckter v Kolbe, 1955 (3) S.A. 109*.

850. *Smith v Hancock [1894] 2 Ch. 377*, cf. *Scheckter v Kolbe, 1955 (3) S.A. 109*.

851. *Gilford Motor Co Ltd v Horne [1933] Ch. 935*; *Prest v Petrodel Resources Ltd [2013] 2 A.C. 415*; *Rush Hair Ltd v Gibson-Forbes [2016] EWHC 2589 (QB)*.

852. *Way v Bishop [1928] Ch. 647*.

853. *Palmer v Mallet (1887) 36 Ch. D. 411*.

854. *Robertson v Willmott (1909) 25 T.L.R. 681*.

855. *Sweeney v Astle [1923] N.Z.L.R. 1198, 1204–1205*.

856. *Sweeney v Astle [1923] N.Z.L.R. 1198*.

857. *Allen v Taylor (1871) 39 L.J. Ch. 627*.

858. *Gophir Diamond Co v Wood [1902] 1 Ch. 950*; cf. *Scheckter v Kolbe (1955) 3 S.A. 109*.

859. *Lovell and Christmas Ltd v Wall (1911) 104 L.T. 85*; cf. *Automobile Carriage Builders Ltd v Sayers (1909) 101 L.T. 419*.

860. *Marshall & Murray Ltd v Jones (1913) 29 T.L.R. 351*.

861. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 328, 336*; *Young v*

Timmins (1831) 1 Cr. & J. 331. See also *Lido-Savoy Pty Ltd v Paredes [1972] V.R. 297*, distinguishing *Warner Bros Pictures Inc v Nelson [1937] 1 K.B. 209*. See also above, paras 16-089 et seq.

862. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 328*; *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308* and *Clifford Davies Ltd v W.E.A. Records Ltd [1975] 1 W.L.R. 61*; *Greig v Insole [1978] 1 W.L.R 302, 325-327*. In the light of these cases it is submitted that *Warner Bros Pictures Inc v Nelson [1937] 1 K.B. 209*, where onerous restrictions upon a film actress were considered not to be within the doctrine since they related to her period of employment, can no longer be relied upon.

863. *[2010] EWHC 1807 (QB).*

864. The contract was entered into with a company WR had formed to exploit his image rights but as the restraint related to WR's activities it was the impact on WR's freedom to trade that had to be assessed.

865. *[2010] EWHC 1807 (QB)* at [650].

866. *[2010] EWHC 1807 (QB)* at [647].

867. *[2010] EWHC 1807 (QB)* at [649]. The court also held that *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269* did not constitute authority for the proposition that a contract which imposes "exclusivity obligations on one party during the subsistence of the agreement cannot, as a matter of principle, come within the scope of the doctrine of restraint of trade" (at [653]).

868. *Symbian v Christensen [2001] I.R.L.R. 77*; *TFS Derivatives Ltd v Morgan [2004] EWHC 3181 (QB), [2005] I.R.L.R. 246*.

869. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 307, 328, 336*, contrast at 317.

870. *Hivac Ltd v Park Royal Instruments Ltd [1946] Ch. 169*.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 2. - The Position at Common Law

(f) - Contracts in Restraint of Trade [595]

(iii) - Vendor and Purchaser of Business

Vendor and purchaser [871]

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Restrictive covenants between vendor and purchaser are looked on with less disfavour by the court. "I think it is now generally conceded", said Lord Watson in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [872]:

> "… that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced."

In the vendor and purchaser situation the covenant is as important for the *vendor* as it is for the purchaser: if the vendor could not enter into a valid covenant in restraint of trade then he could not sell his goodwill as the purchaser would have no assurance that the vendor would not compete against him at some time in the future. In other words, an enforceable covenant is necessary to create a property right (a "vendible asset") in the vendor which he can sell. [873] Also, there may be a disparity of bargaining power between employers and employees which is not present in vendor and purchaser situations, although the extent to which this is presently the case in light of contemporary industrial relations practices is open to question. Deciding whether a covenant is taken to protect goodwill attached to the sale of a business is a matter of substance and not form. Thus where an employer allowed its retiring sales staff to capitalise the value of the contacts they had built up with customers and to be paid a lump sum for it on the cessation of their employment, this was held to be the sale of goodwill (despite appearances to the contrary) and the restraint had to be evaluated accordingly. [874] The court went on to hold that a two-year anti-competition covenant was enforceable even though such a covenant in the employee-employer context would not have been valid.

16-127

The more benign attitude [875] of the courts towards restraints in vendor and purchaser contracts is illustrated by *Nordenfelt* itself: in that case the court held that a covenant by a patentee and

manufacturer of guns and ammunition with the purchasers of the goodwill of his business not to engage in the business of a manufacturer of guns and ammunition for 25 years was not too wide to be a valid restraint. The covenant must, however, have been taken in connection with a genuine sale of a business. [876] A naked covenant in restraint of trade is void. [877] Where the business sold was that of dealing in imitation jewellery in London, it was held that an agreement covering real jewellery and extending to a number of European countries was too wide. [878] Where the lease and goodwill of a hairdresser and tobacconist were sold, the vendor covenanting not to carry on such a business in a particular town during his life, the covenant was held to be unreasonable and void. [879] Where the sale of a goodwill is concerned, if the restriction as to space is considered to be reasonable, it is seldom that the restriction can be held to be unreasonable because there is no limit as to time. [880] The business sold is the only legitimate subject of protection; the purchaser cannot take a covenant protecting other businesses controlled by him. [881] Thus where a vendor sold business A, a gentlemen's hairdresser, he could not enforce against the purchaser a non-competition covenant protecting business B, a ladies' hairdressing business. [882] On the sale of a business with a covenant that the vendor:

> "… would not within ten years … directly or indirectly carry on or assist in carrying on or be engaged, concerned, interested or employed in the business of a quarry within seventy-five miles of"

the quarry sold, it was held to be a breach of this covenant that the vendor had advanced money to his sons to start a similar business within the prohibited area and had given them advice as to how to manage the new business. [883] On the sale of a company, its directors may agree not to compete with the purchaser. Such an agreement may be subject to competition legislation: see Vol.II, Ch.43.

Sale of goodwill without express restraint

16-128

Where the goodwill of a business is sold, there being no express agreement as to the vendor's refraining from future competition, the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser. [884] The ground of this may be either that a man may not derogate from his own grant, or that the vendor had impliedly contracted not to solicit his former customers, or that it would be fraudulent to do so. "It is not right", observed Lord Macnaghten:

> "… to profess to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." [885]

For the same reason the vendor of a business may not represent that he is carrying on business in continuance of, or in succession to, the business carried on by his former firm. [886] The principle of *Trego v Hunt* [887] extends to the executors of a vendor who are executing a contract for the sale of the goodwill. No such covenant can be implied, however, on the part of a bankrupt where the business is sold by the trustee in bankruptcy, because the alienation is compulsory [888]; this is the case even though the bankrupt agreed to aid in realising the business. [889] A purchaser of a business and goodwill of a bankrupt has therefore no right to restrain the bankrupt from setting up a fresh business or from soliciting customers of the old business, and this even though the bankrupt has joined in the conveyance to the purchaser. This rule applies also to the sale of a debtor's business by a trustee of a deed of arrangement for creditors. This is also regarded as a compulsory alienation. [890]

595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

871. Also of relevance are the provisions of art.81 EC (on which see below, Vol.II, Ch.43); as a general proposition, a restrictive covenant which is ancillary to a legitimate transaction such as the sale of business with its associated goodwill and which is appropriately limited in subject matter, geographical scope and time, would not normally infringe EU or domestic competition law: see *Remia and Nutricia v Commission [1985] E.C.R. 2545*.

872. *[1894] A.C. 535, 552*.

873. Blake (1960) 73 Harvard Law Review 625, at 646–648; *Attwood v Lamont [1920] 3 K.B. 571*; *Ronbar Enterprises Ltd v Green [1954] 1 W.L.R. 815, 820–821*. A failure by a solicitor to advise the purchaser of a business that the agreement did not contain a restraint against competition has been held to constitute negligence: see *Luffeorm Ltd v Kitsons LLP [2015] P.N.L.R. 30 QB*.

874. *Allied Dunbar (Frank Weisinger) Ltd v Frank Weisinger [1988] I.R.L.R. 60*.

875. In *Cavendish Square Holdings BV v Makdessi [2012] EWHC 3582 (Comm), [2013] All E.R. (Comm) 787* at [15] the court considered that there was "more freedom of contract between buyer and seller than between master and servant".

876. The vendor of shares in a business may, in certain circumstances, be in the same position as the vendor of the business itself: *Connors Bros Ltd v Connors [1940] 4 All E.R. 179*; *Greening Industries Ltd v Penny (1965) 53 D.L.R. (2d) 643*; *Systems Reliability Holdings Plc v Smith [1990] I.R.L.R. 377*; above, para.16-119.

877. *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] A.C. 181*, below, para.16-140. cf. above, para.16-105. As to agreements between co-operative societies delimiting their trading areas, see *Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd [1960] A.C. 832*, especially 842; cf. *Re Doncaster Co-operative Society Ltd's and Retford Co-operative Society Ltd's Agreement [1960] 1 W.L.R. 1186*.

878. *Goldsoll v Goldman [1915] 1 Ch. 292*. A covenant limited to the sale of imitation jewellery in the United Kingdom and Isle of Man was held to be severable and valid. See above, para.16-105; below, paras 16-211 et seq.

879. *Pellow v Ivy (1933) 49 T.L.R. 422*.

880. *Connors Bros Ltd v Connors [1940] 4 All E.R. 179, 195*.

881. *British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch. 563*; *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934] A.C. 181*.

882. *Giblin v Murdoch (1979) S.L.T. 5*.

883. *Batts Combe Quarry Ltd v Ford [1943] Ch. 51*.

884. *Trego v Hunt [1896] A.C. 7*, approving *Labouchere v Dawson (1872) L.R. 13 Eq. 322*. See also *Jennings v Jennings [1898] 1 Ch. 378*. Even if goodwill is not expressly mentioned, its sale is implied on the sale of a business: *Shipwright v Clements (1871) 19 W.R. 599*.

885. *Trego v Hunt [1896] A.C. 7, 25*.

886. *Churton v Douglas (1859) Johns. 174*.

887. *[1896] A.C. 7*. See Muir Hunter, *Personal Insolvency*, para.3-116.

888. *Cruttwell v Lye (1810) 17 Ves. 335*; *Walker v Mottram (1881) 19 Ch. D. 355*. This is because,

unlike the situation where there is a voluntary alienation, there is no personal covenant when the alienation is compulsory.

889. *Farey v Cooper [1927] 2 K.B. 384*.

890. *Green & Sons (Northampton) Ltd v Morris [1914] 1 Ch. 562*; followed in *Farey v Cooper [1927] 2 K.B. 384, 398*, per Atkin L.J.

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(iv) - Partners

Covenants on dissolution of partnership

16-129

Upon similar principles, including that of *Trego v Hunt* just referred to, restrictive covenants which operate upon the dissolution of a partnership are valid, [891] if they impose no wider restraint than the circumstances reasonably require. [892] In *Bridge v Deacons* [893] it was considered inappropriate to attempt to categorise covenants in partnership agreements as either falling within the vendor-purchaser or employer-employee categories; the court in such cases simply had to determine whether the covenant was no more than was necessary to protect the interests of the covenantee. A fortiori, such restrictive covenants are generally valid during the continuance of the partnership [894]; thus, an agreement by one of the proprietors of a theatre not to write plays for any other theatre is good. [895] In the absence of any express covenant an ex-partner (who has been paid the value of his share including his interest in the goodwill) on dissolution of the partnership may carry on a similar and competing business in his own name and may deal with customers of his former firm and he may advertise himself as having been connected with the business sold. [896] He may not directly or indirectly canvass them or persuade them to deal with himself and not with the old firm, [897] nor may he carry on his business in the name of the old firm or represent his business as still being that of the old firm. [898]

Analogous agreements

16-130

It is well established that the categories involving the restraint of trade doctrine are neither rigid not exclusive. [899] The traditional categories for applying the restraint of trade principles are vendor and purchaser and employment contracts. This obviously is a small sub-set of commercial relationships. In *Kall-Kwik (UK) Ltd v Frank Clarence Rush* [900] the court had to deal with the application of the restraint of trade doctrine to a franchise agreement whereby on the termination of the franchise, the franchisee was restrained from competing with the franchisor. The court held that such a restraint was more akin to a restraint in a vendor and purchaser situation. The franchisee had an obligation to transfer the “goodwill” attached to the franchise at the end of the franchise period and this was analogous to the situation where the vendor of property enters into a restraint in order to protect any goodwill transferred to the purchaser. The interest which a franchisor has in restraining a former franchisee from competing with the franchised business in the territory in which the former franchisee operated is the impact that such competition would have on the business of the franchisee who has replaced the ex-franchisee. [901] Where a majority shareholder sells his shares and enters into a contract of service with the company which contains a covenant in restraint of trade, this could also be categorised as a vendor and purchaser covenant and not one relating to employment. [902] In *Convenience Co Ltd v Roberts* [903] the court held that the principles applicable to a franchise

agreement were not identical to those applied to employee and employer or vendor and purchaser and cited with approval the dictum of Neuberger J. in *Dymond Plc v Reeve* [904] that a franchise agreement is closer to the vendor and purchaser agreement. Such a covenant can be seen as being necessary to protect the goodwill of the business. [905] In *Buchanan v Alba Diagnostics Ltd* [906] Lord Hoffmann upheld as valid a perpetual restraint in the assignment of a patent entitling the assignee to the rights of any improvement in the patent. He considered that it was in the public interest for inventors to be able to borrow money on the security of future rights, [907] and a clear implication of his reasoning is that the agreement was treated as being analogous to the sale of the goodwill of a business.

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

891. As to consideration, see *Leighton v Wales (1838) 3 M. & W. 545*. See generally Lindley & Banks on Partnership, 19th edn (2010) at paras 10–218 et seq. Restrictive covenants in partnership agreements are also subject to art.101 of the Treaty on the Functioning of the European Union: see Lindley & Banks on Partnership, 19th edn (2010), paras 10–238 et seq.

892. See *Whitehill v Bradford [1952] Ch. 236*; the National Health Service Act 1977 (as amended) has not altered the position with regard to medical partnerships; *Kerr v Morris [1987] Ch. 90*. See also *Macfarlane v Kent [1965] 1 W.L.R. 1019*; *Ronbar Enterprises v Green [1954] 1 W.L.R. 815*; *Lyne- Pirkis v Jones [1969] 1 W.L.R. 1293*; *Peyton v Mindham [1972] 1 W.L.R. 8*. See also *Nella v Nella, Independent, November 1, 1999*, as to the meaning of "carry on business" in a restraint of trade covenant in a partnership agreement which the court held required some form of continuous trading activity and not merely preparatory steps.

893. *[1984] A.C. 705 PC*. The court also held that a covenant otherwise reasonable was not against public policy because it prohibited a solicitor from soliciting clients of the firm: see also *Oswald Hickson Collier & Co v Carter-Ruck [1984] A.C. 720*; *Edwards v Worboys [1984] A.C. 724*. cf. *Geraghty v Minter (1979–80) 142 C.L.R. 177*; *Thurston Hoskin & Partners v Jewell Hill & Bennett [2002] EWCA Civ 249*.

894. See above, para.16-094.

895. *Morris v Colman (1812) 18 Ves. 437*.

896. Lindley & Banks on Partnership, 19th edn (2010), at paras 10–204 et seq.

897. *Churton v Douglas (1859) Johns. 174*; *Macfarlane v Kent [1965] 1 W.L.R. 1019*.

898. *Labouchere v Dawson (1872) L.R. 13 Eq. 322*; *Trego v Hunt [1896] A.C. 7*; cf. *Curl Bros Ltd v Webster [1904] 1 Ch. 685*. The executors of a deceased partner will be restrained from soliciting the customers of the old firm: *Boorne v Wicker [1927] 1 Ch. 667*.

899. *Dawnay Day & Co v D'Alphen [1997] T.L.R. 334* (a joint venturer had a sufficient interest to enforce an anti-competition covenant).

900. *[1996] F.S.R. 114*.

901. *Pearl Stevenson Associates v Holland [2008] EWHC 1868 (QB)*. It had been held that if the parties continue to operate a franchise after its expiry, the terms of the original franchise may continue to regulate the parties relationship but not the restrictive covenant, but this was disapproved of in *PSG Franchising Ltd v Lydia Darby Ltd [2012] EWHC 3707 (QB)*, where the authorities are analysed.

902. *Alliance Paper Group Plc v Prestwich [1996] I.R.L.R. 25*. A term in a shareholders' agreement that the parties to it will not disclose confidential information is enforceable: see *Giles v Rhind Unreported February 9, 2000*.

903. *[2001] F.S.R. 625*.

904. *[1999] F.S.R. 148, 153*. See also *Chipsaway International Ltd v Kerr [2009] EWCA Civ 320*.

905. *TSC Europe Ltd v Massey [1999] I.R.L.R. 22* (however, the restraint in this case, an antisolicitation covenant, was held to be unreasonable in that it applied to all employees no matter how junior, and to employees who joined the company after the covenantor had ceased his employment).

906. *[2004] UKHL 5, (2004) S.C.(H.L.) 9*.

907. *Buchanan v Alba Diagnostics Ltd (2004) S.C.(H.L.) 9* at [29].

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(v) - Supply and Acquisition of Goods: Restraints in Vertical Agreements

Application of doctrine

16-131

The treatment of restraints in vertical agreements dealt with in this part (i.e. paras 16-131—16-137) will concentrate on English common law. However, this is an area in which EU law and UK competition law are of equal if not greater importance and this body of law must also be considered when dealing with these types of restraint. [908] Agreements between a supplier of goods [909] and one to whom he supplies them may be described as “vertical” agreements. Such agreements can usefully be treated separately from agreements between suppliers inter se and acquirers inter se, which may be termed “horizontal” agreements. Although the doctrine of restraint of trade is capable of applying to vertical agreements, they are, for various reasons, less likely to be rendered unenforceable by the doctrine than are horizontal agreements. A further distinction [910] has perhaps to be drawn between:

(a)

restrictions which relate exclusively to the goods supplied under vertical agreements, e.g. that the goods shall not be resold for more or less than a certain price or to certain persons or classes of person or outside a certain area; and

(b)

restrictions which relate to goods other than those supplied under the agreement, e.g. absolutely or conditionally that the seller shall not supply similar goods to others or that the buyer shall not acquire similar goods from others.

Agreements which contain restrictions relating only to the goods supplied thereunder may well fall outside the scope of the common law doctrine of restraint of trade since before making the agreement the person acquiring the goods had no right to deal with them at all and in making the agreement he therefore gave up no right but, rather, acquired a limited right. [911] The doctrine is certainly capable of applying to agreements which contain restrictions relating to goods other than those supplied under the agreement, [912] though it would seem that unless the agreement contains special, oppressive features, the doctrine will not be applied where the inclusion of such a restriction in such a transaction has gained general commercial acceptance [913] as perhaps, for example, where a wholesaler agrees to purchase his requirements of a particular class of goods exclusively from a manufacturer. [914]

Exclusive purchasing [915]: solus petrol agreements

16-132

An important application of the doctrine has been to solus petrol agreements, i.e. agreements between petrol companies and the operators of petrol filling stations under which the latter are bound to acquire all their requirements of petrol, whether for resale at a particular station [916] or generally, from the petrol company. So in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [917] the defendants had undertaken to purchase from the plaintiffs for the following four years and five months the plaintiffs' petrol at wholesale schedule prices for all the requirements of a station which the defendants operated and, if they sold the station during that time, to procure the buyer to enter into a similar solus agreement with the plaintiffs; the defendants had further undertaken to keep the garage open at all reasonable hours. The evidence relating to the reasonableness or otherwise of the length of the tie was meagre but in the circumstances, and influenced perhaps by the report of the Monopolies Commission on the Supply of Petrol to Retailers in the UK, [918] the House of Lords held that the tie, being for less than five years, was reasonable and that the agreement should therefore be upheld. But in the same case the House of Lords held unenforceable restrictions of a similar nature contained in a mortgage relating to another station of the defendants, since the restrictions were for 21 years. This further illustrates that where a covenant in restraint of trade, which would be invalid if contained in a simple contract, is incorporated in a mortgage, [919] it does not thereby become enforceable, unless, as it was in the *Esso* case, the covenant is no more than reasonable to protect the mortgagee's interest in the value of the land as security for his loan. [920]

Reasonableness in circumstances

16-133

In determining whether a solus agreement is enforceable or not, no simple rule can be applied since the court will have regard to all the terms of the agreement and the surrounding circumstances. [921] The importance of evaluating the restraint in the light of all the surrounding circumstances is illustrated by *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [922] in which the Court of Appeal upheld as reasonable a tie for 21 years. Previous to this it had been thought that, as a result of the *Esso* decision, a tie for longer than five years would not be valid unless perhaps the petrol company produced evidence of economic necessity justifying a longer period, something which the petrol company failed to do in *Alec Lobb*. In that case the plaintiff garage company, which was in financial difficulties, renegotiated its solus agreement with the defendant, its petrol supplier. The outcome was a lease and lease-back arrangement whereby the plaintiff company for a premium of £35,000 leased its garage to the defendant for 51 years at a peppercorn rent and the defendant leased it back for 21 years to the principal shareholders in the plaintiff company. The plaintiff company sought to have the lease set aside on a number of grounds, one of which was that the tie constituted an unreasonable restraint of trade. Despite the fact that the defendant produced no evidence of economic necessity, the Court of Appeal upheld the validity of the restraint. Dillon L.J. found that the company had as a matter of substance received £35,000 for the tie, something which was undoubtedly beneficial. In addition there were a number of other factors which rendered the tie unobjectionable:

(a)

for planning reasons the site could only be used as a garage and it made little difference to the public whether the petrol sold on it came from the defendant or some other company;

(b)

the plaintiff company could terminate the tie after seven years under a break clause;

(c)

the premises had been subject to a tie for four years before the 21-year tie had been entered into.

Dunn and Waller L.JJ. were also influenced by the fact that to uphold the validity of the tie would encourage the rescue of firms on the verge of bankruptcy. The implication of this is that the more perilous a firm's financial condition, the longer the tie that can be extracted as a price of rescue. Where a tie is unreasonable, the remainder of the agreement may also be unenforceable if the deletion of the tie would alter the nature of the agreement. [923]

Solus petrol agreements

16-134

Apart from the common law, all solus petrol agreements in the United Kingdom were substantially affected by the undertakings given by the petrol companies to the Secretary of State. However, the Secretary of State accepted the release of the undertakings in 2000. [924] There is the possibility of such agreements being subject to a market investigation reference by the Office of Fair Trading to the Competition Commission under Pt 4 of the Enterprise Act 2002, in particular, where competition is restricted due to a network of vertical agreements. [925] Exclusive purchasing and supply obligations may infringe art.81(1) where they appreciably restrict competition and have an appreciable impact on trade between Member States. [926] The undertakings relate not only to the enforcement and determination of existing solus ties and the inclusion of solus ties in new agreements, but also to other terms of agreements between petrol companies and operators of petrol filling stations, including ties relating to lubricants and other goods sold by such stations, the making of certain commission and other arrangements, options and rights of pre-emption over petrol filling stations and the terms of leases and licences of company-owned filling stations. An exclusive supply obligation will usually fall within the prohibition in art.81(1) EC but may benefit from the block exemption for such agreements set out in EC Regulation 1984/83.

Tied public houses [927]

16-135

Another and much older class of exclusive purchasing agreements comprises agreements under which breweries lease or sell public houses on the terms that the publican shall buy his beer exclusively from the brewery. [928] Such agreements have long been enforced at common law [929] and would seem still to lie outside the common law doctrine of restraint of trade, either because of the general commercial acceptance which they have long enjoyed [930] or because the publican accepts the restrictions under the very agreement by which he acquires his interest in the public house. [931]

Implied obligations and limits to rights of supplier

16-136

In considering whether an exclusive purchasing agreement is of a class which has gained general commercial acceptance and therefore falls outside the common law doctrine of restraint of trade, [932] or whether the agreement, though within the doctrine, is reasonable, it is probably relevant to consider the implied obligations of the supplier. Thus a covenant by a lessee of a public house to take beer only from a particular brewery is subject to an implied condition that good and wholesome beer shall be supplied. [933] It has been said that this rule applies even though there is no specific agreement by the brewer to supply the publican with beer, apparently on the ground that the existence of the tying covenant amounts to an implied guarantee by the covenantee that he will at times supply liquor of good quality at reasonable prices in requisite quantities. An injunction against the publican will be granted only for so long a time as the brewers are prepared to supply him with beers of a reasonable quality at a reasonable price. [934]

Exclusive selling agreements and co-operative marketing schemes [935]

16-137

Subject to the consideration that it may be more onerous to require a buyer to take his whole supply from one source than to require a seller to sell his whole output to one buyer, [936] exclusive selling agreements are, it would seem, to be treated in the same way as exclusive buying agreements. [937] Thus an obligation imposed on a farmer to sell all his milk to an agricultural co-operative, with no power on the part of the farmer to terminate his obligation, has been held in restraint of trade and unreasonable [938] because in the circumstances it was an unusual and excessive fetter on the farmer's personal liberty. [939] Where such an obligation was imposed under a marketing scheme which had been accepted by the great majority of producers and contained no unusual features it was, in the circumstances, held to be reasonable and enforceable. [940]

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

908. See Vol.II, para.43-077. The court held in *Days Medical Aids Ltd v Pihsiang Machinery Co Ltd [2004] EWHC 44 (Comm)* that an agreement not invalidated by art.81 of the EC Treaty could not be subject to the common law restraint of trade doctrine. See also *Jones v Ricoh UK Ltd [2010] EWHC 1743 (Ch)*.

909. As to certain special rules relating to patented articles, see below, para.16-141.

910. EC Treaty art.81(1) prohibits anti-competitive agreements, including vertical agreements, unless they satisfy the criteria set out in art.81(3). Regulation 2790/99 on categories of vertical agreements [1999] O.J. L336/21 grants block exemption to vertical agreements provided that a market share cap of 30 per cent is not exceeded and omits certain "hardcore" restrictions. The Commission has published Guidelines on its approach to vertical agreements and this Regulation ([2000] O.J. C291/1). The Competition Act 1998 entered into force on March 1, 2000. It contains the Ch.I and II prohibitions which are closely modelled on arts 81 and 82 EC. Vertical agreements, except for those fixing resale prices, are currently excluded from the Ch.I, but not Ch.II, prohibition (SI 2000/310). The Government has proposed to repeal this exclusion (A World Class Competition Regime, COM(2001) 5233, paras 8.14–8.16). In any event, vertical agreements would benefit from a parallel exemption by virtue of s.10 of the Competition Act together with block exemption Regulation 2790/99. Many vertical agreements will have anti-competitive effect entered into by suppliers with power over the market may have appreciable anti-competitive effect and thus caught by art.81(1): see Vol.II, para.43-096.

911. cf. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269* (below, para.16-139), where such reasoning is applied in the case of restrictions relating to the use of land; and see *Elliman, Sons & Co v Carrington & Son Ltd [1901] 2 Ch. 275*; but contrast *British Motor Trade Association v Gilbert [1951] 2 All E.R. 641*, where, however, the plaintiffs had not supplied the goods.

912. See *Palmolive Co (of England) Ltd v Freedman [1928] 2 Ch. 264*.

913. Above, para.16-093.

914. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 328, 336, 963*; cf. *Petrofina (Great Britain) Ltd v Martin [1966] 1 Ch. 146, 184-185*. See also *A. Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 W.L.R. 1308* and *Clifford Davis Ltd v W.E.A. Records Ltd [1975] 1 W.L.R. 61*.

915. As to cases decided before 1967 relating to exclusive purchasing, see generally the cases referred to in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*. It is important to note that all exclusive purchasing agreements will be affected by the EC Treaty, in particular art.81. See also the block exemption regulation which deals with solus petrol agreements: Commission Regulation 1984/83. Those exclusive purchasing agreements which

appreciably restrict competition and affect inter Member States trade may be subject to art.81(1) of the EC Treaty, though they may be eligible block exemption conferred by Regulation 2790/99. See Vol.II, paras 43-033—43-034.

916. As to where the station was owned by the petrol company when the agreement was made, see below, para.16-138. Article 5(a) of the Regulation 2790/99 (block exemption) exempts non-compete obligations in agreements for the lease of a petrol station and the supply of petrol for the duration of the agreement (as opposed to the normal five-year rule, see Vol.II, para.43-046).

917. *[1968] A.C. 269*, and see (1966) 82 L.Q.R. 307: (1966) 29 M.L.R. 541; [1967] Camb. L.J. 104; *Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 W.L.R. 814*; *Amoco Australia Pty Ltd v Rocca Bros Co Engineering Pty Ltd [1975] A.C. 561*; *Cleveland Petroleum Ltd v Darstone Ltd [1969] 1 W.L.R. 116*; *Esso Petroleum Ltd v Niad Ltd [2001] All E.R. (D) 324* (the court granted recovery of profits rather than damages for breach by the promisor of a solus type agreement). See also *Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 801*, at [30]-[32].

918. House of Commons Paper 1965 No.264; see below, para.16-133.

919. Restraints contained in mortgages may also be enforceable after redemption as invalid clogs on the equity of redemption: see Megarry & Wade, *The Law of Real Property*, 8th edn (2012), at para.25–090.

920. *[1968] A.C. 269* and see [1967] 2 Q.B. 514, 555, 578.

921. cf. below, para.16-137, and above, para.16-105.

922. *[1985] 1 W.L.R. 173 (noted (1985) 101 L.Q.R. 306)*.

923. *Crehan v Courage Ltd (No.1) [1999] Eu. L.R. 834*.

924. DTI Press Release P/2000/864.

925. Vol.II, paras 43-133—43-134.

926. Where these conditions are satisfied the agreements may benefit from block exemption under Regulation 2790/99.

927. See Vol.II, paras 43-033 et seq.

928. Monopolies Commission, Report on the Supply of Beer, 1989, Cm.651; Supply of Beer (Tied Estate) Order 1989 (SI 1989/2390); Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989 (SI 1989/2258); Supply of Beer (Tied Estate) (Amendment) Order 1997 (SI 1997/1740); these ties will be governed by EU law and subject to the block exemptions referred to n.831, above. The European Commission's proposals for reform of competition policy towards distribution agreements do not include the retention of sector-specific rules for the beer sector: see the European Commission "Communication on the application of the EC competition rules to vertical restraints" of September 30, 1998, s.V(3).

929. *Hartley v Pehall (1827) 1 Peake 178*; *Catt v Tourle (1869) L.R. 4 Ch. App. 654*; *Clegg v Hands (1890) 44 Ch. D. 503*; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269* especially 333, 334. See also *Cutsforth v Mansfield Inns Ltd [1986] 1 W.L.R. 536*. But see below, para.16-137.

930. See above, para.16-093; and see *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*.

931. As to covenants contained in conveyances and leases generally, see below, para.16-139.

932. *Thornton v Sherratt (1818) 8 Taunt. 529*.

933. *Courage & Co v Carpenter [1910] 1 Ch. 262*.

934. *Catt v Tourle (1869) L.R. 4 Ch. App. 654*.

935. See Vol.II, para.43-039.

936. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*, per Lord Reid at 298.

937. See above, paras 16-132—16-134.

938. *McEllistrim v Ballymacelligott Co-operative Society Ltd [1919] A.C. 548*; *Joseph Evans & Co Ltd v Heathcote [1918] 1 K.B. 418*, where, however, since the association was a "trade union", the agreement fell within the Trade Union Acts 1871 and 1876 and was therefore sufficient to support an account stated, on which the plaintiffs were able to recover.

939. See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*.

940. *English Hop Growers Ltd v Dering [1928] 2 K.B. 174*; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*.

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(f) - Contracts in Restraint of Trade [595]

(vi) - Restraints on the Use of Land or Chattels

Restraint affecting commercial use of land

16-138

Where a restraint affecting the commercial use of land is accepted by one who enjoyed his interest in the land before the making of the arrangement under which the restraint was imposed, it is clearly established that the doctrine of restraint of trade applies to the same extent as it otherwise would. [941]

Restraint contained in conveyance or lease

16-139

There is authority for the proposition that where a restraint on the use of a particular piece of land, e.g. that the land shall not be used for the purposes of trade generally or of particular trades or that all the goods of some kind sold from the land shall be bought from a specified source, is imposed in a conveyance or lease of the land in question, the common law doctrine of restraint of trade does not apply. The purchaser or lessee of the land, before he made the agreement, had no right to use the land at all and in making the agreement he therefore gave up no right but, rather, acquired a limited right. [942] This reasoning is not, however, free from difficulty, as has been pointed out in paras 16-089 et seq., above.

Restraint on use of chattels

16-140

On similar reasoning, restraints on the use of a chattel which are imposed upon a party by the contract under which he acquires the chattel may well fall outside the common law doctrine of restraint of trade. [943] Where the restraint relates to chattels not acquired under the contract which imposes the restraint, the doctrine ought in principle to apply. And while in *United Shoe Machinery Co of Canada v Bruner* [944] the Privy Council upheld a condition in a demise of machines that no other machines of a like kind should be used by the lessee during the continuance of the contract, the reasons given for the decision are unsatisfactory. [945]

Patented articles and patent licences

16-141

Section 44 of the Patents Act 1977 contained provisions designed to prevent the owner of a patent or

an interest in a patent using his patent to extend his patent monopoly beyond the terms of the patent, e.g. by requiring purchasers of the patented goods to acquire only from him or his nominees other goods or by prohibiting licensees of the patent from using articles, whether patented or not, which are not supplied by him or his nominees. Section 44 was repealed by s.70 of the Competition Act 1998. The practices proscribed by s.44, and other terms in licences of intellectual property rights might be caught by art.81(1) of the EC Treaty or the Ch.I prohibition in the Competition Act. [946] However, many such licences enjoy block exemption by virtue of Regulation 240/96 and would benefit from a so-called "parallel exemption" under domestic law. [947]

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

941. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269*. Such agreements may also be subject to the Competition Act 1998 and art.101 of The Treaty on the Functioning of the European Union.

942. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 298, 308, 309, 325*; cf. 316, 334-335. See also *Cleveland Petroleum Co Ltd v Dartstone Ltd [1969] 1 W.L.R. 116*; *Robinson v Golden Chips (Wholesale) Ltd [1971] N.Z.L.R. 257*; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Pty Ltd [1975] A.C. 561*; *Stephens v Gulf Oil Canada Ltd (1976) 110 D.L.R. (2d) 229*.

943. See above, para.16-138.

944. *[1909] A.C. 330*. This type of arrangement would now be subject to arts 81 and 82 EC and in the light of the size of the fines exigible for breach of these articles, the common law has a very limited role to play in this area.

945. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 297*.

946. See Vol.II, Ch.43.

947. See Vol.II, para.43-117.

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(vii) - Supply and Acquisition of Goods: Restraints in Horizontal Agreements

Horizontal agreements classified

16-142

The treatment of restraints in horizontal agreements dealt with in this part (i.e. paras 16-142—16-145) will concentrate on English common law. However, this is an area in which EU law and United Kingdom competition law are of equal if not greater importance and this body of law must also be considered when dealing with these types of restraint. [948] The two most common classes of restrictive agreements between producers or suppliers of goods inter se are those between vendor and purchaser of a business under which the vendor accepts restrictions for the protection of the goodwill sold and agreements whereby two or more producers or suppliers accept restrictions as to the prices at which or terms on which they will sell, or as to the quantities or descriptions of goods they will produce or sell or as to the persons to whom or areas in which they will sell. [949] Agreements between vendors and purchasers have already been discussed [950]; where the restraint is reasonably required for the protection of the goodwill sold, the restrictive covenant is usually enforceable, otherwise not. Thus where, on "the sale of the goodwill of a licence" to make beer, which in fact the seller had never made, the seller undertook not to make beer for 15 years thereafter, the undertaking was held unenforceable as a bare covenant against competition. [951]

Employer's Association

16-143

Section 128 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that the purpose of an unincorporated employers' association and, in so far as they relate to the regulation of relations between employers and workers or trade unions, the purposes of an employers' association which is a body corporate, shall not, by reason only that they are in restraint of trade, be unlawful so as, inter alia, to make any agreement or trust void or voidable. This provision replaces earlier ones [952] and makes clear that such an association is not illegal as it might otherwise be at common law. The expression "employers' association" is defined by s.122 of the 1992 Act to include any organisation (whether permanent or temporary) which consists wholly or mainly of employers or individual proprietors of one or more descriptions and is an organisation whose principal purposes include the regulation of relations between employers of that description or those descriptions and workers or trade unions. [953] The principal purposes of such an organisation may also include cartel purposes but, if they do so, then, applying the reasoning adopted in *Faramus v Film Artistes Association*, [954] it would seem that s.128 of the 1992 Act legalises only such agreements as are relevant or directed to the purposes of the organisation by virtue of which the organisation is an employers' association and not agreements which are relevant or directed only to other of the organisation's purposes. The point, however, is academic since *cartel* agreements fixing prices and quantities are never illegal at common law and therefore do not require statutory legitimation. But where "legalised" either under

s.128 of the 1992 Act or at common law, such agreements are not thereby rendered enforceable in the courts and are enforceable, if at all, only if they would be at common law. However, s.128 of the 1992 Act further provides that no rule of an unincorporated employers' association nor, in so far as it relates to the regulation of relations between employers and workers or trade unions, any rule of an employers' association which is a body corporate, shall be unlawful or *unenforceable* by reason only that it is in restraint of trade. It would seem therefore that *none* of the *rules* of an *unincorporated* cartel is affected by the doctrine of restraint of trade, provided that the principal purposes of the cartel include the regulation of labour relations. [955]

Price-fixing agreements

16-144

Agreements between suppliers of goods as to the price at which they will sell their goods are subject to the common law doctrine of restraint of trade. This matter would now in all likelihood be dealt with under the Competition Act 1998 or art.82; it is difficult to imagine parties wanting to litigate about the validity at common law of a price-fixing arrangement. [956]

Auction rings

16-145

An agreement by which the parties agree not to bid against each other at an auction and to divide the goods purchased, i.e. to establish a ring, has been held valid at common law as neither fraudulent nor in restraint of trade [957] but if made by a dealer it is a criminal offence [958] and therefore unenforceable.

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

948. See Vol.II, paras 43-016, 43-081 et seq.

949. There are many horizontal agreements where the anti-competitive effect of the restrictions is outweighed by its beneficial effects on technical progress or improved distribution, for example, agreements providing for co-operation on research and development.

950. Above, paras 16-126—16-128.

951. *Vancouver Malt and Sake Brewing Co v Vancouver Breweries [1934] A.C. 181*. As to cooperative marketing schemes see above, para.16-137.

952. See the Trade Union Acts 1871 to 1906, particularly ss.3 and 4 of the Trade Union Act 1871, repeated and replaced by the Industrial Relations Act 1971, particularly ss.35 and 61; Trade Union and Labour Relations Act 1974 s.3(5).

953. See *Greig v Insole [1978] 1 W.L.R. 302, 356-362*.

954. *[1964] A.C. 925*.

955. The validity of such rules may be affected by the Competition Act 1998 or by the EC Treaty. See above, paras 16-129, 16-138; Vol.II, paras 43-035 et seq.

956. For a common law example, see *Att-Gen of Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] A.C. 781*; and see *Cade & Sons Ltd v Daly Co Ltd [1910] 1 I.R. 306*; contrast *Urmston v Whitelegg Bros (1890) 63 L.T. 455* (10-year worldwide price-fixing cartel held unreasonable). See further above, paras 16-131 et seq.

957. *Rawlings v General Trading Co [1921] 1 K.B. 635*; and see *Cohen v Roche [1927] 1 K.B. 169*.

958. The Auctions (Bidding Agreements) Act 1927 s.1 as amended by the Auctions (Bidding Agreements) Act 1969 ss.1, 2 and the Criminal Law Act 1977 Sch.13; s.3 of the 1969 Act entitles the vendor to avoid the contract of sale or alternatively to recover damages.

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(viii) - Labour and Services: Restraints in Horizontal Agreements [959]

Labour

16-146

Section 11 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that the purposes of any trade union shall not, by reason only that they are in restraint of trade, be unlawful so as, inter alia, to make any agreement or trust void or voidable. This provision is intended to make clear that the purposes of such an association are not illegal (as they might be at common law), and it does not render agreements made by such an association enforceable [960]; whether the agreement is enforceable still depends on the application of the common law rules relating to restraint of trade discussed below. The expression “trade union” is defined by s.1 of the 1992 Act to include any organisation (whether permanent or temporary) which consists wholly or mainly of workers of one or more descriptions and is an organisation whose principal purposes include the regulation of relations between workers of the description or those descriptions and employers or employers’ associations. The wording of s.11 of the Act makes it clear that *none* of the *rules* of trade unions is affected by the doctrine of restraint of trade. [961]

16-147

An agreement between traders to regulate the wages and hours of employment of their workers for one year in accordance with the decision of the majority has been held to be against public policy and unenforceable at common law. [962] Similarly a rule of a trade protection society that no member should employ an employee who had left the service of another member without the consent in writing of his previous employer till after the expiration of two years was held invalid at common law. [963] Also, an arrangement between the organisers of a professional sport which restricts the way in which the participants in that sport may earn their livelihood may be invalidated if it constitutes an unreasonable restraint. [964] Indeed the validity of a contract of that nature may have to be judged by the same strict standards as would an individual covenant by an employee with his employer directed to the same end [965]; moreover while there may be very good reasons for the agreement from the employer’s point of view, it may be against the public interest to interfere in such a way with the freedom of employees. [966] An employee who is injured by the operation of such an agreement between employers or by rules to such an effect of an association of employers, whether or not the terms of that agreement or of those rules are incorporated into the employee’s contract of employment, may be granted a declaration against the employers or their association that the agreement or rules, as the case may be, are in unreasonable restraint of trade and therefore unenforceable, [967] and perhaps an injunction restraining the parties enforcing or purporting to enforce them. [968]

Supply of services: common law

16-148

Restrictive agreements relating to the supply of services are at common law subject to the doctrine of restraint of trade [969] upon the same principles as are restrictive agreements relating to the supply of goods. [970] Thus where a group of master stevedores agreed to divide among themselves the work at a particular port, it was held that a provision that a member who on the request of a customer did work which was allotted to another member should pay that other member an equivalent was valid at common law, but not a provision which in certain circumstances prevented a particular job from being accepted by any member. [971] Such an agreement would also infringe art.101 of the Treaty on the Functioning of the European Union.

Supply of professional services

16-149

The regulation of professional services is as much subject to the common law doctrine of restraint of trade [972] as the regulation of other services, [973] at any rate where the profession engages in trade. [974] Public policy may invalidate rules of a body such as the Stewards of the Jockey Club which prevent a class of people, such as women, from exercising a calling over which the body has control [975] or rules of professional conduct laid down for a profession whether or not those rules are intended to be binding. [976]

Supply of labour: common law

16-150

Agreements between workers binding them to regulate their work in accordance with the decision of some outside body or otherwise curtailing the free right to dispose of labour are at common law subject to the doctrine of restraint of trade [977] upon the same principles as agreements between employers to regulate the acquisition of labour. [978] Such contracts have generally been held to be in unreasonable restraint of trade and therefore unenforceable at common law. [979] Where a union's rules impose unjustifiable restraints on members, others of its rules, e.g. for the payment to members of superannuation benefits, have been held also to be unenforceable. [980] Where the rules of a union imposed no restrictive obligations on the members, a rule which provided for the payment of strike pay to those who took part in an authorised strike was held to be enforceable at common law as no more than an insurance of the members against the consequences of a strike. [981]

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

959. As to restrictions imposed by an employer on his employees, see above, paras 16-114 et seq.

960. See above, para.16-143.

961. This was designed to nullify the effect of *Edwards v Society of Graphic and Allied Trades [1971] Ch. 365*. See also *Greig v Insole [1978] 1 W.L.R. 302, 365*; *Associated Newspaper Group Ltd v Wade [1979] 1 W.L.R. 697, 710* (restraint of trade does not mean interference with business).

962. *Hilton v Eckersley (1856) 6 E. & B. 47*; and see *Mogul Steamship Co v McGregor, Gow & Co [1892] A.C. 25, 42; (1889) 23 Q.B.D. 598, 619*.

963. *Mineral Water Bottle, etc., Society v Booth (1887) 36 Ch. D. 465* (the members of the association could protect any confidential information); *Davies v Thomas [1920] 2 Ch. 189, 195*.

964. *Eastham v Newcastle United F.C. Ltd [1964] Ch. 413*; *Greig v Insole [1978] 1 W.L.R. 302*; *Buckley v Tuttey (1971) 125 C.L.R. 353*.

965. *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1959] Ch. 108*. See also above, para.16-114.

966. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 300, 301*.

967. *Eastham v Newcastle United F.C. Ltd [1964] Ch. 413*; *Cooke v Football Association [1972] C.L.Y. 516*; *Greig v Insole [1978] 1 W.L.R. 302*.

968. See *Nagle v Feilden [1966] 2 Q.B. 633*. See also *Cooke v Football Association [1972] C.L.Y. 516* where a claim for damages for loss of wages was rejected as having no ground in contract or tort.

969. *Collins v Locke (1879) 4 App. Cas. 674*; *Budget Rent-a-Car International Inc v Mamos Slough Ltd (1977) 121 S.J. 374*.

970. See above, para.16-144.

971. *Collins v Locke (1879) 4 App. Cas. 674*.

972. See below, para.16-151 for statutory provisions.

973. *Dickson v Pharmaceutical Society of Great Britain [1970] A.C. 403*.

974. *Dickson v Pharmaceutical Society of Great Britain [1970] A.C. 403, 455* but it is to be noted that the traditional categories of covenant in restraint of trade include covenants by doctors, dentists, solicitors, etc., who probably do not engage in trade.

975. *Nagle v Feilden [1966] 2 Q.B. 633*.

976. *Dickson v Pharmaceutical Society of Great Britain [1970] A.C. 403*. The professional services sector is mainly controlled under the Fair Trading Act 1973.

977. *Hornby v Close (1867) L.R. 2 Q.B. 153*; *Mogul Steamship Co Ltd v McGregor, Gow & Co [1892] A.C. 25, 59, 60*; *Cullen v Elwin (1904) 90 L.T. 840*; *Boddington v Lawton, The Times, February 4, 1994*.

978. See above, paras 16-146—16-147.

979. *Russell v Amalgamated Society of Carpenters and Joiners [1912] A.C. 421*; and see Citrine's Trade Union Law, 3rd edn, pp.44–45; Grunfeld, *Modern Trade Union Law* (1966), pp.64–71; *Boddington v Lawton [1994] I.C.R. 478*.

980. *Miller v Amalgamated Engineering Union [1938] Ch. 669*.

981. *Gozney v Bristol Trade and Provident Society [1909] 1 K.B. 901*.

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(ix) - Invalidating and Regulatory Statutory Provisions

Restrictive trade practices, (goods and services) monopolies

16-151

Many practices which are in restraint of trade, or which are designed to stifle competition, are dealt with by specific statutes. The legislation cover, inter alia, restrictive trading agreements relating to goods and services, restrictive labour practices, resale price maintenance and the anti-competitive impact of monopolies. These statutory controls are dealt with in Vol.II, Ch.43.

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595. See Heydon, *The Restraint of Trade Doctrine* (1971); Kamerling and Osman, *Restrictive Covenants under Common and Competition Law*, 4th edn (2004).

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Section 3. - Contracts Unenforceable By Statute

(a) - General Principles

Unenforceability by statute and common law distinguished

16-152

The illegality which renders a contract unenforceable at common law may arise by statute. [982] Unenforceability by statute, on the other hand, arises where a statute itself on its true construction deprives one or both of the parties of their civil remedies under the contract in addition to, or instead of, imposing a penalty upon them. If the statute does so, it is irrelevant whether the parties meant to break the law or not. A significant distinction between cases of contracts which are unenforceable at common law because they were entered into with the object of committing an act illegal by statute and of contracts which are rendered illegal by statute is that in the former case one has to look to see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act that contract will be unenforceable. In the latter case one has to consider, not what acts the statute prohibits, but what contracts it prohibits; but one is not concerned at all with the intent of the parties [983]; if the parties enter into a prohibited contract that contract is unenforceable [984] and ignorance by the parties of the law does not make it the less so. [985]

The distinction illustrated

16-153

The distinction between contracts prohibited by statute and those prohibited at common law is well brought out in *Dungate v Lee*, [986] where the existence of a partnership of a betting office was called in issue. One of the parties denied the existence of the partnership, contending that the bookmaker's permit required by statute was held by him alone and that any partnership would have been contrary to the provisions of the Betting and Gaming Act 1960. It was held that even if, in the course of the partnership, the unlicensed partner committed offences against the Act, the Act did not render the partnership itself illegal as all it required was that one partner be suitably qualified. Nor was the partnership agreement illegal at common law since it did not, by its terms, require the unlicensed partner to act illegally as a bookmaker in the conduct of the business and it was not entered into with an intention on the part of the partners that the unlicensed partner should so act.

Express voidness by statute

16-154

Statutes often provide expressly for the civil consequences of breach of their provisions and this is by far the preferable solution. [987] A contract may, by statute, be void without being illegal, the only penalty being that a contract made in contravention of the statute is entirely ineffective to create rights, as in the case of a contract made in contravention of the Gaming Acts 1845 and 1892; or again a contract may be unenforceable without being either illegal or void, in which case it is effective to

alter the rights of the parties, although the altered rights are not enforceable by them. [988] However, if a contract is illegal, the effect is "to avoid the contract ab initio … if the making of the contract is expressly or impliedly prohibited by statute". [989]

Statute expressly not affecting validity

16-155

A statutory prohibition to which a criminal sanction is attached may also provide that it does not render any contract entered into in breach of its terms void or unenforceable. [990] Whether such a provision has no effect whatsoever on the parties' contractual rights and obligations will depend upon the language used and the statutory purpose underlying the legislation. Thus, although the statute may provide that breach of its prohibition does not render a contract void or unenforceable, the court may nevertheless refuse to enforce the contract because this would be assisting in the furtherance of something that is illegal. [991]

Statute silent as to civil rights

16-156

But where the statute is silent as to the civil rights of the parties but penalises the making or performance of the contract, the courts consider whether the Act, on its true construction, [992] is intended to avoid contracts of the class to which the particular contract belongs or whether it merely prohibits the doing of some particular act. [993] In the following paragraphs certain tests which have been applied by the courts are considered. However, it is important to note that where a contract or its performance is implicated with breach of a statute this does not entail that the contract is avoided. Where the Act does not expressly deprive the plaintiff of his civil remedies under the contract the appropriate question to ask is whether, having regard to the Act and the evils against which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it. [994]

Aids to statutory interpretation

16-157

(1)–(5) Where a statute imposes a penalty on one or both of the parties to a contract, as a result of their entering into the contract or of their manner of performing it, the court will consider whether on the construction and purpose of the statute the doing of the particular act is forbidden as illegal or whether there is merely a charge imposed upon it. If the latter, it is clear that the contract itself is not prohibited. Thus where a tobacco manufacturer sued for the price of tobacco he had sold to the defendant, the fact that he was not licensed to sell tobacco and that his name was not painted on his place of business as required by statute did not prevent him from recovering since there was nothing in the Act to prohibit every sale and its only effect was to impose a penalty for the purpose of the Revenue, on the carrying on of the trade without complying with its requirements. [995] If, on the true construction of the statute:

> "… *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in mind the protection of the revenue or any other object. The sole question is whether the statute *means to prohibit the contract*." [996]

If, on the other hand, the object of the statute is the protection of the public from possible injury [997] or fraud, or is the promotion of some object of public policy, the inference is that contracts made in contravention of its provisions are prohibited. [998] Thus where by statute it was not lawful:

> "… to sell, or to supply … a motor-vehicle … for delivery in such a condition that the use thereof on a road in that condition would be unlawful,"

such a sale was held illegal and a cheque given for the price could not be sued on. [999] Similarly, it was by statute illegal to contract as a moneylender without registration; accordingly a moneylender's failure to register invalidated contracts made and securities taken by him the course of his business, since the whole purpose of the Act was the protection of the public. [1000] It has also been suggested [1001] that:

> "… not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done. If it be the latter, then the act is a prohibited act."

16-158

The courts have also been reluctant to find contracts unenforceable because the illegality doctrine operates in an all or nothing way and there is no proportionality between the loss ensuing from non-enforcement and the breach of statute. This is to be contrasted with fines for criminal acts where some proportionality does pertain. This aspect of the matter caused concern to Devlin J. in *St John Shipping Corp v Joseph Rank Ltd*. [1002] In that case the illegality involved the plaintiff overloading its ship and the defendants wished to hold back merely that portion of the freight which was earned by the overloading. But as Devlin J. pointed out the principle of illegality:

> "… cares not at all for the element of deliberation, or for the gravity of the infraction, and *does not adjust the penalty to the profits unjustifiably earned*." [1003]

Thus, were the doctrine to have applied in that case, it would have entitled the defendants to hold back the full freight which was 40 times the maximum fine for the offence of overloading. [1004] Coupled with this, non-enforcement may have the effect of punishing the offender twice where the statute contains its own penalty for breach.

16-159

The courts have also been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party to the contract who has not performed his part of the bargain but who has benefited from the performance by the other party. As was stated by Devlin J., in the *St John Shipping* case, non-enforcement of the contract may result in the forfeiting of a sum which:

> "… will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it." [1005]

16-160

The courts have also appreciated that the growth in statutory law (including delegated legislation) can result in the unwitting and quite innocent breach of the statute. In *Shaw v Groom* [1006] the court held that failure to comply with the provision of the Rent Act requiring a landlord to provide a tenant with a rent book did not result in the landlord being unable to obtain the payment of rental arrears. One of the factors obviously influencing the court in reaching this conclusion was the growth in the volume of legislation which could easily result in the innocent transgression of some statutory prohibition. [1007]

16-161

Although the courts have recognised “the desirability of (their) … assisting to enforce a statute”, [1008] the consequence of this in driving from the seat of judgment sometimes innocent supplicants has also to be weighed in the balance. [1009]

16-162

None of the above factors constitutes a litmus test which produces fore-ordained results. Obviously it would be preferable if the legislature were specifically to provide for the consequences of breach of the statute. Experience indicates that such legislative foresight is not always displayed, and where it is not the court must answer this question—Does the:

> “… ambit and intent of the particular statute in the light of any other legislation affecting the subject matter … preclude the plaintiff recovering on the contract if he had committed the offence?” [1010]

Illegality through manner of performance

16-163

The question of statutory illegality in a contract generally arises in connection with its formation, but it may also arise in connection with its performance, [1011] since the effect of the statute may be to deprive one or both parties of their rights unless the contract is performed in a particular manner, or, to put the matter another way, the manner in which a contract is performed may turn it into the sort of contract that is prohibited by statute. [1012] Thus, the seller of agricultural fertiliser, who omitted to give to the purchaser an invoice showing the composition of the fertiliser, was held unable to recover its price since the seller had not performed the contract in the only way in which the statute allowed it to be performed. [1013] In another case [1014] statutory regulations required that the seller of utility goods should furnish to the buyer an invoice containing certain particulars. The plaintiff made a contract of sale for non-utility goods, to which the regulations did not apply; but he purported to perform it by delivering to the buyer, without objection, utility garments to which the regulations did apply; and he did not furnish the invoice. The Court of Appeal held that this contract was no less unenforceable than would have been a contract the initial terms of which provided for the sale of utility garments, and which could only have been lawfully performed by the delivery of the requisite invoice.

Unlicensed transactions

16-164

Where a statute or statutory instrument prohibits the doing of work otherwise than under a licence, [1015] a contract under which unlicensed work is carried out will generally be unenforceable. [1016] If there is in existence some licence, the illegality only extends to the excess by which the work exceeds the amount of the licence, unless there is an unseverable agreement to exceed the amount licensed. [1017]

Unlicensed consumer credit business

16-165

Contracts made in contravention of the licensing provisions of the Moneylenders Acts were illegal and would not be enforced. [1018] The latter are now being replaced by the Consumer Credit Act 1974, under s.40(1) of which a regulated agreement with a person who carries on consumer credit business while unlicensed is not illegal but is unenforceable against the debtor unless the Director General of

Fair Trading orders otherwise.

Omission to register according to statute

16-166

Where a statute imposes an obligation to register contracts of a particular kind and provides penalties for failure to register, the non-registration of such a contract has been held not to render the contract itself unenforceable. [1019] Such contracts may be expressly avoided by the statute. Thus, the Companies Act 2006 [1020] expressly avoids as against the liquidator and any creditor of a limited company mortgages and charges created by the company which have not been registered in accordance with the provisions of the Act. [1021]

Illegal performance of legal contracts

16-167

The cases cited above might appear to support the proposition that an initially legal contract will be unenforceable on the basis that an illegality was committed in its performance. There is authority that in fact they were decided:

> "… on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by statute." [1022]

This would also be in keeping with the general principle that the mere fact that there is an illegality associated with the performance of the contract [1023] does not render it illegal and unenforceable. Thus in *St John Shipping Corp v Joseph Rank Ltd* [1024] cargo owners resisted a claim for freight on the ground that the carriers had so overloaded their ship with the cargo in respect of which the freight was claimed as to submerge the ship below the load line. Devlin J. held that although this amounted to a statutory offence, the legality of the contract was unaffected, since the statute in question was to be construed as prohibiting merely the act and not the contract under which it was done.

Statute: one party only affected

16-168

Statutes which prohibit certain contracts often impliedly recognise, for example by punishing only one of the parties, that the parties are not equally at fault, and therefore on their true construction only one of the parties to the contract is prevented from suing upon it. Accordingly, when:

> "… the policy of the Act in question is to protect the general public or class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties." [1025]

The other party to the contract is not deprived of his civil remedies because of the criminal default of the guilty party. [1026]

Statute affecting both parties

16-169

In certain cases a statute may be construed to prohibit both parties from suing on a contract of the sort in question, e.g. since it makes them both guilty of a criminal offence in entering into the contract. In such cases, no matter how much more culpable one party is than the other, both are equally unable to sue upon the contract; and this is so even though the party who seeks to sue on the contract was at the time it was made ignorant of the facts which brought the contract within the statutory prohibition. [1027] Thus in *Re Mahmoud and Ispahani* [1028] the plaintiff agreed to sell and the defendant to buy 150 tons of linseed oil. By a statutory order then in force it was illegal "to buy or sell or otherwise deal in" linseed oil unless both parties had a licence. The defendant did not have a licence. Irrespective of the parties' state of knowledge about the existence of licences the contract was illegal and unenforceable by either, since both were prohibited from making it and the prohibition was for the benefit of the public. [1029] Since in this case the plaintiff had a licence and had been told by the defendant, albeit falsely, that he also had one, the plaintiff's failure to recover on the contract may seem rather inequitable. Similarly in *Yin v Sam*, [1030] Malayan Rubber Regulations provided that "no person shall purchase … rubber … unless he shall have been duly licensed". A sold rubber to B, who, unknown to A, did not hold a licence. The Privy Council, purporting to apply *Re Mahmoud and Ispahani* [1031] held that A could not recover the price. But the decision is to be questioned since, whereas in *Re Mahmoud and Ispahani* [1032] the regulations made it illegal "to buy or sell", in *Yin v Sam* [1033] the regulations apparently made it an offence only "to buy"; A was therefore not the subject of a direct statutory prohibition [1034] nor himself guilty of a criminal offence [1035] and ought therefore not to have been held to be statutorily deprived of his rights; nor should he have been barred at common law since he had no knowledge that the performance of the contract would necessarily involve the commission of a criminal offence by B. [1036] It is not possible, however, to go so far as to state that an innocent party to a contract rendered illegal by statute will invariably be entitled to enforce the contract. [1037]

Alternative cause of action

16-170

Even where a statute deprives a party of a civil remedy under a contract, he may, if in fact innocent of turpitude, be able to sue upon a collateral warranty or implied term that the requirements of the law had been complied with, or for the deceit, or perhaps the negligence, of the other in misrepresenting that fact. This will be dealt with in para.16-193.

Alteration of law pending action

16-171

Where the law is altered by statute while an action is pending, the rights of the parties will be decided according to the law as it existed at the time the action was commenced, unless the statute shows a clear intention to vary such rights by making its action retrospective. [1038]

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982. See above, para.16-006.

983. But the parties' knowledge may not be entirely irrelevant, since only one party may be expressly penalised by the statute and therefore the statute will normally deprive only him of his civil rights under it (see below, para.16-168). But if the other has knowledge of the illegality he may become an aider and abettor and accordingly find himself penalised and disabled from suing on the contract: *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 385, 393*; *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828*.

984. See *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 283*. In any given situation it may not be easy to determine whether a statute prohibits acts as opposed to contracts.

985. *Kiriri Cotton Co Ltd v Dewani [1960] A.C. 192*.

986. *[1969] 1 Ch. 545*; cf. *Langton v Hughes (1813) 1 M. & S. 593*.

987. See, e.g. Trade Descriptions Act 1968 s.35; Human Rights Act 1998 s.6 (it is unlawful for a public authority to act in a manner incompatible with convention rights), see above, para.16-152.

988. *Eastern Distributors v Goldring [1957] 2 Q.B. 600, 614*.

989. per Devlin J., *Archbolds (Freightage) Ltd v Spanglett Ltd [1961] 1 QB 374, 388*. See also *D.R. Insurance Co v Central National Insurance Co of Omaha [1996] C.L.C. 64, 68*; *Royal Boskalis Westminster NV v Mountain [1997] C.L.C. 816*.

990. This was the language used in s.8(3) of the Companies Securities (Insider Dealing) Act 1985 which has now been repealed but it is repeated in the replacement legislation: see Criminal Justice Act 1993 s.63(2).

991. *Chase Manhattan Equities Ltd v Goodman [1991] B.C.L.C. 897, 931–934*. See also *S.C.F. Finance Co Ltd v Masri (No.2) [1987] Q.B. 1002, 1026*.

992. The natural meaning of a penal statute is not to be extended by reasoning based on the substance of the transaction under scrutiny: *Re H.P.C. Productions Ltd [1962] Ch. 466*.

993. See *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 389–390*.

994. *Shaw v Groom [1970] 2 Q.B. 504*; *Ailion v Spiekermann [1976] Ch. 158*; *Geismar v Sun Alliance and London Insurance Ltd [1978] Q.B. 383*.

995. *Smith v Mawhood (1845) 14 M. & W. 452*; *Johnson v Hudson (1809) 11 East 180*.

996. *Cope v Rowlands (1836) 2 M. & W. 149, 157*; *Smith v Mawhood (1845) 14 M. & W. 452, 463*; and see *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277, 293*; *Yin v Sam [1962] A.C. 304*. See below, paras 16-159, 16-164, 16-169 as to the extent of the unenforceability of the contract.

997. *Vinall v Howard [1953] 1 W.L.R. 987*. And see Road Traffic Act 1988 s.18(4) and Sch.1, which makes it an offence to sell motor-cyclists' protective helmets which do not comply with specifications. Such statutes sometimes create statutory duties enforceable at the suit of the injured party, e.g. see Consumer Protection Act 1987 and regulations made thereunder: Vol.II, paras 44-449 et seq.

998. *Victorian Daylesford Syndicate Ltd v Dott [1905] 2 Ch. 624*; *Little v Poole (1829) 9 B. & C. 192*; *Cope v Rowlands (1836) 2 M. & W. 149*; *Taylor v Crowland Gas & Coke Co (1854) 10 Exch. 293*. See, however, *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267*.

999. *Vinall v Howard [1953] 1 W.L.R. 987*, applying Road Traffic Act 1934 s.8 (reversed on the facts *[1954] 1 Q.B. 375*); by s.75(7) of the Road Traffic Act 1988 it is now expressly provided that the statutory prohibition of the sale of unroadworthy vehicles contained in that section shall not affect the validity of contracts or rights arising under contracts.

1000. *Victorian Daylesford Syndicate Ltd v Dott [1905] 2 Ch. 624*. See now the Consumer Credit Act 1974 ss.21, 40(1) and Pt III (as amended): *Menaka v Lum Kum Chum [1977] 1 W.L.R. 267*. It may be, however, that even though the statute is designed to protect the public, precluding a member of the public from being able to sue on it will cause him prejudice. This was the essence of the problem in the reinsurance cases: see *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil [1985] Q.B. 966*; *Stewart v Oriental Fire and Marine Ins. Co Ltd [1985] 1 Q.B. 988*; *Phoenix General Insurance Co of Greece SA v Administration Asigurarilor, etc. [1988] Q.B. 216*. It is submitted that the proper policy is to allow the contract to be enforced by the innocent party: see Financial Services and Markets Act 2000 s.27. See also *Estate of Anandh v Barnet Primary Health Care Trust [2004] EWCA Civ 5, [2004] All E.R. (D) 242 (Jan)*.

1001. *Victorian Daylesford Syndicate Ltd v Dott [1905] 2 Ch. 624, 630*.

1002. *[1957] 1 Q.B. 267*.

1003. *[1957] 1 Q.B. 267, 281* (emphasis added). cf. *Archer v Brown [1985] Q.B. 401, 423F–H*.

1004. Treitel, *Crime, Proof and Punishment*, p.95.

1005. *[1957] 1 Q.B. 267, 288*.

1006. *[1970] 2 Q.B. 504*. cf. *Anderson Ltd v Daniel [1924] 1 K.B. 138*.

1007. *Shaw v Groom [1970] 2 Q.B. 504, 521–522*.

1008. *Shaw v Groom [1970] 2 Q.B. 504, 521*.

1009. *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 288*.

1010. *Shaw v Groom [1970] 2 Q.B. 504, 520*, per Sachs L.J.; see also Harman L.J., at 516. See also *Yango Pastoral Co Ltd v First Chicago Australia Ltd (1978) 139 C.L.R. 410*; *Fire and All Risk Ins. v Powell [1966] V.R. 513*; *Pavey & Mathews Pty Ltd v Paul (1986–87) 162 C.L.R. 221* (allowing a quantum meruit claim by a builder with respect to work performed under an oral contract which by statute was made unenforceable by the builder unless it was in writing). See the very helpful guidance for determining whether breach of the statute renders a contract illegal and unenforceable: *Nelson v Nelson (1995) 132 A.L.R. 133, 192–193*.

1011. *Anderson Ltd v Daniel [1924] 1 K.B. 138, 149*; *Ashmore, Benson Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828*.

1012. *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 284*.

1013. *Anderson Ltd v Daniel [1924] 1 K.B. 138*; overruled by the Fertilisers and Feeding Stuffs Act 1926 s.1(2); *Marles v Philip Trant & Sons Ltd [1954] 1 Q.B. 29*, but see now Agriculture (Miscellaneous Provisions) Act 1954 s.12(1).

1014. *B. & B. Viennese Fashions v Losane [1952] 1 All E.R. 909*.

1015. cf. *Re Mahmoud and Ispahani [1921] 2 K.B. 716*, see also below, para.16-165.

1016. *Bostel Bros Ltd v Hurlock [1949] 1 K.B. 74*; *Jackson Stansfield & Sons v Butterworth [1948] 2 All E.R. 558*; *Woolfe v Wexler [1951] 2 K.B. 154*; *Howell v Falmouth Boat Construction Co Ltd [1951] A.C. 837*; *Smith & Son (Bognor Regis) Ltd v Walker [1952] 2 Q.B. 319*; *Young v Buckles [1952] 1 K.B. 220*.

1017. *Dennis & Co Ltd v Munn [1949] 2 K.B. 327*; *Frank W. Clifford Ltd v Garth [1956] 1 W.L.R. 570*. See also below, para.16-212.

1018. See Vol.II, para.44-027.

1019. *Wright v Horton (1887) 12 App. Cas. 371*.

1020. Companies Act 2006 s.860. See above, para.10-046.

1021. As to the effects of failure to furnish particulars of agreements which are subject to registration under the Competition Act 1998, see paras 43-116, 43-126.

1022. *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 284*.

1023. *Coral Leisure Group Ltd v Barnett [1981] I.C.R. 503, 508*; see also above, para.16-156.

1024. *[1959] 1 Q.B. 267*; and see *Dungate v Lee [1969] 1 Ch. 545*; *Shaw v Groom [1970] 2 Q.B. 504*.

1025. *Anderson v Daniel [1924] 1 K.B. 138, 147*; *Crehan v Inntrepreneur Pub Company CPC [2004] EWCA Civ 637, [2004] E.C.C. 28*, the claimant, as a matter of Community Law, could not claim damages from his co-contractor with respect to an agreement which breached art.81 of the EC Treaty. The claimant in *Crehan* was not significantly responsible for any distortion of competition.

1026. *Marles v Philip Trant & Sons Ltd [1953] 1 All E.R. 645* (there was no appeal from this party of Lynskey J.'s judgment with which Denning L.J. expressed his agreement *[1954] 1 Q.B. 29, 36*); *Ailion v Spiekermann [1976] Ch. 158*; see also cases on reinsurance cited in n.905 to para.16-157, above.

1027. *Re Mahmoud and Ispahani [1921] 2 K.B. 716*. See also *Wilson, Smithett & Cope Ltd v Terruzzi [1976] Q.B. 683*; *United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] A.C. 168, 188–190*.

1028. *[1921] 2 K.B. 716*.

1029. *Re Mahmoud and Ispahani [1921] 2 K.B. 716, 729*. At 730 Scrutton L.J. left open the question of whether the plaintiff would have had a remedy for deceit: on this, see below, para.16-193.

1030. *[1962] A.C. 304*.

1031. *[1921] 2 K.B. 716*.

1032. *[1921] 2 K.B. 716*.

1033. *[1962] A.C. 304*.

1034. cf. *Re Mahmoud and Ispahani [1921] 2 K.B. 716, 731–732* where Atkin L.J. expressed the view that a direct statutory prohibition sufficed even if the party prohibited could not be prosecuted because he lacked mens rea.

1035. See *Sayce v Coupe [1953] 1 Q.B. 1*.

1036. See *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374* (above, para.16-156), which was not cited.

1037. *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd [1988] Q.B. 216*, "Illegal Transactions: The Effect of Illegality On Contracts And Torts" (Law Com., Consultation Paper No.154, 1999).

1038. *Hitchcock v Way (1837) 6 A. & E. 943*; *Lauri v Renard [1892] 3 Ch. 402, 421*; *Re Athlumney [1898] 2 Q.B. 547, 551*; *Beadling v Goll (1922) 39 T.L.R. 128*; *Ward v British Oak Insurance Co Ltd [1932] 1 K.B. 392, 397*; *Croxford v Universal Insurance Co Ltd [1936] 2 K.B. 253*; *Re Nautilus Shipping Co Ltd [1936] Ch. 17, 28*; *Craxfords (Ramsgate) Ltd v Williams and Steer Manufacturing Co Ltd [1954] 1 W.L.R. 1130*; and see *York Estates v Wareham (1950) 1 S.A. 125*.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 3. - Contracts Unenforceable By Statute

(b) - Statutory Regulation of Trading with the Enemy

Trading with the Enemy Act 1939

16-172

Trading with the enemy is regulated and prohibited by the Trading with the Enemy Act 1939. By s.1 of the Act, [1039] a person trading with or attempting to trade with the enemy is liable to a fine or imprisonment. By s.1(2), a person shall be deemed to have traded with the enemy:

> "(a)
>
> … if he has had any commercial, financial or other intercourse with or of the benefit of an enemy, and, in particular, if he has
>
> (i)
>
> supplied any goods to or for the benefit of an enemy, or obtained any goods from an enemy or traded in or caused any goods consigned to or from an enemy or destined for or coming from enemy territory, or
>
> (ii)
>
> paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory, or
>
> (iii)
>
> performed any obligation to or discharged any obligation of any enemy whether the obligation was undertaken before or after the commencement of the Act, or
>
> (b)
>
> if he has done anything which, by virtue of the provisions of the Act, is to be treated as trading with the enemy."

Anything done under the authority of a Secretary of State, the Treasury or the Department of Trade does not fall within the Act; nor does the receipt of a payment from an enemy of a sum due in respect of a transaction under which all obligations on the part of the person receiving payment had already been performed when the payment was received and had been performed at a time when the person from whom payment was received was not an enemy. [1040]

16-173

By s.2(1) of the Act [1041] an enemy means:

> "(a)
>
> … any state, or sovereign of a state, at war with Her Majesty;
>
> (b)
>
> any individual resident in enemy territory [1042];
>
> (c)
>
> any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under section 2 of the Act, is an enemy;
>
> (d)
>
> any body of persons constituted or incorporated in, or under the laws of, a state at war with Her Majesty; and
>
> (e)
>
> as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business; but the expression does not include any individual by reason only that he is an enemy subject."

By s.15(1) of the Act, enemy territory means any area which is under the sovereignty of, or in the occupation of, a Power with whom Her Majesty is at war, not being an area in the occupation of Her Majesty or of a Power allied with Her Majesty. [1043]

1039. As amended by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.2 and Sch.II para.2.

1040. See *R. & A. Kohnstamm Ltd v Ludwig Krumm (London) Ltd [1940] 2 K.B. 359*.

1041. As amended by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.2 and Sch.II para.3. See also s.2(2) of the Act of 1939.

1042. Resident means de facto resident: *Re Hatch [1948] Ch. 592*, distinguishing *Vandyke v Adams [1942] Ch. 155*, where it was held that a British prisoner of war is not resident in enemy territory

for the purposes of the Act; and see *The Atlantic Scout [1950] P. 266*; *Vamvakas v Custodian of Enemy Property [1952] 2 Q.B. 183*.

1043. See also s.15(1A), added by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.2 and Sch.II para.8.

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Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 4. - Enforcement of Collateral and Proprietary Rights [1044]

(a) - The Maxim Ex Turpi Causa Non Oritur Actio and Related Rules

Ex turpi causa non oritur action

16-174

When a contractual right is said to be unenforceable on the ground that ex turpi causa non oritur actio, sometimes all that is meant is that the general principles discussed earlier in this chapter [1045] apply to deprive the party of a contractual remedy which he would otherwise have, though the maxim is generally confined to cases involving criminality or immorality. On other occasions the maxim is used with specific reference to unenforceability at common law on the ground that an apparently innocent contract was entered into for an objectionable purpose. Thus in *Pearce v Brooks* [1046] the plaintiff sued the defendant, a prostitute, for the hire of a brougham which he knew was to be used by her in her calling. It was held that he could not recover and Pollock C.B. said:

> "I have always considered it was settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied … Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is ex turpi causa non oritur actio."

This is, in effect, merely an application of the general common law principle that one who knowingly enters into a contract with an improper object cannot enforce his rights thereunder. In *Lilly Icos LLC v 8pm Chemists Ltd* [1047] it was argued that there was a broad principle that a claimant could not recover for a loss arising out of "the claimant's own involvement in an illegal activity whether under English law of foreign law". [1048] The court rejected this as being incompatible with a number of cases the most important of which is *Tinsley v Milligan* [1049] where recovery on the grounds of title was allowed even where the title had been acquired in the course of an illegal transaction. It has been held that before the ex turpi causa rule is engaged outside the criminal law, there must be "an element of moral turpitude or moral reprehensibility in the relevant conduct". [1050] While this may be sufficient in most situations to invoke the principle, it is not necessary. It has been held that a "quasi-criminal act committed intentionally or negligently is sufficiently serious to engage the ex turpi causa rule". [1051] The principle has also been rejected that "in the case of acts which are tortious rather than criminal, the rule only applies if the acts involve dishonesty". [1052] What will be relevant will be the seriousness of the tort and the claimant's state of knowledge at the time he committed the act:

> "If the claimant knew the material facts, and particularly if he committed the act in question intentionally, then the rule is likely to apply." [1053]

Flaux J. in *Safeway Stores Ltd v Twigger* [1054] stated that the policy behind the ex turpi causa rule is "a flexible one and its application is not rigid but depends upon particular circumstances", citing the

dictum of Lord Hoffmann in *Gray v Thames Trains Ltd* [1055] that the rule "expresses not so much a principle as a policy … not based on a single justification but on a group of reasons, which vary in different circumstances". The "range of factors" principle applied in *Patel v Mirza* [1056] endorses this approach. [1057] Where the ex turpi maxim is applicable, it applies to assignees. [1058] It has not been expressly decided whether the maxim applies to a criminal act of strict liability where the claimant has not in any way been at fault. [1059] There is also uncertainty as to the level of fault that is needed in order to trigger the rule. [1060] It is, however, clear that "ordinary private wrongs, sounding in tort or contract, do not give rise to the illegality defence". [1061] Also there may be situations where a competing public policy "requires the imposition of civil liability notwithstanding that the claim is founded on illegal acts". [1062]

Attribution and the law of illegality

16-175

Many claims that might fall foul of the ex turpi causa principle involve companies. Before examining its application to companies, it is first necessary to examine the principle of attribution. As a body corporate can only act through human agents, the application of the ex turpi causa principle to a body corporate necessitates identifying the relevant corporate actor whose mental act can be attributed to the company. In *Jetivia SA v Bilta (UK) Ltd* (reported sub nom. *Bilta (UK) Ltd v Nazir (No.2)*) [1063] Lord Sumption considered that the "question of what persons are to be so far identified with a company that their state of mind will be attributed to it does not admit of a single answer." [1064] In *Bilta (UK) Ltd* the Supreme Court had to address the principle of attribution whereby the criminal or wrongful acts of directors could be attributed to the company. A company through its liquidators brought an action against its directors and other parties for losses caused by a carousel fraud carried out by the company as a consequence of which it was placed in liquidation on the petition of HMRC for non-payment of VAT. The company claimed successfully that the defendants were accountable as constructive trustees for their knowing assistance in the diversion of the VAT. The defendants had sought to strike out the company's claim on the grounds that it was bound to fail because the directors' dishonest and criminal conduct was to be attributed to the company and the doctrine of ex turpi causa precluded the company from relying on its own illegality. The Chancellor dismissed the application to strike out, this was upheld by the Court of Appeal which in turn was upheld by the Supreme Court. Although all of the Justices were in agreement as to outcome, it is very difficult to extract a ratio from this case as there was a division between its members on a number of central issues, as was pointed out by Lord Neuberger. [1065] All agreed that where the company was a victim of fraud or wrongdoing by its directors or of which directors had knowledge the acts or knowledge would not be attributed to the company as a defence in an action against directors. This "breach of duty" exception to the principle of attribution is not limited to fraud but can apply to knowledge of a breach that falls short of dishonesty. [1066] There was, however, disagreement as to the legal basis on which this outcome was based.

"Rules of attribution"

16-176

The fundamental question is "whose act or knowledge or state of mind is *for the purpose* of the relevant rule to count as the act, knowledge or state of mind of the company?" [1067] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1068] has been described as the leading modern case on the issue of attribution. [1069] Lord Hoffmann formulated a tripartite classification of the "rules of attribution". These were: (i) the primary rules of attribution derived from company's constitution typically its articles, (ii) general rules of attribution which are equally available to natural persons, the rules of agency, and (iii) exceptional cases when a rule of law, either expressly or by implication excludes attribution on the basis of the general principles or vicarious liability. [1070] The most common situation where a special rule is needed is where in the case of a statute the legislature has not spelled out any rule of attribution and the court has to fill the lacuna [1071] or is dealing not with some statutory provision but with, for example, the general maxim ex turpi causa non oritur action. [1072]

No question of piercing the corporate veil

16-177

Lord Sumption stated that it "cannot be emphasised too strongly" that attribution in both the civil and criminal context does not involve piercing the corporate veil; "the law treats the company as thinking through its agents just as it acts through them". [1073] It is difficult to understand why the principle of piercing was at all relevant as in piercing the corporate veil the individual is made liable whereas in attribution the individual's acts are attributed to the company, it is the company that is liable. [1074]

Attribution context-specific

16-178

It is important to note the significance of the fact that the rules of attribution are context specific. The courts have to determine whose "state of mind is *for the purpose* of the relevant rule" to be attributed to the company. [1075] Normally attribution involves senior management or the directors but it is dependent on the context and the courts have imputed the conduct of an ordinary employee to a company, the conduct of an assistant transport manager and his assistant where the context was considered to require it. [1076] The "directing organ" of the company may have delegated the entire conduct of the company's affairs to a particular agent or delegated a particular function. [1077] The importance of context and purpose is central to the reasoning of the court in *Bilta (UK) Ltd*. It involved an action by the company against the wrong-doing directors and the court reasoned that in this situation it is "self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach" [1078] simply because he knew about it. An agent is not "entitled to attribute his own dishonesty to the company for the purpose of giving himself immunity from the ordinary consequences of his breach of duty." [1079] The court also disapproved the reasoning of the Court of Appeal in *Safeway Stores Ltd v Twigger* [1080] but considered there may be public policy justifying the decision, though expressing no views on its merits. [1081] In an action against the director for loss or liability in transactions with a third party it must be possible for the company to invoke the principle of attribution, "attribution can be disclaimed for one purpose but invoked for another". [1082]

The Stone & Rolls case

16-179

In *Moore Stephens (a firm) v Stone & Rolls Ltd* [1083] the House of Lords in a three-to-two majority held that the ex turpi causa principle is applicable to companies and prevented a claim for damages for negligence by a company against its auditors: the fraud of the dominant director and shareholder should be attributed to the company so that the company itself was fraudulent and therefore deprived by the ex turpi principle of a contractual remedy. This raises the question of how the necessary wrongful intent, is necessary for the operation of the ex turpi causa principle, can be formed by the company. This is done by the doctrine of attribution which was the central issue in *Stone & Rolls*. It is difficult to state the precise ratio of *Stone & Rolls*, "commentators and practitioners have found the case difficult". [1084] In *Bilta (UK) Ltd* Lord Mance said that he did "not propose to say very much about the case". [1085] He considered that the court must have regarded that the context has some relevance to attribution and noted that Lord Walker had "now explicitly withdrawn from the position that attribution operates independently of context". [1086] The reference to Lord Walker is to his judgment in *Moulin Global Eyecare Trading Ltd v The Commissioner of Inland Revenue* [1087] where he considered that the statement in Stone & Rolls that the:

> "fraud exception as being of general application, regardless of the nature of the proceedings as being wrong as the exception had a more limited scope." [1088]

Lord Mance also agreed with Lord Neuberger that he could not endorse Lord Sumption's suggestion [1089] that *Stone & Rolls* established "an apparently general and context unspecific distinction between personal and vicarious liability as central to the application of the illegality defence". [1090] He also disagreed with Lord Sumption that "the illegality defence is only available to a company where it is "directly as opposed to vicariously responsible for the illegality". [1091] Lords Toulson and Hodge considered *Stone & Rolls* "a much debated and criticised case", in which "the judges were divided three to two, and different reasons were given by the majority". [1092] After analysing the judgments in *Stone & Rolls* at length, Lords Toulson and Hodge stated: [1093]

> "We conclude that *Stone & Rolls* should be regarded as a case which has no majority ratio decidendi. It stands as authority for the point which it decided, namely that on the facts of that case no claim lay against the auditors, but nothing more."

This endorses the view of the Law Commission that "It is difficult to anticipate what precedent, if any, *Stone & Rolls* will set regarding the illegality defence". [1094]

16-180

Lord Neuberger considered it difficult to derive a "reliable principle" from *Stone & Rolls* and gave by way of example the decision in *Bilta (UK) Ltd* where "Lord Sumption and Lords Toulson and Hodge have reached rather different conclusions as to the effect of the majority judgments". [1095] He cited Lord Denning [1096] to the effect that the judgment should be "put on one side … marked" not to be looked at again". [1097] Lord Neuberger could not agree with Lord Sumption:

> "that the illegality defence is only available where the company is directly, as opposed to vicariously, responsible for the illegality can be derived from *Stone & Rolls* (whether or not the proposition is correct in law, which I would leave entirely open, although I see its attraction)." [1098]

The principles of attribution are not affected by the judgment in *Patel v Mirza* [1099] as there will still need to be a determination of whether the wrongful act should be attributed to the company.

Ex turpi causa and criminal acts

16-181

In *Gray v Thames Trains Ltd* [1100] Lord Hoffmann considered that there was a wider and narrower version of the ex turpi maxim. Its narrower form is:

> "… that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully enforced on you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage."

Its wider form is that a person "cannot recover compensation for loss which [he] have suffered in consequence of his own criminal act". [1101] Lord Hoffmann favoured the wider form. [1102] In that case, the plaintiff, who as a result of a railway accident suffered post-traumatic shock stress disorder which led him to kill someone, as part of his claim for negligence against the train operator, sought to recover damages for his loss of earnings arising from his detention in prison and in a hospital for the mentally ill. The narrower version would prevent him from so doing. He also claimed damages for feelings of guilt and remorse consequent on the killing and sought an indemnity against any claims which might be brought against him by dependants of the man he had killed. These further claims

were not the consequence of the imprisonment but nonetheless they were rejected on the wider principle. [1103] The ex turpi causa principle would also preclude a wrongdoer from enforcing an indemnity agreement to recover fines and costs imposed for breach of the law. [1104] This, however, would not extend to the costs of a wrongdoer defending himself against a criminal charge, for example, a lorry driver defending himself against a charge of dangerous driving. [1105]

Tainting

16-182

The maxim ex turpi causa non oritur actio is also applied to the case of an apparently innocent contract which is nevertheless vitiated by the illegality of another contract to which it is merely collateral—the illegality of the latter tainting the former. [1106] Thus in *Spector v Ageda* [1107] the plaintiff loaned money to the defendant to repay a loan which had been made by a third party to the defendant and which was an illegal moneylending transaction. The plaintiff knew that her loan was to be used to pay off the illegal loan and the issue which squarely faced the court was, Megarry J. stated [1108]:

> "… whether a loan knowingly [1109] made in order to discharge an existing loan that was wholly or partially illegal was itself tainted with illegality."

He answered the question in the affirmative; the second transaction was tainted by the illegality of the first and was accordingly unenforceable. A bribe will taint a contract and make it unenforceable. [1110] It is not necessary to show an actual bribe and "an attempted civil law bribe" will suffice; bribery involves serious moral turpitude and the "moral turpitude involved on the part of the briber is much the same in the case of an attempted bribe as it is in the case of an actual bribe". [1111]

16-183

Analogous to the principle of tainting is the situation where an illegal contract involves a statutory entitlement which would apply to the contract had it been legal. The following are examples of this: (a) the claimant, a foreign national, who is not entitled to work in the United Kingdom, uses forged documents to obtain employment and alleges racial discrimination against his employer [1112]; (b) an employee employed under an illegal contract (no tax or NIC deducted) alleges sexual discrimination [1113]; and (c) the claimant hires a motorcycle for courier work by presenting false documentation and is injured because of the negligent failure to maintain the motorcycle in a roadworthy condition. [1114] As a matter of principle, unless the concurrent action, e.g. the statutory claim or the claim in tort, directly relies upon and seeks to enforce the illegal contract, there is no reason why the claimant's rights should not be enforceable. Where the cause of action is not causally linked with the contract, the illegality of the contract will not constitute a bar to the transaction. [1115]

Limits to the maxim

16-184

It is not sufficient, in order to bring the claimant within the maxim, that he should merely be obliged to give evidence of an illegal contract as part of his case, as for instance where the illegal purpose has not been carried out; for the rule normally applies only where the action is founded upon the illegal contract, and is brought to enforce it. [1116] Thus a claimant is entitled to be compensated for his loss of earnings even though he had in the past failed to disclose them to the Inland Revenue. [1117] In *Euro-Diam Ltd v Bathurst*, [1118] Kerr L.J. held that the ex turpi causa defence must be "approached pragmatically and with caution". He considered that the defence would not succeed where "some reprehensible conduct on [the claimant's] part is disclosed in the course of the proceedings" but the claimant does not have to found his claim on any illegal act. [1119] In *Hounga v Allen* [1120] an illegal immigrant who could not legally work in the UK brought proceedings before the employment tribunal

for unlawful discrimination in connection with her dismissal from employment. [1121] Such discrimination is a statutory tort. [1122] An appeal against the Court of Appeal's reversal of the Tribunal's decision in her favour on the grounds of the illegality of the contract of employment was allowed by the Supreme Court. The Court of Appeal considered that the illegality of the contract of employment formed a material part of the claimant's case and therefore to enforce it would condone the illegality. Lord Wilson, with whom two of the Justices agreed, considered that if the test applicable to the defence of illegality in the case was that of an inextricable link and stated that "I, for one, albeit conscious of the inherent subjectivity in … so saying, would hold the link to be absent", referring to the illegality of her entry to the UK as "no more than background facts". [1123] He also considered that there were no public policy grounds for applying the illegality defence, in fact quite the opposite, to apply the defence could encourage employers to enter into illegal contracts in the belief that they could discriminate with impunity. Lord Wilson considered that before the principle of illegality applied to "bar a civil claim, and particularly one in tort, there must be a sufficiently close connection between the illegality and the claim made" [1124] and this connection was not present. [1125] Where property has passed to a party, [1126] his proprietary rights therein will be recognised and enforced notwithstanding that his purpose in taking the transfer was objectionable, [1127] or that the transfer was otherwise made in pursuance of a contract which on grounds of public policy could not have been enforced. [1128] There is authority which suggests that "merely committing an offence of strict liability is not enough to engage the ex turpi causa rule". [1129] Although dishonesty is not required, what matters is the claimant's knowledge of the nature of the offence at the relevant time. [1130]

Benefits resulting from crime

16-185

Closely akin to the maxim ex turpi causa non oritur actio is the rule that neither a party nor his representative is permitted to found rights upon his deliberate commission of a crime:

> "It is clear … that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence." [1131]

The rule only makes unenforceable rights to money or property to which, but for the crime, the plaintiff would have had no right or title [1132]; it does not apply where the right on which the plaintiff relies would no less have come into existence when it did, even had the plaintiff committed no crime. [1133] And it has been said that:

> "… in these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems, afford no moral justification to a court to apply the maxim [1134];"

> "… in each case it is not the label which the law applies to the crime … but the nature of the crime itself which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice." [1135]

The court has held that there may be exceptional cases where criminal or quasi criminal acts will not constitute turpitude for the purpose of the illegality defence. [1136] Such a case would be where the offence in question is too trivial to engage the defence. [1137]

Rights resulting from victim's death

16-186

Where a husband insured his life for the benefit of his wife, and his wife was convicted of murdering him, neither the wife nor her assigns could recover the insurance money. It was held, however, that there was a resulting trust in favour of the murdered husband's estate, inasmuch as between his representatives and the insurers no question of public policy arose, and their rights were unaffected by the wife's crime. [1138] Similarly when a man insured the life of another for his own benefit and then murdered him for the sake of the insurance money, the murderer's representatives could not recover on the policy. [1139] The rule would also apply to a conviction for manslaughter. [1140] However, a special verdict that the accused is "not guilty by reason of insanity" is, for this purpose, equivalent to a simple acquittal. [1141]

The Forfeiture Act 1982

16-187

The Forfeiture Act 1982, [1142] which started life as a private member's Bill, is intended to modify the public policy in cases such as *R. v Chief National Insurance Commissioner* [1143] where the court held that a wife who had killed her husband forfeited statutory entitlements accruing because of his death despite the fact that in the circumstances there was little moral blame attached to the wife's conduct. This Act vests in the court a discretion to modify the "forfeiture rule" which is defined in s.1(1) as:

> "… the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of that killing."

Thus it only applies to benefits acquired by the person who does the killing and not to a situation where the estate of the deceased benefits. [1144] The court can modify the forfeiture rule in whole or in part [1145] but only where it is satisfied that:

> "… having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effects of the rule to be so modified in that case." [1146]

The power to modify the forfeiture rule does not however apply "in the case of a person who stands convicted of murder". [1147] In circumstances where a person "stands convicted of an offence of which unlawful killing is an element" the Act contains its own limitation period and an order can only be made where proceedings are commenced within a period of three months commencing with the conviction. In the first reported case applying the Act [1148] a widow who had for many years been subjected to violent and unprovoked attacks by her husband accidentally shot him with his shotgun in circumstances where she feared another attack. She was convicted of manslaughter and given a non-custodial sentence. In these circumstances, given the relative lack of moral culpability on the part of the widow, Vinelott J. held that the forfeiture rule should not operate and his decision was upheld on appeal. The Court of Appeal considered it appropriate for the court in exercising its discretion under s.2(2) to take into consideration the widow's loyalty as a wife, the widow's mental distress at the time the accident occurred, the deceased's behaviour, and the deceased's own assessment of how the wife should be treated on his death. [1149] The Court of Appeal has also held that in exercising its discretion under s.2(2), it was wrong for the court to consider that it had to do justice as between the parties, rather it had to take into consideration all aspects of the case. [1150]

Life insurance and suicide

16-188

Until 1961 one who committed suicide when sane was guilty of a crime, committing as it were murder

on himself, and a claim by his personal representatives on a life policy effected by him could not be enforced since it was treated as equivalent to a claim by a murderer or his representative on a policy effected by the murderer on the life of the person murdered. [1151] Even before 1961, public policy was no bar to a claim on such a policy, [1152] by assignees for value, at any rate to the extent of their actual interest, [1153] or by the representatives of the deceased if he was insane at the time of his suicide. [1154] Section 1 of the Suicide Act 1961 abrogated the rule of law whereby it was a crime for a person to commit suicide and it is thought that public policy is no longer a bar to any claim resulting from the suicide of the assured. But there may still be a distinction between suicide when sane and when insane. In the case of insane suicide, in the absence of any special condition that the policy is to be avoided by suicide, the policy continues to be enforceable as under the old law. [1155] In the case of sane suicide, in the absence of any special condition, express or implied, that the policy shall not be avoided by suicide, policy moneys may still be irrecoverable by reason of the presumption [1156] that the promise to pay on the happening of a specified event does not apply where that event was deliberately caused by the assured. [1157] Where, however, the policy contains a promise, express or implied, to pay in the event of suicide, there is no room for that presumption to operate.

Assured suffering death at the hands of the law

16-189

In *Amicable Society v Bolland* [1158] where the assured was hanged for forgery, it was held that his assignees could not recover the sum for which his life was insured. The essential feature of the decision was that the court would not allow a claim in contract to be based on the contracting party's crime as a necessary constituent of the cause of action, even though an interval of time and circumstance separated the crime from the resulting death. [1159]

Indemnity against liability resulting from commission of crime

16-190

An indemnity [1160] against civil [1161] or criminal, [1162] liability resulting from the deliberate commission of a crime by the person to be indemnified generally cannot be enforced by the criminal or his representatives, the reason being that, on grounds of public policy, either the indemnity is subject to an implied exclusion which operates against the criminal and his representatives or they are under a personal disability or ban which prevents their suing on it. [1163] Thus, in *Askey v Golden Wine Co Ltd* [1164] a wholesaler, through his own gross negligence, incurred a fine and costs as a result of breaches of the Food and Drugs Act and had to refund money to his retailers. Denning J. held that it would be against public policy to permit him to recover his loss, by way of damages for conspiracy, from those responsible for the management of the company which supplied him with the goods and it is clear from the judgment that the learned judge would have held a claim against the company for damages for breach of contract in respect of such loss to be equally unenforceable. And in *Moore Stephens (a firm) v Stone & Rolls Ltd (In Liquidation)* [1165] the House of Lords held that a company which had been involved in obtaining payments under letters of credit by presenting to banks false documents in relation to fictitious commodity trading would not be entitled to recover damages from its auditors even if (which was not decided) the auditors were in breach of contract in failing to detect the frauds. But probably, as in the case of the closely related rule that a man may not benefit from his own crime, this rule does not apply to every breach of the criminal law [1166]; indeed, it has been said that the courts' refusal to permit a person who has committed an anti-social act to assert a resultant right depends not only on the nature of the anti-social act but also on the nature of the right asserted. [1167] Thus, for example, the rule does not apply to every breach of the criminal law. It does not apply, for example, to the innocent commission of an offence of strict liability. [1168] It is also clear that policies of insurance relating to motor accidents are enforceable, so that a motorist who has to pay damages for negligence can recover an indemnity from his insurers; and this is so even though the negligence was so gross [1169] as to amount to manslaughter. [1170] Perhaps this is to be explained on the ground that here the act to be indemnified is one intended by the law that people should insure against, [1171] or that the social harm which would be caused by not enforcing such insurance rights outweighs the gravity of the anti-social act committed and the extent to which such acts will be encouraged by the enforcement of such rights. [1172] With these cases should be contrasted *Gray v Barr* [1173]; a husband

shot and killed his wife's lover; it was held by the Court of Appeal that the husband could not recover under an insurance policy (even if it covered the occurrence) the damages which he had had to pay to the lover's estate. The husband had caused the victim's death in the course of deliberately committing an unlawful and dangerous act (threatening the lover with a loaded shotgun) which in the opinion of the Court of Appeal amounted to the crime of manslaughter, and to allow persons to enforce indemnities against the consequences of their own acts of armed violence would clearly be contrary to public policy. There was no evidence in this case whether the husband could satisfy the judgment without obtaining payment from the insurance company. The failure of the court to advert to this would indicate that it was not a relevant factor although the effect of the judgment might be to deprive an innocent party of compensation.

16-191

In *Cooke v Routledge* [1174] the Northern Ireland Court of Appeal held that a driver could recover under his insurance policy the cost of a replacement vehicle in circumstances where he had crashed his car while driving with an excess of alcohol in his blood for which he was not convicted. The insurance company argued that as a matter of public policy no such recovery should be permitted. The court rejected this argument on the grounds [1175]:

> "Insurance companies and insured persons need to be able to ascertain their respective rights with some degree of certainty. It would be impossible for either to know in what circumstances cover would be afforded under a motor policy. As [counsel for the appellant] asked rhetorically in his argument on behalf of the appellant, what level of consumption of alcohol would prevent recovery? What degree of reckless driving would lead to an exclusion of liability? If excessive speed were to disentitle an insured from enforcing the policy, what degree of excess over the permitted limit would do so? And what if the repair of the vehicle had been grossly neglected by the insured?"

The court considered it was of importance that cases, such as *Gray v Barr*, [1176] where a criminal act by the insured had precluded recovery, "concerned branches of insurance other than motor insurance". [1177]

Indemnity against liability resulting from commission of tort

16-192

Where the act to be indemnified is not only a tort but also a crime, the position is that set out in the preceding paragraph. Where the act is a mere tort, the enforceability of an agreement to indemnify against liability resulting from its commission depends upon the nature of the act and the circumstances of its commission. [1178] Thus a contract to indemnify a person against liability for an act which constitutes the tort of deceit is unenforceable. [1179] So also an agreement to indemnify a person against liability for the publication of what he knows to be a libel is unenforceable. [1180] But an indemnity against innocent publication of a libel is enforceable by virtue of the provisions of s.11 of the Defamation Act 1952 which enacts that an agreement for indemnifying any person against civil liability for libel in respect of the publication of any matter shall not be unlawful unless at the time of publication that person knows that the matter is defamatory, and does not reasonably believe that there is a good defence to any action brought upon it. And at common law, where, as a natural consequence of a breach of contract by one party, the other incurs liability for defamation, there is no rule of public policy which prevents the recovery by way of damages of the loss suffered by the first party as a result of his tort, at any rate where the commission of the tort was not deliberate. [1181]

1044. See Williams (1942) 8 Camb. L.J. 51; Coote (1972) 35 M.L.R. 38; Merkin (1981) 97 L.Q.R. 420.

1045. See above, paras 16-019, 16-020; *Euro-Diam Ltd v Bathurst [1990] 1 Q.B. 1, 34–37*.

1046. *(1866) L.R. 1 Ex. 213, 217*. See also *K. v P. and J. [1993] Ch. 140* (defence of ex turpi causa does not preclude a claim for contribution under the Civil Liability (Contribution) Act 1978). For the application of the ex turpi causa principle in tort see *Hall v Herbert [1993] 2 S.C.R. 159 (noted, (1994) 110 L.Q.R. 357)*.

1047. *[2009] EWHC 1905 (Ch)*.

1048. *[2009] EWHC 1905 (Ch)* at [273].

1049. *[1994] 1 A.C. 340*; see below para.16-198. See also *O'Kelly v Davies [2014] EWCA Civ 1606*.

1050. *Safeway Stores Ltd v Twigger [2010] EWHC 11 (Comm)* at [26]. The phrase "morally reprehensible" was derived from the decision of the Singapore Court of Appeal in *United Project Consultants Ltd v Leong Kwok Onn (trading as Leong Kwok Onn & Co) [2005] 4 S.L.R. 214* at [54] which the court cited with approval.

1051. *Les Laboratoires Servier v Apotex Inc [2011] EWHC 730 (Pat)* at [91].

1052. *[2011] EWHC 730 (Pat)* at [93].

1053. *[2011] EWHC 730 (Pat)* at [93].

1054. *[2010] EWHC 11 (Comm)*.

1055. *[2009] 3 W.L.R. 167* at [30]. See also *Les Laboratoires Servier v Apotex Inc [2011] EWHC 730 (Pat)*.

1056. ! *[2016] UKSC 42, [2016] 1 W.L.R. 399*.

1057. ! See above, para.16-014B.

1058. *DR Insurance Co v Central National Insurance Co of Omaha [1996] C.L.C. 64, 73, [1996] 1 Lloyd's Rep. 74, 82*.

1059. *Safeway Stores Ltd v Twigger [2010] EWHC Civ 1472* at [18]. See below, para.16-184.

1060. *Griffin v UHY Hacker Young & Partners (a firm) [2010] EWHC 146 (Ch)*.

1061. *Bilta (UK) Ltd v Nazir (No.2) [2015] 2 W.L.R. 1168* (hereafter *Bilta (UK) Ltd*).

1062. See also *R. (on the application of Best) v Chief Land Registrar [2015] EWCA Civ 17* at [43].

1063. *[2015] 2 W.L.R. 1168* at [67].

1064. *[2015] 2 W.L.R. 1168* at [67].

1065. *[2015] 2 W.L.R. 1168* at [12].

1066. *[2015] 2 W.L.R. 1168* at [71].

1067. *[2015] 2 W.L.R. 1168* at [41] (italics in original).

1068. *[1995] 2 A.C. 500* (hereafter *Meridian*).

1069. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [67]. See also Lord Walker in *Moulin Global Eyecare Trading Ltd v The Commissioner of Inland Revenue [2014] HKPCA 22* at 77 who considered that "*Meridian* is now rightly regarded as the leading case on the topic of attribution in company law", (hereafter *Global Eyecare*).

1070. *[1995] 2 A.C. 500* at 508.

1071. *Global Eyecare [2014] HKPCA 22* at [78].

1072. *[2014] HKPCA 22* at [78]. The court gave as an example *Stone &Rolls Ltd v Moore Stephens (a firm) [2009] 1 A.C. 1391*.

1073. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [65].

1074. There may of course be an action for breach of warranty of authority by the individual acting for the company.

1075. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [4].

1076. *Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd [1973] 1 W.L.R. 828*; *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [46].

1077. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [67].

1078. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [42].

1079. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [64].

1080. *[2010] EWCA Civ 1472, [2011] 2 All E.R. 841*.

1081. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [162].

1082. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [43].

1083. *[2009] UKHL 39, [2009] 1 A.C. 39* (hereafter *Stone & Rolls*).

1084. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [15].

1085. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [46].

1086. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [46].

1087. *[2014] HKCFA 22*.

1088. [2014] HKFCA 22 at [101].

1089. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [46]. Lord Sumption's suggestion can be found at paras [79] and [80].

1090. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [48].

1091. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [50].

1092. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [134].

1093. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [154].

1094. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [153].

1095. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [23].

1096. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [29].

1097. *Re King [1963] Ch. 459* at 483 (this was in another context).

1098. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [29].

1099. ⚠ *[2016] UKSC 42*. See above, paras 16-014A et seq.

1100. *[2009] UKHL 33, [2009] 1 A.C. 1339*.

1101. *[2009] UKHL 33* at [29].

1102. *[2009] UKHL 33* at [55].

1103. See also Lord Phillips at [7] and [19], Lord Scott at [56], Lord Rodger at [84] and Lord Brown at [103].

1104. *Coulson v News Group Newspapers Ltd [2012] EWCA Civ 1547, [2013] I.R.L.R. 116*.

1105. *[2012] EWCA Civ 1547, [2013] I.R.L.R. 116* at [43]. Another example given was that of a journalist defending himself against a criminal charge arising out of the publication of allegedly obscene material.

1106. *Fisher v Bridges (1854) 3 E.B. 642*; *Geere v Mare (1863) 2 H. & C. 339*; *Clay v Ray (1864) 17 C.B.(N.S.) 188*; *Taylor v Chester (1869) L.R. 4 Q.B. 309*; *Bigos v Bousted [1951] 1 All E.R. 92*; *Hall v Woolston Hall Leisure Ltd [1998] I.C.R. 651*. See also below, paras 16-211 et seq. on severance.

1107. *[1973] Ch. 30*; see also *Heald v O'Connor [1971] 1 W.L.R. 497* involving the Companies Act 1948 s.54 (now replaced by Companies Act 2006 Pt 18 Ch.2); *Swan v Bank of Scotland (1836) 10 Bli. (N.S.) 627*; *Pye Ltd v B. G. Transport Service Ltd [1966] 2 Lloyd's Rep. 300*; *Geismar v Sun Alliance and London Insurance Ltd [1978] Q.B. 383*; *Euro-Diam Ltd v Bathurst [1990] 1 Q.B. 1*; *Saunders v Edwards [1987] 1 W.L.R. 1116*; *Re Berkeley Applegate (Investment Consultants) Ltd [1989] Ch. 32, 53*.

1108. *Re Berkeley Applegate (Investment Consultants) Ltd [1989] Ch. 32, 44*.

1109. From Megarry J.'s judgment it would appear that the party to the second transaction must actually know of the illegality or deliberately shut their eyes, and the mere fact that they ought to have known is not enough *Spector v Ageda [1973] Ch. 30*.

1110. *Nayyar v Denton Wilde Sapte [2009] EWHC 3218 (QB)*.

1111. *Nayyar v Denton Wilde Sapte [2009] EWHC 3218* at [92].

1112. ⚠ *V v Addey & Stanhope School [2004] EWCA Civ 1065, [2004] 4 All E.R. 1056* where the Court of Appeal (Civil Division) upheld the decision of the Employment Appeal Tribunal that illegality precluded the claimant from pursuing his racial discrimination claim. See also *Wheeler v Quality Deep Ltd [2004] EWCA Civ 1085* where the lack of English and limited knowledge of tax and national insurance provisions were considered relevant in determining the extent to which the employee participated in an illegality.

1113. *Hall v Woolston Hall Leisure Ltd [2001] W.L.R. 225* (claimant could pursue claim as she was protected by a statutory tort and did not have to rely on the contract); *Hunt v Power Resources Ltd [2004] All E.R. (D) 23 (Apr)*.

1114. *Flavis v Pauley [2002] All E.R. (D) 436 (Oct)* (matter referred to trial to determine whether defence of illegality was available). See also *Delaney v Pickett and Tradewise Insurance Services Ltd [2011] EWCA Civ 1532* (a car passenger could sue a driver in tort where the car was being used in a joint venture to transport illegal drugs).

1115. *Hall v Woolston Hall Leisure Ltd [2001] W.L.R. 225*; *Leighton v Michael [1996] 1 I.R.L.R. 67*; *Sweetman v Nathan [2003] EWCA Civ 1115*; *Sutton v Hutchinson [2005] EWCA Civ 1773*.

1116. *Taylor v Bowers (1876) 1 Q.B.D. 291, 295, 300*; *Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B. 65*; *Belvoir Finance Co Ltd v Stapleton [1971] 1 Q.B. 210*; *Euro-Diam Ltd v Bathurst [1990] Q.B. 1*. It may be, however, that the wrongful conduct is of such a nature (e.g. benefiting by means of a collateral transaction from a crime) that the court will refuse to enforce the tainted transaction: *Geismar v Sun Alliance and London Insurance Ltd [1978] Q.B. 383*; *Hall v Woolston Hall Leisure Ltd [2001] 1 W.L.R. 225*. This case dealt with the application of the maxim to a claimant seeking a remedy for the statutory tort under the Sex Discrimination Act 1975 but the contract cases are discussed. See also The Illegality Defence In Tort (Law Commission, Consultation Paper No.160); *Hewison v Meridian Shipping Pte [2002] EWCA Civ 1821, [2002] All E.R. (D) 146*; *Soutzos v Asombang [2011] EWHC 1582 (Ch)*; *Lilly Icos LLC v 8pm Chemists Ltd [2009] EWHC 1905 (Ch)*.

1117. *Hewison v Meridian Shipping Services Pte Ltd [2002] EWCA Civ 1821, [2003] I.C.R. 766* at [36].

1118. *[1990] 1 Q.B. 1*. Although the "affront to the public conscience" test adopted by Kerr L.J. in *Euro-Diam Ltd v Bathurst* for determining the effect of illegality was rejected by the House of Lords in *Tinsley v Milligan [1994] 1 A.C. 340*, it is submitted that this aspect of his judgment remains good law. See below, paras 16-187, 16-193.

1119. *Euro-Diam Ltd v Bathurst [1990] 1 Q.B. 1, 35–36*.

1120. See also *R. (on the application of Best) v Chief Land Registrar [2015] EWCA Civ 17 [2014] 1 W.L.R. 2889*.

1121. *[2014] UKSC 47, [2014] 1 W.L.R. 2889*. The discrimination was allegedly contrary to Race Relations Act 1976 s.4(2) *[2014] UKSC 47* and is a statutory tort: see *[2014] 1 W.L.R. 2889* at [25].

1122. *[2014] 1 W.L.R. 2889* at [25].

1123. *Hounga v Allen [2014] 1 W.L.R. 2889* at [40]. Two other justices agreed with him, Lord Kerr and Baroness Hale.

1124. *Hounga v Allen [2014] 1 W.L.R. 2889* at [55].

1125. *Hounga v Allen [2014] 1 W.L.R. 2889* at [59].

1126. See below, para.16-195.

1127. *Feret v Hill (1854) 15 C.B. 207*; *Ayerst v Jenkins (1873) L.R. 16 Eq. 275, 283, 284*; *Alexander v Rayson [1936] 1 K.B. 169, 184*; *Edler v Auerbach [1950] 1 K.B. 359, 373*; cf. *Greenwood v Bishop of London (1814) 5 Taunt. 727, 746*; *Mason v Clarke [1954] 1 Q.B. 460* (reversed on the facts on this point *[1955] A.C. 778*).

1128. See below, para.16-195.

1129. *Les Laboratoires Servier v Apotex Inc [2011] EWHC 730 (Pat)* at [81].

1130. *Les Laboratoires Servier v Apotex Inc [2011] EWHC 730 (Pat)* at [81].

1131. *In the Estate of Crippen [1911] P. 108, 112*; *Re Giles [1972] Ch. 544*; *Geismar v Sun Alliance and London Insurance Ltd [1978] Q.B. 383*. cf. *Gray v Barr [1971] 2 Q.B. 554*; *Pitts v Hunt [1991] 1 Q.B. 24*; *Charlton v Fisher [2001] EWCA Civ 112, [2001] 1 All E.R. (Comm) 769*; *Dubai Aluminium Co Ltd v Salaam [2000] 3 W.L.R. 910*.

1132. *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 292*. It also applies where a person who is injured by his accomplice in crime sues the accomplice or his estate in tort: *Pitts v Hunt [1991] 1 Q.B. 24*. See also *Thorne v Silverleaf [1994] 1 B.C.L.C. 637, 645*.

1133. *Marles v Philip Trant & Sons Ltd [1954] 1 Q.B. 29*.

1134. per Lord Wright M.R. in *Beresford v Royal Insurance Co Ltd [1937] 2 K.B. 197, 220 (affirmed [1938] A.C. 586)*; *Marles v Philip Trant Sons Ltd [1954] 1 Q.B. 29, 37*; cf. *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 292*.

1135. *R. v Chief National Insurance Commissioner [1981] Q.B. 758, 765*. See also *Thorne v Silverleaf [1994] 1 B.C.L.C. 637*.

1136. *Les Laboratoires Servier v Apotex [2014] UKSC 55, [2014] 3 W.L.R. 1257* at [29].

1137. *[2014] UKSC 55* at [29].

1138. *Cleaver v Mutual Reserve Fund Life Association [1892] 1 Q.B. 147*, per Fry L.J. at 159 (making it clear, however, that the murderer should never benefit). Where the deceased and the killer held property as joint tenants, the forfeiture rule in all probability operates to "sever the joint tenancy in the proceeds of sale and in the rent and profits until sale" a result which can be achieved by treating the "beneficial interests as vesting in the deceased and survivors as tenants in common": per Vinelott J. in *Re K. (Deceased) [1985] Ch. 85*, 100H (the judgment of Vinelott J. was upheld on appeal *[1986] Ch. 180*).

1139. *Prince of Wales, etc., Association Co v Palmer (1858) 25 Beav. 605*.

1140. *In the Estate of Hall [1914] P. 1*; *Re Giles [1972] Ch. 54* (manslaughter by reason of diminished responsibility); cf. above, para.16-185 n.1037; *R. v Chief National Insurance Commissioner [1981] Q.B. 758* (wife convicted of manslaughter not entitled to widow's allowance under s.24(1) of the Social Security Act 1975).

1141. *Re Houghton [1915] 2 Ch. 173*, relating to the old verdict of "guilty, but insane" under s.2 of the Trial of Lunatics Act 1883, which is now repealed by s.1(1) of the Criminal Procedure (Insanity) Act 1964.

1142. See (1983) 46 M.L.R. 62; Cretney (1990) 10 O.J.L.S. 289.

1143. *[1981] Q.B. 758*.

1144. See, e.g. *Beresford v Royal Insurance Co Ltd [1937] 2 K.B. 197, CA*.

1145. Forfeiture Act 1982 s.5.

1146. s.2(2).

1147. s.5.

1148. *Re K [1985] Ch. 85, [1986] Ch. 180, CA*. See also *Re Royse [1985] Ch. 22*; *Re S. (Deceased) [1996] 1 W.L.R. 235*; *Dunbar v Plant [1997] 4 All E.R. 289* (in this case Phillips L.J. disapproved of the approach of the judge in *Re S. [1996] 1 W.L.R. 235, 387*).

1149. The court's discretion was not to be limited by the principles of the Inheritance (Provision for Family and Dependants) Act 1975.

1150. *Dunbar v Plant [1997] 4 All E.R. 289, 302–303, 312–313*.

1151. *Horn v Anglo-Australian, etc., Life Assurance Co (1861) 30 L.J. Ch. 511*; *Beresford v Royal Insurance Co Ltd [1937] 2 K.B. 197, [1938] A.C. 586*.

1152. As to the possibility of a claim by the deceased's personal representatives for return of the premiums, see *St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267, 293*.

1153. *Beresford v Royal Insurance Co Ltd [1938] A.C. 586, 600*; *Moore v Woolsey (1854) 4 E. & B.*

243.

1154. See n.1053, above.

1155. See n.1053, above.

1156. See MacGillivray on Insurance Law, 12th edn (2012), para.14–037.

1157. Thus under the old law, though claims by assignees for value were not barred by public policy (see n.1055, above), enforcement of such claims depended upon the insurance policy containing a promise to pay, either generally, or to assignees for value (*White v British Empire Mutual Life Insurance Co of New York (1868) L.R. 7 Eq. 394*; *Rowett Leakey & Co v Scottish Provident Institution [1927] 1 Ch. 55*; *Royal London Mutual Insurance Society Ltd v Barrett [1928] Ch. 411*), in the event of sane suicide.

1158. *(1830) 2 Dow. & Cl. 1*, where, however, the assignees were volunteers.

1159. *Beresford v Royal Insurance Co [1937] 2 K.B. 197, 213; affirmed [1938] A.C. 586*.

1160. As to the right of contribution as between joint tortfeasors, see Civil Liability Contribution Act 1978. See also para.16-195.

1161. *Haseldine v Hosken [1933] 1 K.B. 822* (indemnity against solicitor's civil liability for champerty held unenforceable): but see now below, para.16-192.

1162. *Colburn v Patmore (1834) 1 Cr. M. & R. 73*; *Fitzgerald v Leonard (1893) 32 L.R.Ir. 675*. cf. *Geismar v Sun Alliance and London Insurance Ltd [1978] Q.B. 838*.

1163. *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 760, 765*; *Charlton v Fisher [2001] EWCA Civ 112, [2001] 1 All E.R. (Comm) 769*.

1164. *[1948] 2 All E.R. 35*. See above, para.16-186 n.1040.

1165. *[2009] UKHL 39, [2009] 1 A.C. 1391*. It was held that the acts of the sole owner of the company were attributable to it: see above, para.16-174.

1166. cf. *R. v Chief National Insurance Commissioner [1981] Q.B. 758, 765*, per Lord Lane C.J.

1167. *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 767–768*.

1168. *Gregory v Ford [1951] 1 All E.R. 121*; *Osman v J. Ralph Moss Ltd [1970] 1 Lloyd's Rep. 313*.

1169. As to the distinction between negligence and intention in such cases, see *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745*. The *Hardy* case was approved by the House of Lords in *Gardner v Moore [1984] A.C. 548* where an uninsured driver had deliberately driven his car at the plaintiff for which he was convicted.

1170. *Tinline v White Cross Insurance Association Ltd [1921] 3 K.B. 327*; *James v British & General Insurance Co Ltd [1972] 2 K.B. 311*; compare *Crage v Fry (1903) 67 J.P. 240*; *Cointat v Mynham & Son [1913] 2 K.B. 220*; reversed on a different point *(1914) 30 T.L.R. 282*: *R. Leslie Ltd v Reliable Advertising, etc., Agency Ltd [1915] 1 K.B. 652*; *Simon v Pawsons & Leafs Ltd (1932) 38 Com. Cas. 151*, with *Fitzgerald v Leonard (1893) 32 L.R.Ir. 675* and *Askey v Golden Wine Co Ltd [1948] 2 All E.R. 35*.

1171. per Greer L.J. in *Haseldine v Hosken [1933] 1 K.B. 822, 838*; and see the difference of opinion between Denning and Hodson L.JJ. in *Marles v Philip Trant & Sons Ltd [1954] 1 Q.B. 29, 39–40* and 44.

1172. *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 768*. In *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 769*, Diplock L.J. considered that an assured who had discharged his liability

to the victim would not be able to enforce his contractual right to indemnity against the insurance company where the damages were connected with an intentional criminal act; cf. the case of insurance by employers which covers liability for breach of the Factories Act, where under the law before the Employers' Liability (Compulsory Insurance) Act 1969 the explanation put forward in the text to n.1073 above, would not have applied but which had never been suggested to be unenforceable, however gross the employer's negligence.

1173. *[1971] 2 Q.B. 554*.

1174. *[1998] N.I.L.R. 174*.

1175. *Cooke v Routledge [1998] N.I.L.R. 174, 185f–g*, per Carswell L.C.J.

1176. *[1971] 2 Q.B. 554*.

1177. *Cooke v Routledge [1998] N.I.L.R. 174, 186h–g*.

1178. See the dicta in *Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745, 767–770*. cf. *Adamson v Jarvis (1827) 4 Bing. 66*; *Betts & Drewe v Gibbins (1834) 2 A. & E. 57*; *Lister v Romford Ice & Cold Storage Co Ltd [1957] A.C. 555*; in all of which indemnities have been enforced.

1179. *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 Q.B. 621*.

1180. *Smith v Clinton (1908) 99 L.T. 840*.

1181. *Bradstreets British Ltd v Mitchell and Carapanayoti & Co Ltd [1933] Ch. 190*; *Daily Mirror Newspapers Ltd v Exclusive News Agency (1937) 81 S.J. 924*; *K. v P. [1993] Ch. 140* (in an action against the defendant for conspiracy to defraud, the ex turpi causa maxim did not preclude the defendant from serving a contribution notice on a third party).

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 4. - Enforcement of Collateral and Proprietary Rights [1044]

(b) - Collateral Transactions

Alternative cause of action

16-193

Although the ex turpi causa principle precludes a plaintiff from being able directly to enforce an illegal contract, it does not prevent him from enforcing causes of action which are collateral to the contract. By this means the courts have to some extent mitigated the severity of the illegality doctrine. In *Strongman Ltd v Sincock* [1182] the plaintiff carried out building work for which it did not possess the appropriate licence and thus was unable to bring an action on the contract for the work done. However, the defendant (an architect) had assured the plaintiff that he would obtain the necessary licence and the court held that this gave rise to a collateral contract on which the plaintiff could maintain an action. An action may also lie in fraud as occurred in *Shelley v Paddock* [1183] where the plaintiff was induced to enter into an illegal contract for the sale of a house in Spain by the fraud of the defendant. Also, where the circumstances are appropriate, there is no reason why a plaintiff should not recover damages for negligent misrepresentation. It was once thought that it was essential for the plaintiff to show that he was ignorant of the illegality. [1184] This was a point emphasised in both *Strongman Ltd v Sincock* [1185] and *Shelley v Paddock*. [1186] However, in *Saunders v Edwards* [1187] the court allowed a plaintiff, who was a knowing party to an illegal contract, to recover damages for the fraud of the defendant. The plaintiff had purchased a flat from the defendant. The purchase price contained an inflated figure for fixtures and fittings which reduced the stamp duty payable by the plaintiff. Despite the fact that the court found that the plaintiff's conduct was tainted by the illegality connected with the evasion of stamp duty, the court allowed the plaintiff to recover damages for the fraud of the defendant in misrepresenting the extent of the property being sold. The court held that the "relative moral culpability" of the parties could be taken into consideration in deciding whether the plaintiff should be given a remedy which did not involve the enforcement of the contract. [1188] As the moral culpability of the defendant greatly outweighed that of the plaintiff in the Saunders case, the court allowed the plaintiff to recover. In the light of the House of Lords disapproval in *Tinsley v Milligan* [1189] of the approach of the court in the Saunders case, it is no longer proper to carry out a balancing exercise as to the relative culpability of the parties. However, the decision in *Saunders v Edwards* [1190] can possibly be explained on the grounds that the plaintiff had "an unassailable claim for damages for fraud which did not involve any reliance on the contract of sale itself". [1191] Also, where services are rendered under a contract which is intended to be performed in an illegal manner, or which is illegal at its inception, a quantum meruit claim will not lie. [1192] Such a claim would circumvent the public policy underlying the making of a contract illegal. Assets transferred for a specific purpose so as to give rise to a *Quistclose* trust [1193] which arose out of a transfer connected with an illegal contract would also not be recoverable. [1194]

1044. See Williams (1942) 8 Camb. L.J. 51; Coote (1972) 35 M.L.R. 38; Merkin (1981) 97 L.Q.R. 420.

1182. *[1955] 2 Q.B. 525*.

1183. *[1980] Q.B. 348* (Brandon L.J., had serious doubts but he reluctantly agreed with the majority). It is also important to note that in *Shelley v Paddock* the fraud did not relate to the legality of the transaction, that is, the sale of the house: see *(1978) 94 L.Q.R. 484*. See also *Burrows v Rhodes [1899] 1 Q.B. 816*; *Dott v Brickwell (1906) 23 T.L.R. 61*; *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 392–393*; *Southern Industrial Trust Ltd v Brooke House Motors Ltd (1968) 112 S.J. 798*.

1184. It was considered that if the plaintiff had knowledge of the illegality he would be in pari delicto with the defendant and thus unable to obtain the assistance of the court.

1185. *[1955] 2 Q.B. 525, 536–537*. Denning L.J. in that case also thought it important that the plaintiff was not negligent with respect to determining the existence of the illegality. cf. the degree of knowledge required where a contract is allegedly tainted with the illegality of some other transaction: above, para.16-182 n.1011.

1186. *[1980] Q.B. 348, 357*.

1187. *[1987] 1 W.L.R. 1116*; see also *Mitsubishi Corp v Alafouzos [1988] 1 F.T.L.R. 47*; *Hughes v Clewley (The "Siben") (No.2) [1996] 1 Lloyd's Rep. 35*.

1188. It was on this basis that the court distinguished *Alexander v Rayson [1936] 1 K.B. 169*. The court left open the issue of what would have happened had the defendant refused to complete and the plaintiff had sued for specific performance or damages (at 1125C). The court also considered that the dictum of Lindley L.J. in *Scott v Brown, Doering, McNab & Co [1892] 2 Q.B. 724, 729* could not be applied literally in every situation (at 1127).

1189. *[1994] 1 A.C. 340; [1993] 3 W.L.R. 126*.

1190. *[1987] 1 W.L.R. 1116*.

1191. *Tinsley v Milligan [1994] 1 A.C. 340, 360*. On this reasoning, the point left open by the judge (see n.1090 above) would be answered in the negative.

1192. *Taylor v Bhail [1996] C.L.C. 377* (cost of repairs inflated to defraud insurers). In *AL Barnes Ltd v Time Talk (UK) Ltd [2003] EWCA Civ 402, The Times, April 9, 2003* the reasoning in *Taylor v Bhail* was considered to apply to cases where the contract was illegal as formed but not to a case where there was illegality in the performance of the contract.

1193. *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567*.

1194. *Patel v Mirza [2013] EWHC 1892 (Ch)*.

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Volume I - General Principles

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Chapter 16 - Illegality and Public Policy

Section 4. - Enforcement of Collateral and Proprietary Rights [1044]

(c) - Recovery of Money Paid or Property Transferred under Illegal Contracts [1195]

Restitution of benefits under an illegal contract

16-194

The decision in *Patel v Mirza* [1196] has changed the law governing the restitution of benefits conferred under a contract that is unenforceable because of illegality in a fundamental way. It would normally permit the recovery of any money or property transferred under the contract. As Lord Toulson stated [1197]:

> "a person who satisfied the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration".

Lord Toulson, speaking for the majority, was here applying the factors-based approach [1198]; but the minority also considered that restitution should be available, as explained earlier. [1199]

Quantum meruit

16-194A

It seems that the restitutionary remedies available may include a quantum meruit for services rendered under the unenforceable contract. In *Patel v Mirza* [1200] Lord Toulson pointed out that the courts in *Hounga v Allen* [1201] did not consider whether the claimant was "entitled to be paid for the services she rendered on a quantum meruit". Such a claim would be independent of the illegality and a strong argument can be made that it should be available. Lord Sumption, citing *Hounga v Allen* [1202] was of the opinion that "a claim for a quantum meruit for services performed" may well have been successful. [1203]

Transfer of property under illegal transactions [1204]

16-195

When property has been delivered in pursuance of an illegal agreement [1205] and there is subsequently a dispute about the property between the transferor and the transferee, the question often arises whether the court should give effect to the transferee's interest [1206] or disregard it and enforce the transferor's original rights. The fact that by reason of illegality the transferee could not have enforced the agreement under which the transfer was made does not necessarily mean that delivery to him of property thereunder will not pass to him the property or the interest in question. Thus where goods are delivered in pursuance of an illegal contract of sale, the property in them passes to the purchaser who will be entitled to damages against anyone, including the vendor, who thereafter wrongfully deprives him of those goods. [1207] Where a person takes a lease of property intending to use it for an immoral purpose, he acquires an interest under the executed lease despite the intention to use the property for an immoral purpose. [1208] It is now clear that property may pass under an illegal sale, although the goods have not been delivered to the buyer, [1209] so that the buyer may obtain rights against a *third* person. But it would not appear that a buyer to whom property in goods has passed under an illegal contract can claim them, or damages for their conversion, from a *seller* who has never delivered them at all. Such a claim would not differ in substance from a claim for the delivery, or for damages for the non-delivery, of the goods under the illegal contract and its success would defeat the policy of the rule against the enforcement of such a contract. [1210] Statutes may avoid not only the agreement in pursuance of which a transfer is made [1211] but also the transfer itself so that the transferor can rely on his original title and recover the property from the transferee to whom, because of the statute, no property passed and who therefore cannot set up any interest in the property by way of defence to the claim. [1212]

Determination of limited interests created by illegal transactions

16-196

Where the interest created by an illegal transaction was by the provisions of the transaction limited for a term, after the expiry of that term the transferor can probably recover the property. Thus, the owner of a house let to a prostitute could no doubt recover possession by ejectment at the end of the term, though he would be precluded from recovering rent if he knew the purpose to which it was intended to put the premises. [1213] Whether an owner could recover possession for non-payment of rent (assuming the lease provides for this) where, for example, he knowingly rents premises for the purposes of prostitution is more problematical. It is difficult to see how the owner could recover without relying on the lease and accordingly he would be denied the assistance of the court. It has been argued that as the lease is illegal neither party can rely on it so that the tenant is a tenant at will and the owner can thereupon take steps to terminate the lease. [1214] Although creative as a solution to the problem, it ignores the fact that illegal contracts can operate to transfer title and presumably any other proprietary interest. Accordingly, the tenant would acquire a limited interest under the lease and it would appear that the owner would therefore be unable to recover possession until the limited property interest of the tenant comes to an end. [1215] On the other hand, money or property may be paid or transferred by way of security for the performance of an illegal act which is not performed; in such cases it is thought that a claim to recover the money or property, on the ground of the non-performance of the act for which payment was made, would fail. For had the money or property been paid or transferred outright by way of payment a claim based on a total failure of consideration would have failed. [1216] Great difficulties arise however in the case where the property has been bailed under a contract which is illegal by common law or statute.

16-197

In *Bowmakers Ltd v Barnet Instruments Ltd* [1217] the Court of Appeal formulated the rule to be applied in cases of bailment of chattels thus:

> "In our opinion a man's right to possess his own chattels will as a general rule be enforced as against one who, without any claim or right, is detaining them or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek and is not forced either to found his claim on the illegal contract or to plead

its illegality in order to support his claim."

In that case, illegal bailments of machinery under hire-purchase agreements were assumed to have been terminated, in some cases by the sale of the machinery by the bailees, and, in one other case, by their refusal to deliver the machinery up to the plaintiffs on demand. The bailments having been terminated, the plaintiffs were held entitled to rely on their proprietary interests in the machinery, and accordingly recovered damages for conversion. [1218] The principal difficulty in the case arises with regard to the implicit finding that the latter bailment was terminated by the defendant bailees' refusal to deliver up the machinery on demand. If it were always possible for a bailor to terminate an illegal bailment on breach of its terms by the bailee, merely by demanding the return of the property bailed, little would be left of the general rule of non-recovery so far as bailments are concerned. [1219] It has been argued that the hire-purchase agreement in *Bowmakers Ltd v Barnet Instruments Ltd* probably contained a cesser clause making the agreement determine on the failure of the hirer to pay instalments and thus the owner was entitled to recover the machinery which was still in the possession of the defendants. [1220] There may also be special cases where a person is not entitled to recover property although his title to it is clear. An example of this type of case was given by Du Parcq L.J., in *Bowmakers Ltd v Barnet Instruments Ltd* [1221] as occurring where the owner of obscene books attempts to recover them, and a similar result has been suggested where the owner of a weapon to be used to commit a serious crime tries to recover it. [1222]

16-198

The principle in *Bowmakers* also applies to equitable interests. In *Tinsley v Milligan* [1223] the plaintiff and the defendant contributed to the purchase of a house which was placed in the sole name of the plaintiff for the purpose of enabling the defendant to make fraudulent claims on the Department of Social Security. The plaintiff and defendant quarrelled and the plaintiff, having moved out of the house, commenced proceedings asserting ownership of the whole of the house. The defendant successfully counterclaimed for, inter alia, an order that the plaintiff held the house on trust in equal shares for the defendant and plaintiff. The House of Lords reasoned that the fact that the arrangement involved an illegality did not prevent an equitable interest from arising [1224] and, since the fusion of law and equity, the principle in *Bowmakers* extended to equitable interests. As all that the defendant was seeking was recovery of an equitable proprietary interest which arose under a resulting trust, she could recover it without having to rely on the illegality. The majority of the House in *Tinsley v Milligan* [1225] also rejected the argument that the "clean hands" maxim in equity precluded the plaintiff from recovering on the grounds of title. Although collateral rights, as in *Tinsley v Milligan*, [1226] may arise out of an illegal contract, a collateral right normally involves a proprietary right and does not include a right of action on the contract itself. [1227] The reasoning in *Tinsley v Milligan* [1228] was applied in *O'Kelly v Davies* [1229] where title to the family home was transferred solely to the female partner to enable her to claim benefits as though she was a single woman living alone. The Court of Appeal upheld the decision of the trial judge that the male partner could establish a proprietary interest by the parties' course of dealing in relation the property, including respective contributions to the purchase by means of mortgage repayments, [1230] and there was accordingly no need to have recourse to the unlawful purpose of the arrangement. *Tinsley v Milligan* [1231] has been held to be an authority for the proposition that if "title could be asserted without reliance on the illegality, the defendant could not rely on the illegality to defeat the title". [1232] It is important to note that *Tinsley v Milligan* [1233] is exclusively about title and not the enforcement of illegal contracts, and does not "endorse … a claim to title, where the title is dependent upon the enforceability of the illegal transaction". [1234] Title can also pass under an illegal contract. [1235] In *Patel v Mirza* [1236] Lord Neuberger considered that "it would have been disproportionate to have refused to enforce Miss Milligan's equitable interest in the relevant property on grounds of the illegal activity". Lord Toulson agreed, he considered that it "would have been disproportionate to have prevented her from enforcing her equitable interest in the property and conversely to have left Miss Tinsley unjustly enriched". [1237] Also, as Lord Mance pointed out as the court in *Tinsley v Milligan* was reversing rather than enforcing the illegal transaction it could therefore "take into account both the objective fact of joint contributions and the parties' actual and by itself, legal purpose of joint ownership". [1238]

Locus poenitentiae: presumption of advancement

16-199

In *Tinsley v Milligan* [1239] the House of Lords considered that its reasoning would not apply to a situation where there was a presumption of advancement between the plaintiff and the defendant [1240] (in that the presumption would negative the resulting trust). This was the issue that was before the court in *Tribe v Tribe*. [1241] In that case, a father transferred to his son shares in a company in order to protect them against the possible claims of his creditors, the shares to be held by his son on trust for him until he had settled the claims. Eventually, he settled with his creditors and sought to recover the shares from his son who refused to re-transfer them. The court held that the father could recover his shares. The court reasoned that provided the "illegal purpose has not been carried into effect in any way", [1242] the father could recover his shares on the grounds that he did not intend to confer the beneficial interest on the son and therefore the presumption of advancement would be successfully rebutted. On the facts of the case the court held that as the illegal purpose had not been carried into effect since no deception had been practised on the father's creditors, the father could recover the shares. This decision extends, in a way that is unacceptable, the principles on the right of withdrawal with respect to illegal contracts, in that it enables the transferor of property to recover it where the illegal purpose for which it was transferred in the first place is no longer needed to protect the transferor's interests. [1243] Millett L.J. considered that the policy underlying the locus poenitentiae was the discouragement of fraud and therefore it necessarily also encouraged "withdrawal from a proposed fraud before it is implemented". [1244] However, Millett L.J. recognised that in *Tribe v Tribe* recovery by the father would not be necessary to encourage withdrawal since the reason for the withdrawal was not a change of mind but simply that it was no longer needed. [1245] This, rather than discouraging illegal contracts, produces the opposite effect since the transferor of property has nothing to lose and everything to gain by entering into the illegal transaction. On these grounds, *Tribe v Tribe* should be viewed as an extreme, if not wrong, application of the locus poenitentiae rule.

16-200

The approach in *Tinsley v Milligan*, depending as it does on proprietary concepts, was not followed in the important decision of the High Court of Australia, *Nelson v Nelson*. [1246] It is not possible to do justice to the subtlety and scholarship of this judgment. *Nelson v Nelson* involved a contract designed to acquire for the transferor of property under the contract a statutory benefit to which she would not have been entitled had the transfer not been effected. Thus it was a situation on all fours with *Tinsley v Milligan*. Rather than adopt the proprietary based reasoning of *Tinsley v Milligan*, the approach of the High Court was to determine whether the statutory rule which rendered the contract illegal precluded relief and the court held that it did not. The court cited with approval the views of an American author to the effect:

> "… if illegality consists of the violation of a statute, courts will give or refuse relief depending upon the fundamental purpose of the statute." [1247]

The majority also held that in granting relief the court could do it on terms; such a power enables the harshness of the illegality doctrine to be tempered in appropriate circumstances.

16-201

The *Bowmakers* principle can, as with the illegality doctrine in general, operate in a capricious way. The capriciousness of its operation was trenchantly criticised in the Australian Higher Court decision, *Nelson v Nelson* [1248]:

> "The *Bowmakers* rule has no regard to the legal and equitable rights of the parties, the merits of the case, the effect of the transaction in undermining the policy of the relevant

> legislation or the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable positions of the parties or the policy of the legislation is unsatisfactory, particularly when implementing a doctrine that is founded on public policy."

Class-protecting statutes

16-202

Quite apart from the decision in *Patel v Mirza*, [1249] which opens the way in most cases for the recovery of benefits conferred under a contract that is unenforceable because of illegality, [1250] the action for money had and received would also lie where it is clear from the statute which prohibits the making of the contract or the doing of the act in question that the parties are not to be treated as in pari delicto. Thus, as Lord Mansfield said in *Browning v Morris* [1251]:

> "But where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, many bring his action and defeat the contract."

The court will normally grant him relief without putting him on terms, as to impose terms as a condition precedent to the granting of relief would be virtually tantamount to enforcing the illegal contract. [1252] For example, the Rent Act 1977 contains provisions [1253] entitling a tenant to recover money which he could not lawfully have been required to pay; and in a case decided under an earlier Act it was held that he could recover an illegal premium even though he was a willing party to a fraudulent scheme to evade the Act. [1254] It used to be thought that the prevalence of such provisions had made the old class-protecting rules obsolete, [1255] until their reaffirmation by the Privy Council in *Kiriri Cotton Co Ltd v Dewani* [1256]: a tenant paid his landlord a premium for a flat; by accepting the premium, the landlord committed an offence under a Rent Restriction Ordinance which did not expressly say that such premiums could be recovered. Nonetheless the tenant was allowed to recover the premium under the old rules relating to class-protecting statutes.

Oppression and fraud

16-203

Even before the decision in *Patel v Mirza* [1257] a person could recover money paid or property transferred under an illegal contract if he was forced by the other party to enter into the illegal contract. "Oppression" is here used in a somewhat broad sense. Thus in *Atkinson v Denby* [1258] the plaintiff was insolvent and offered to pay his creditors a dividend of 5s. in the pound. All the creditors were willing to accept the dividend in full settlement of their claims, except the defendants, who said he would only accept it if the plaintiff first paid him £50. The plaintiff did so, but was later allowed to recover the £50 on the ground that he had been forced to agree to defraud the other creditors. [1259] Similarly, recovery is possible if the party entered into the contract as a result of the other party's fraudulent misrepresentation that the contract was lawful. Thus in *Hughes v Liverpool Victoria Legal Friendly Society* [1260] the plaintiff effected a policy of insurance with the defendants on the life of a person in which he had no insurable interest. The contract was illegal, [1261] but the plaintiff was able to recover the premiums he had paid as he had been induced to make the contract by the fraudulent

representation of the defendants' agent that the policy was valid. The decisive factor in these cases is the fraud of the defendant and not the innocence of the plaintiff, although if the plaintiff is not innocent there can be no recovery. [1262] The plaintiff would have failed if the representation that the policy was valid had been innocently made [1263]; if, however, the misrepresentation is one of *fact* rather than law, and no bar to rescission has arisen, then the person who has been induced to enter the contract after the misrepresentation has been made, even *innocently*, would seem to have the right to rescind it and so recover his money or property. [1264]

Mistake [1265]

16-204

Although in the light of *Patel v Mirza* [1266] it may seldom be necessary to rely on it, there is some authority for the view that money can be recovered if it was paid under an excusable mistake of *fact* affecting the legality of the contract. In *Oom v Bruce* [1267] the plaintiff as agent for the Russian owner of goods in Russia took out a policy of insurance with the defendant. Neither party knew (or could have known) that Russia had declared war on this country before the contract was made. It was held that the plaintiff could recover his premium as he was not guilty of any fault or blame in entering the illegal contract.

Locus poenitentiae

16-205

The locus poenitentiae principle enabled a party to resile from an executory contract and recover anything paid or transferred under the contract. [1268] Lord Toulson stated in *Patel v Mirza* [1269] that it was "not necessary to discuss the question of locus poenitentiae" as the court was permitting the claimant to recover his consideration. He added that the principle had "only acquired importance because of the strictness of the basic rule" on the effect of illegality on the enforcement of contracts, and the fact that the courts had adopted the "wrong approach" to the effect of illegality on contracts. [1270] Lord Mance was unable to accept this as the "concept behind locus poenitentiae is restitutionary". [1271] Lord Sumption considered that the "notion of penitence" or "the voluntary character of the plaintiff's withdrawal" were irrelevant when dealing with the consequences of an unenforceable illegal contract as the right of restitution follows from the "legal ineffectiveness of the contract". [1272] Although the minority did not set out a definitive view on the principle of locus poenitentiae it is clear that money or property transferred under an illegal contract is recoverable provided such recovery is not against public policy. [1273]

Marriage brokage contracts

16-208

For historical reasons the general rule of non-recovery after substantial performance does not apply to marriage brokage contracts. In such cases, equity had always allowed relief to the party dealing with the marriage broker owing to the jealousy with which contracts relating to marriage were regarded; and the common law courts adopted this equitable exception. In *Hermann v Charlesworth*, [1274] therefore, although the defendant had taken steps and incurred expense towards carrying out his part of a marriage brokage contract, the plaintiff was allowed to recover back money she had paid thereunder.

Principal and agent

16-209

A principal can recover from his agent money which he has paid to the agent, albeit for a legally objectionable purpose, provided that he instructs the agent to return it to him before the agent has paid it over under the contract, [1275] at any rate if the purpose was not grossly criminal or turpitudinous or if the principal still enjoyed a locus poenitentiae. [1276] Where money is received by an agent for his principal from a third party under an illegal contract it would seem that the principal may recover the money from the agent in an action for money had and received. [1277] Where the receipt of the money is itself illegal and part of an illegal transaction in which both the principal and the agent are concerned, [1278] or the agency itself is otherwise illegal, [1279] the principal cannot recover the money from the agent; similarly in such a case in the absence of a locus poenitentiae, [1280] the principal cannot recover from the agent money which he has paid to the agent for the purposes of the contract and which the agent has wrongfully appropriated to his own use. [1281] Nor can a principal sue his agent for failure to perform a transaction which is, by common law or statute, void or otherwise unenforceable at the principal's suit. [1282]

Trustees and other fiduciaries

16-210

A trustee who misapplies trust funds for an illegal purpose would, on the principles stated above, be unable to recover the funds thus advanced. The cestuis que trust, however, where they do not know of, or acquiesce in, the illegal transaction effected by their trustee, appear to be in a better position than he is to recover the trust property which has been illegally advanced and is traceable in the hands of third parties who would, in the absence of illegality, be bound to restore such property. It is submitted that there is no reason of policy why the beneficiary, if innocent of any illegal purpose, should be precluded from recovering in a proprietary action, provided, of course, a proprietary base to the claim can be shown. In any case it is clear that an innocent beneficiary may bring an action in personam against the trustee claiming damages for breach of trust, notwithstanding the latter's unlawful purpose. Thus in *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1283] the plaintiff company, through its directors, lent money to various persons for the purpose of purchasing shares in itself, contrary to s.54 of the Companies Act 1948. [1284] It was held that the company could claim damages [1285] against its directors for breach of their fiduciary duty to the company to apply its funds for authorised purposes only, and against its bankers both for breach of their duty as constructive trustees of the company's accounts and also in contract for negligence in the running of its financial affairs.

1044. See Williams (1942) 8 Camb. L.J. 51; Coote (1972) 35 M.L.R. 38; Merkin (1981) 97 L.Q.R. 420.

1195. The approach in this section follows that of Peel, *Treitel on The Law of Contract*, 12th edn (2007), pp.541–565. See also Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2011), Ch.25; Burrows, *The Law of Restitution*, 3rd edn (2010), pp.595–598.

1196. ! *[2016] UKSC 42*. See Strauss, ''The Diminishing Power of the Defendant: Illegality After Patel v Mirza'' [2016] R.L.R. 145; Burrows, *A New Dawn for the Law of Illegality*, Oxford Legal Studies Research Paper No.42 (2017). See above, paras 16-014B—16-014C.

1197. ! *[2016] UKSC 42* at [116].

1198. ! See above, para.16-014F.

1199. ! See above, paras 16-014G—16-014L.

1200. ❗*[2016] UKSC 42* at [74].

1201. ❗*[2014] UKSC 47, [2014] 1 W.L.R. 2889*. Lord Neuberger considered that there was real room for debate that the principle was applicable: *[2016] UKSC 42* at [180].

1202. ❗*[2014] UKSC 47, [2014] 1 W.L.R. 2889* at [243]. See para.16-013 for analysis of *Hounga v Allen*.

1203. ❗*[2016] UKSC 42* at [243].

1204. See Higgins (1962) 25 M.L.R. 149: Grodecki (1955) 71 L.Q.R. 254.

1205. cf. below, para.16-196.

1206. The transferor cannot claim to have retained the beneficial interest where, in order to establish the trust in his favour, he must rely on the illegal purpose of the transfer: *Palaniappa Chettiar v Aranasalam Chettiar [1962] A.C. 294*.

1207. *Singh v Ali [1960] A.C. 167*. And see *Taylor v Chester (1869) L.R. 4 Q.B. 309*; *Tinsley v Milligan [1994] 1 A.C. 340, 374*, per Lord Browne-Wilkinson: "the effect of illegality is not to prevent a proprietary interest in equity from arising or to produce a forfeiture of such right: the effect is to render the equitable interest unenforceable in certain circumstances". The court will not enforce a claim by a person claiming funds held by a person in the position of trustee (in this case a solicitor) where the claimant has to rely on his fraud: see *Halley v Law Society [2003] EWCA Civ 97*.

1208. *Feret v Hill (1854) 15 C.B. 207*.

1209. *Belvoir Finance Co Ltd v Stapleton [1971] 1 Q.B. 210*; cf. *Kingsley v Sterling Industrial Securities [1967] 2 Q.B. 747, 783*.

1210. Peel, *Treitel on The Law of Contract*, 13th edn (2011), pp.554–555.

1211. See above, para.16-169.

1212. *Amar Singh v Kulubya [1964] A.C. 142*.

1213. *Jajbhay v Cassim (1939) A.D. 537, 557 (S. Africa)*; *Alexander v Rayson [1936] 1 K.B. 169, 186–187*.

1214. *Munro v Morrison [1980] V.R. 83*.

1215. See *Jajbhay v Cassim (1939) A.D. 537*.

1216. Contrast *Milner v Staffordshire Congregational Union Inc [1956] Ch. 275*, where the contract was statutorily unlawful only in the sense of being void and a deposit was therefore recoverable. And see *South Western Mineral Water Co Ltd v Ashmore [1967] 1 W.L.R. 1110*; below, para.16-218.

1217. *[1945] K.B. 65, 71*; applied in *Singh v Ali [1960] A.C. 167* and also in *Belvoir Finance Co Ltd v Harold G. Cole & Co Ltd [1969] 1 W.L.R. 1877*; *Tinsley v Milligan [1993] 3 W.L.R. 126*.

1218. But if the action for conversion is statute-barred and the only cause of action is under the illegal bailment, the action will fail: *Thomas Brown & Sons v Fazal Deen (1962) 108 C.L.R. 391 (Australia)*.

1219. Contrast *Bigos v Bousted [1951] 1 All E.R. 92*; *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 384*. And see Hamson (1949) 10 Camb. L.J. 249; Paton, *Bailment in the*

Common Law (1972), pp.34–36; Coote (1972) 35 M.L.R. 38.

1220. See Peel, *Treitel on The Law of Contract*, pp.548–549.

1221. *[1945] K.B. 65, 72*.

1222. *Treitel* at pp.553–554. See, however, Lord Goff's terrorist example in *Tinsley v Milligan [1994] 1 A.C. 340, 362*. See also *Webb v Chief Constable of Merseyside Police [2000] 1 All E.R. 209, 22* (person could not recover, on the basis of title, controlled drugs seized by the police); *Costello v Chief Constable of Derbyshire Constabulary [2001] EWCA Civ 381, [2001] 3 All E.R. 150*.

1223. *[1994] 1 A.C. 340*. See also *Sansom v Gardner [2009] EWHC 3369 (QB)*.

1224. *Tinsley v Milligan [1994] 1 A.C. 340, 373–374*.

1225. ❗*[1994] 1 A.C. 340* (Lord Keith and Lord Goff dissenting). All of the law lords disapproved of the approach of the courts in *Thackwell v Barclays Bank Plc [1986] 1 All E.R. 676*; *Saunders v Edwards [1987] 1 W.L.R. 1116*; and *Euro-Diam Ltd v Bathurst [1990] Q.B. 1* which had been followed by the majority of the Court of Appeal in *Tinsley v Milligan*. See also *Davies v O'Kelly [2015] 1 W.L.R. 2725* at [20].

1226. *[1994] 1 A.C. 340*.

1227. *Mahonia Ltd v JP Morgan Chase Bank [2003] 2 Lloyd's Rep. 911*, at [27]. See also *Mahonia Ltd v West LB AG [2004] EWHC 1938 (Comm)*.

1228. *[1994] 1 A.C. 340*.

1229. *[2015] 1 W.L.R. 2725*.

1230. *[2015] 1 W.L.R. 2725* at [29].

1231. *[1994] 1 A.C. 340*.

1232. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [138].

1233. ❗*[1994] 1 A.C. 340*.

1234. ❗*Shah v Greening [2016] EWHC 548 (Ch)* at [61].

1235. *[2015] UKSC 23* at [138].

1236. ❗*[2016] UKSC 42* at [181].

1237. ❗*[2016] UKSC 42* at [112]. See also Lord Neuberger *[2016] UKSC 42* at [164], decision in "*Tinsley* … is generally thought to be unsatisfactory", Lord Neuberger endorsed the judgment of Lord Toulson: *[2016] UKSC 42* at [181].

1238. ❗*[2016] UKSC 42* at [201].

1239. *[1994] 1 A.C. 340*. See Enonchong (1994) 14 O.J.L.S. 295.

1240. *[1994] 1 A.C. 340, 372*.

1241. ❗*[1996] Ch. 107*; *Collier v Collier [2002] EWCA Civ 1095, [2002] B.P.I.R. 1057*.

> "It is … now accepted on all sides that, if *Collier v Collier [2002] BPIR 1057* came before the courts today it would be decided differently": *Patel v Mirza [2016] UKSC 42* at [221], per Lord Clarke. This was not accepted by Lord Sumption who considered that if "*Collier v Collier* were to come before the courts today, the result should be the same … ": *Patel v Mirza [2016] UKSC 42* at [238]."

See Enonchong [1996] R.L.R. 78.

1242. *Tribe v Tribe [1996] Ch. 107, 121*, per Nourse L.J.; see also 135, per Millett L.J.

1243. See Rose (1996) 112 L.Q.R. 386.

1244. *Tribe v Tribe [1996] Ch. 107, 134*.

1245. *[1996] Ch. 107, 135*.

1246. *(1995) 132 A.L.R. 133*.

1247. *Nelson v Nelson (1995) 132 A.L.R. 133, 149*.

1248. *(1995) 132 A.L.R. 133, 190*.

1249. ❗*[2016] UKSC 42, [2016] 1 W.L.R. 399*.

1250. ❗See above, para.16-194.

1251. *(1778) 2 Cowp. 790*; *Barclay v Pearson [1893] 2 Ch. 154*; *Bonnard v Dott [1906] 1 Ch. 740*. In *Lodge v National Union Investment Co [1907] 1 Ch. 300* it was held that the borrower could not recover his securities unless he repaid the money lent to him; but this decision has been distinguished out of existence: *Chapman v Michaelson [1908] 2 Ch. 612; [1909] 1 Ch. 238*; *Cohen v J. Lester Ltd [1939] 1 K.B. 504*; *Kasumu v Baba-Egbe [1956] A.C. 539*; cf. *Barclay v Prospect Mortgages Ltd [1974] 1 W.L.R. 837*. See also now Consumer Credit Act 1974 s.40(1) as amended by the Enterprise Act 2002 s.278.

1252. *Kasumu v Baba-Egbe [1956] A.C. 539*.

1253. e.g. Rent Act 1977 ss.119–125; see, e.g. *Steele v McMahon [1990] 44 E.G. 65*; *Saleh v Robinson [1988] 36 E.G. 180*. See also Housing Act 1980 s.79; *Ailion v Spiekermann [1976] Ch. 158* (illegal premium on assignment); *Farrell v Alexander [1977] A.C. 59*.

1254. *Gray v Southouse [1949] 2 All E.R. 1019*.

1255. See *Green v Portsmouth Stadium [1953] 2 Q.B. 190*; where the ratio now appears to be that the statute in question was passed, not to protect bookmakers, but to regulate racecourses.

1256. *[1960] A.C. 192*.

1257. ❗*[2016] UKSC 42, [2016] 1 W.L.R. 399*; see above, para.16-194.

1258. *(1862) 7 H. & N. 934*; cf. *Smith v Cuff (1817) 6 M. & S. 169*; *Davies v London & Provincial Marine Insurance Co (1878) 8 Ch. D. 469*; *Erwin v Snelgrove [1927] 4 D.L.R. 1028*.

1259. For a case where the "oppression" was caused by factors other than the other party's conduct see *Kiriri Cotton Co Ltd v Dewani [1960] A.C. 190, 205*, per Lord Denning; contrast *Bigos v Bousted [1951] 1 All E.R. 92* (illness of daughter not sufficient to excuse party in making unlawful foreign exchange transaction).

1260. *[1916] 2 K.B. 482*; *Reynell v Sprye (1852) 1 De G.M. & G. 660*.

1261. Life Assurance Act 1774 s.1.

1262. *Parkinson v College of Ambulance Ltd [1925] 2 K.B. 1*.

1263. *Harse v Pearl Life Assurance Co [1904] 1 K.B. 558*.

1264. This was assumed in *Edler v Auerbach [1950] 1 K.B. 359* where, however, a bar to rescission had arisen. See Peel, *Treitel on The Law of Contract*, 13th edn (2011), pp.544–545.

1265. *Treitel* at p.544. On mistake of law see below, paras 29-044 et seq.

1266. *[2016] UKSC 42, [2016] 1 W.L.R. 399*; see above, para.16-194.

1267. *(1810) 12 East 225*.

1268. *Bone v Ekless (1860) 29 L.J. Ex. 438, 440*; *Palaniappa Chettiar v Arunasalam Chettiar [1962] A.C. 294, 302–303*. The right to resile was subject to a number of qualifications which need not be addressed.

1269. *[2016] UKSC 42* at [116]. See also Lord Neuberger at [193].

1270. *[2016] UKSC 42* at [116].

1271. *[2016] UKSC 42* at [202]. He considered that "it would be desirable to avoid the moral undertones of the Latin brocard" and simply recognise the claimant's restitutionary right: *[2016] UKSC 42* at [202].

1272. *[2016] UKSC 42* at [252].

1273. See *[2016] UKSC 42* at [110] where Lord Toulson considered it appropriate to refuse assistance where this would "assist the claimant in a drug trafficking operation".

1274. *[1905] 2 K.B. 123*; and see *Roberts v Roberts (1730) 3 P.Wms. 66, 75, 76*; *Cole v Gibson (1750) 1 Ves.Sen. 503*. See also para.16-087.

1275. *Hampden v Walsh (1876) 1 Q.B.D. 189*; *Hastelow v Jackson (1828) 8 B. & C. 221, 226*; *Burge v Ashley & Smith Ltd [1900] 1 Q.B. 744*.

1276. *Bone v Eckles (1860) 5 H. & N. 925*; *Tennant v Elliott (1791) 1 B. & P. 3*; *Farmer v Russell (1798) 1 B. & P. 296*. As to locus poenitentiae, see above, paras 16-205 et seq.

1277. See *Sykes v Beadon (1879) 11 Ch. D. 170, 194–195*; and see *Bridger v Savage (1885) 15 Q.B.D. 363*; *De Mattos v Benjamin (1894) 63 L.J.Q.B. 248*; cf. *Rawlings v General Trading Corp [1921] 1 K.B. 635, 642*; *Hill v William Hill (Park Lane) Ltd [1949] A.C. 530*.

1278. *Nicholson v Gooch (1856) 5 E. & B. 999, 1016*; cf. *Jubilee Cotton Mills Ltd v Lewis [1924] A.C. 958, 978*.

1279. See *Harry Parker Ltd v Mason [1940] 2 K.B. 590*; *Kabel v Ronald Lyon Espanola SA (1968) 208 E.G. 269*. For criticisms of this requirement, see Merkin (1981) 97 L.Q.R. 420, 437–439.

1280. See above, n.1166.

1281. Above paras 16-197, 16-198.

1282. *Cohen v Kittell (1889) 22 Q.B.D. 680*.

1283. *[1968] 1 W.L.R. 1555, 1652–1659*.

1284. The Companies Act 1948 s.54 has been repealed by the Companies Act 1981 Sch.4. On the provision of financial assistance by a company for the purchase or subscription of its shares see Companies Act 2006 Pt 18 Ch.2. Subsequent to *Selangor United Rubber Estates Ltd v Cradock (No.3) [1968] 1 W.L.R. 1555* the courts interpreted the Companies Act 1948 s.54, as being for the protection of the company, despite the fact that criminal sanctions can be imposed on the company for breach of the section (s.54(2)), and thus the company could bring an action to recover any money or property transferred under the section. See above, para.10-038; *Belmont Finance Ltd v Williams Furniture Ltd (No.2) [1980] 1 All E.R. 393*; *Armour Hick Northern Ltd v Whitehouse [1980] 1 W.L.R. 1520*. See also *International Sales and Agencies Ltd v Marcus [1982] 2 C.M.L.R. 46, 55*.

1285. Breach of s.54 (see now Companies Act 2006 Pt 18 Ch.2) would give rise to an action for breach of trust against the directors and any person who assisted in that breach: *Selangor United Rubber Estates Ltd v Cradock (No.3) [1968] 1 W.L.R. 1555*; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No.2) [1980] 1 All E.R. 393*.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 5. - Severance

Introductory

16-211

Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract [1286] are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable. The question then arises whether the unobjectionable may be enforced and the objectionable disregarded or "severed". [1287] The same question arises in relation to bonds where the condition is partly against the law. [1288]

Partial statutory invalidity

16-212

It was laid down in some of the older cases that there is a distinction between a deed or condition which is void in part by statute and one which is void in part at common law. [1289] This distinction must now be understood to apply only to cases where the statute enacts that an agreement or deed made in violation of its provisions shall be wholly void. [1290] Unless that is so, then provided the good part is separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute. The general rule is that:

> "… where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." [1291]

Thus, a covenant in a lease that the tenant should pay "all parliamentary taxes", only included such as he might lawfully pay, and a separate covenant to pay the landlord's property tax, which it was illegal for a tenant to contract to pay, although void, did not affect the validity of the instrument. [1292] In some situations where there is a statutory requirement to obtain a licence for work above a stipulated financial limit but up to that limit no licence is required, the courts will enforce a contract up to that limit. [1293] There is some doubt whether this applies to a lump sum contract "for a single and indivisible work". [1294] Even in this situation if the cost element can be divided into its legal and illegal components, the courts will enforce the former but not the latter. [1295]

General principles

16-213

Although a number of authorities on the application of the doctrine of severance cannot easily be reconciled, it is submitted that two underlying principles have throughout guided the courts. First, the

courts will not make a new contract for the parties, whether by rewriting the existing contract, or by basically altering its nature [1296]; secondly, the courts will not sever the unenforceable parts of a contract unless it accords with public policy to do so. [1297]

Contracts cannot be rewritten

16-214

The first limitation on the courts' power to sever the bad from the good is that they cannot make a new contract for the parties. Examples of one aspect of this limitation are provided by the courts' refusal to rewrite contracts which contain provisions in restraint of trade. The severance of the unreasonable part of the covenants in these cases is effected only where it is possible to do so by merely running a blue pencil through the offending part. For the blue pencil test to apply, it is essential that:

> "the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining." [1298]

Thus, in *Goldsoll v Goldman*, [1299] the defendant, who was a London dealer in imitation jewellery, on selling his business to the plaintiff, covenanted not to compete with the plaintiff as:

> "a dealer in real or imitation jewellery in … any part of the United Kingdom, … the United States of America, Russia or Spain."

The covenant was unreasonable in so far as it extended to real jewellery and to competition outside the United Kingdom, but was otherwise reasonable. It was held that the words "real or" and the listed places outside the United Kingdom could be severed leaving only a reasonable covenant which could be enforced.

Scope of agreement to be left unchanged

16-215

Although the courts will never effect a severance unless the illegal part can be "blue pencilled", it does not follow that they will always effect a severance when that is so. [1300] The court will not strike out words of a contract if to do so would "alter entirely the scope and intention of the agreement", [1301] there being "in truth but one covenant" and not two. [1302] The question of what is a single covenant and of what is the scope of an agreement is in each case one as to the proper construction of that particular covenant or agreement. [1303] Thus, where the business intended to be protected by a restrictive covenant contained several departments, it was held that a covenant which restricted the covenantor from carrying on any of the sorts of business carried on by those departments, was a single covenant and was not severable in respect of the different sorts of business. [1304] Again, a covenant not to engage in a business in any one of several capacities was held to be a single covenant. [1305] *Goldsoll v Goldman*, [1306] on the other hand, provides an illustration where certain areas [1307] and types of business [1308] which a covenant in restraint of trade unreasonably covered were held to be severable. So too, a covenant not to disclose trade secrets may be severable from a covenant not to engage in a business. [1309] Where an employee's covenant not to interfere with customers of the employer [1310] is so construed that *"customers"* includes those persons who first become customers after the termination of the service, it will in ordinary circumstances be regarded as a single covenant and will not be severed so as to allow of its enforcement in respect of those who were customers during the service. [1311]

Severance of a condition

16-216

Many covenants in restraint of trade will be in conditional form and provide that X will receive £Y on condition that he refrains from doing a particular act. Assuming that the condition is in restraint of trade, the question arises as to whether the severance of the condition is at all possible in that it will transform a conditional obligation on the part of the covenantor into an absolute one; that is, payment of the £Y will be due even though X does not perform part of the bargain. This was the issue in *Marshall v N.M. Financial Management Ltd*. [1312] The case involved a provision in a contract for the payment of commission to a self-employed sales agent after the contract's termination. Payment of the commission was conditional on the ex-agent not competing with the defendant for a period of one year. The court held that the anti-competition covenant was in restraint of trade. The question before the court was whether the plaintiff as the party "who has been freed from an invalid restraint of trade can enforce the remainder of the contract without it". [1313] The court held that he could since the "whole or substantially the whole [of the] consideration" [1314] was not the restraint but the provision of the services that earned the commission.

Where a mortgage imposed upon the mortgagor an obligation, which was in unreasonable restraint of trade, to buy certain kinds of goods only from the mortgagee for 21 years, the unenforceability of the tie was so closely linked with the provision in the mortgage that it should be irredeemable for the same period, that this provision too was held to be unenforceable, though in other respects the enforceability of the mortgage itself was unaffected. [1315]

Rules of association in part objectionable

16-217

If the fundamental object of any association, whether it be a combination to fix prices or a trade union, is obnoxious to the law because it is an unreasonable restraint of trade, at common law the association is illegal and the agreement upon which it is founded is wholly unenforceable. [1316] So, for instance, where a society with the militant objects of a trade union combined with these the provident purposes of a friendly society and by its rules members might be expelled and their benefits forfeited for non-compliance with the decisions of committees directing the militant operations, it was held that the main object was illegal as being in restraint of trade and that as the provident rules were inseparably connected with that object, they were affected by its illegality and were therefore unenforceable. [1317] If the fundamental object of the association is not unlawful, the fact that certain of its rules are in unreasonable restraint of trade does not make the association unlawful though of course those particular rules cannot be enforced. [1318]

Illegality of part of the consideration

16-218

Many of the older authorities laid down that if a contract was made on several considerations, one of which was illegal, the whole contract was unenforceable and severance was impossible. [1319] Such a test is unworkable [1320] and, as has been recognised in more modern decisions, the partial illegality, and hence unenforceability, is only relevant in one of two ways. First, the severance of the offending clause may so alter the scope of the whole contract as to make it a new contract. The true test under this head is therefore whether the illegal promise is substantially the whole or main consideration for the promise now sought to be enforced. If it is, then the court will not sever it, leaving only a small part of the consideration to support the promise of the defendant [1321]; otherwise it may. Thus, in *Goodinson v Goodinson*, [1322] a husband promised to make regular payments to his wife if she would forbear to bring any matrimonial proceedings against him, would indemnify him against her debts and would not pledge his credit for necessaries. The agreement not to commence matrimonial proceedings was against public policy as an attempt to oust the jurisdiction of the court; but as it did not form the main part of the consideration for the promise to make the payments, the court severed that part of the agreement and enforced the rest in favour of the wife. [1323] Similarly an employee can sue for his whole wages notwithstanding that his contract of employment imposes upon him a

severable covenant in restraint of trade. An alternative approach is to be found in *South Western Mineral Water Co Ltd v Ashmore* [1324]; the illegal term of a contract was there severed, but the contract was thereby so altered in scope that it was held to be unenforceable; restitutio in integrum was therefore ordered and an order was made for the return of money paid under the contract. Such an order could not have been made but for the severance of the illegal term. [1325]

Severance and public policy

16-219

The second way in which the partial illegality of the consideration is relevant relates to the second of the two general principles mentioned above. [1326] This second limitation on the courts' power to sever the bad from the good is that they will not do so unless this accords with public policy. For example, part of the consideration for the promise of either party may be such as so gravely to taint the whole contract that there is no ground of public policy requiring the courts to assist either party by severing the offending parts [1327]: "[i]n all the cases a distinction is taken between a merely void and an illegal consideration". [1328] In this context illegal means that which amounts to a criminal offence or is contra bonos mores, [1329] where, on grounds of public policy, the illegality may, though does not invariably, preclude severance. Agreements the object of which is to defraud the Revenue, [1330] or which involve trading with the enemy, [1331] have been held to be incapable of severance. [1332] On the other hand, examples of mere voidness on grounds of public policy are agreements to oust the jurisdiction of the court [1333] and agreements which are merely in restraint of trade. [1334]

Employer and employee covenants in restraint of trade

16-220

There is authority for saying that, on grounds of public policy, the courts should be reluctant to sever in favour of an employer [1335] the unreasonable clauses in a covenant in restraint of trade made between employer and employee. Thus Lord Moulton in *Mason v Provident Clothing Co Ltd* [1336] expressed the view that parts of such a covenant should only be severed:

> "… in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause";

on the ground that it would:

> "… be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and, by employing their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required."

"To hold otherwise," it has been said, [1337] is:

> "… to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation."

However, more modern authorities [1338] appear to be in favour of applying to covenants in restraint of

trade between employer and employee the same rule as to other covenants, that is to say, the rule that where the parts of a covenant really amount to separate and independent covenants they may be severed from one another, but not otherwise. [1339]

1286. Where one contract is collateral to another and illegal contract, the former may be "tainted" by the illegality of the latter (see the authorities cited in para.16-182); the courts thus look at the substance of the matter and treat the two transactions as forming a single and unseverable arrangement. In *Spector v Ageda [1973] Ch. 30*, Megarry J. expressed the view obiter that where the original transaction is only partially illegal, e.g. by statute, then unless that partial illegality is shown to relate solely to some defined portion of the subsequent transaction, so that only that defined portion is affected, the *whole* of the subsequent transaction will be affected by the illegality. This means that the party to the subsequent transaction is put in a worse position than the party to the original illegal transaction, a view admitted by the judge to be "draconian", but consistent with the court's policy against devising means of preventing those who are implicated from burning their fingers more than to a limited extent. Similarly, individual covenants in a contract may be so closely connected that they stand or fall together, although the remainder of the contract may be severable: *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 314, 321*.

1287. See Marsh (1948) 64 L.Q.R. 230, 347.

1288. See *Baker v Hedgecock (1889) 39 Ch. D. 520*; *Kearney v Whitehaven Colliery Co Ltd [1893] 1 Q.B. 700*; *S. Nevanas & Co v Walker and Foreman [1914] 1 Ch. 413, 423*; *British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch. 563*.

1289. *Maleverer v Redshaw (1670) 1 Mod. 35*; repudiated in *Collins v Blantern (1767) 2 Wils.K.B. 341, 347, 351*.

1290. *Doe d. Thompson v Pitcher (1815) 6 Taunt. 359, 369*.

1291. *Pickering v Ilfracombe Ry (1868) L.R. 3 C.P. 235, 250*; *Payne v Brecon Corp (1858) 3 H. & N. 572*; *Pallister v Gravesend Corp (1850) 9 C.B. 774*; *Royal Exchange Assurance Corp v Sjorforsakrings Aktiebolaget Vega [1901] 2 K.B. 567, 573*; *Chemidus Wavin Ltd v Société Pour La Transformation Et L'Exploitation Des Resines Industrielles SA [1978] 3 C.M.L.R. 514*. cf. *Electrical Trades Union v Tarlo [1984] Ch. 720, 731*.

1292. *Gaskell v King (1809) 11 East 165*; and see *Wigg v Shuttleworth (1810) 13 East 87*; *Howe v Synge (1812) 15 East 440*; *Greenwood v Bishop of London (1814) 5 Taunt. 727*; as to personal covenants in deeds where the real security is by statute void see *Mouys v Leake (1799) 8 T.R. 411*; *Gibbons v Hooper (1831) 2 B. & Ad. 734*.

1293. *Frank W. Clifford Ltd v Garth [1956] 1 W.L.R. 570*.

1294. *Frank W. Clifford Ltd v Garth [1956] 1 W.L.R. 570, 572*.

1295. *United City Merchants (Investments) Ltd v Royal Bank of Canada [1982] Q.B. 208, on appeal [1983] 1 A.C. 168*. See also above, para.16-159.

1296. Where a contract contains an ancillary provision which is illegal and which is for the benefit of the plaintiff, the court will normally be disposed to allow the plaintiff to waive it and enforce the contract: *Carney v Herbert [1985] A.C. 301, 317A–B, PC*.

1297. For observations on the statement of principle in para.16-213, see *United City Merchants, etc. [1982] Q.B. 208, 229–230*, per Stephenson L.J.; *Sadler v Imperial Life Assurance Co of Canada Ltd [1988] I.R.L.R. 388* at 393, cited with approval in *Beckett Investment Management Ltd v Hall [2007] EWCA Civ 613, [2007] I.R.L. 793* at [35]–[36]. In *Sadler* (involving restraint of trade) the court held that severance required that: (i) "the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording that remains"; (ii) "the

remaining terms are supported by consideration" and (iii) the removal of the unenforceable provisions does not alter the character of the contract" (*[1988] I.R.L.R. 388, 393*).

1298. *Business Seating (Renovations) Ltd v Broad [1989] I.C.R. 729, 734*. Where the covenant contains a number of separate and distinct prohibitions, severance will be more easy to effect: see *Ginsberg v Parker [1988] I.R.L.R. 483*.

1299. *[1914] 2 Ch. 603, [1915] 1 Ch. 192*; followed in *Ronbar Enterprises Ltd v Green [1954] 1 W.L.R. 815*; and see *Scorer v Seymour Jones [1966] 1 W.L.R. 1419*; *Francis Delzenne Ltd v Klee (1968) 112 S.J. 583*.

1300. *Attwood v Lamont [1920] 3 K.B. 571, 578, 593*.

1301. *Attwood v Lamont [1920] 3 K.B. 571, 580*; and see below, para.16-218.

1302. *Attwood v Lamont [1920] 3 K.B. 571, 593*; and see *Baker v Hedgecock (1888) 39 Ch. D. 520*; *Kenyon v Darwen Cotton Manufacturing Co Ltd [1936] 2 K.B. 193*; *James E McCabe Ltd v Scottish Courage Ltd [2006] EWHC 538 (Comm)*.

1303. *Miles v Durham [1891] 1 Ch. 576*.

1304. *Attwood v Lamont [1920] 3 K.B. 571*; *British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch. 563*.

1305. *British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch. 563*.

1306. *[1914] 2 Ch. 603, [1915] 1 Ch. 292*.

1307. And see *Mallan v May (1843) 11 M. & W. 653*; *Underwood & Son Ltd v Barker [1899] 1 Ch. 300* ; *Hooper & Ashby v Willis (1905) 94 L.T. 624*; *Bromley v Smith [1909] 2 K.B. 235*; *Nevanas & Co v Walker and Foreman [1914] 1 Ch. 413*; *Putsman v Taylor [1927] 1 K.B. 637, 741*.

1308. And see *Hooper v Willis (1905) 94 L.T. 624*; *Bromley v Smith [1909] 2 K.B. 235*.

1309. *Caribonum Co Ltd v Le Couch (1913) 109 L.T. 385, 587*.

1310. A covenant by a managing director against soliciting customers while so employed or afterwards has been upheld as not wider than necessary for the protection of the covenantee's trade: *Gilford Motor Co Ltd v Horne [1933] Ch. 935*.

1311. *Konski v Peet [1915] 1 Ch. 530*; *East Essex Farmers Ltd v Holder [1926] W.N. 230*; *Express Dairy Co v Jackson (1930) 99 L.J.K.B. 181*; in *Baines v Geary (1887) 35 Ch. D. 154* and *Dubowski & Sons v Goldstein [1896] 1 Q.B. 478*, the covenants were held to be severable; but unless distinguishable on the terms of the covenants, these two authorities probably cannot now be relied on: see *Continental Tyre Co v Heath (1913) 29 T.L.R. 308*. See also *S. Ivestone Records Ltd v Mountfield [1993] E.M.L.R. 152*.

1312. *[1997] 1 W.L.R. 1527*.

1313. *Marshall v N.M. Financial Management Ltd [1997] 1 W.L.R. 1527, 1531*.

1314. Citing Denning L.J., *Bennett v Bennett [1952] 1 K.B. 249, 261*.

1315. *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 314, 321*. cf. *Petrofina (Gt. Britain) Ltd v Martin [1966] Ch. 146* where there was no mortgage and the unreasonable restraints were so pervasive as to vitiate the entire contract.

1316. *Hilton v Eckersley (1856) 6 E. & B. 47*. See above, paras 16-143—16-147 as to statutory position of such associations.

1317. *Russell v Amalgamated Society of Carpenters [1912] A.C. 421*; cf. *Swaine v Wilson (1889) 24 Q.B.D. 252*; *Finch v Oake [1896] 1 Ch. 409*.

1318. *Collins v Locke (1879) 4 App. Cas. 674*; *Osborne v Amalgamated Society of Ry Servants [1911] 1 Ch. 540, 553*.

1319. *Shackell v Rosier (1836) 3 Scott 59*; *Lound v Grimwade (1888) 39 Ch. D. 605*; *Jones v Merionethshire Permanent Benefit Building Society [1891] 2 Ch. 587; [1892] 1 Ch. 173*.

1320. Williston, *Contracts*, 9th edn, s.7–79; Marsh (1948) 64 L.Q.R. 230, 242.

1321. *Bennett v Bennett [1952] 1 K.B. 249*; see also *Putsman v Taylor [1927] 1 K.B. 637, 639, affirmed [1927] 1 K.B. 741*; *Chemidus Wavin Ltd v Société Pour La Transformation Et L'Exploitation Des Resines Industrielle SA [1978] 3 C.M.L.R. 514, CA*.

1322. *[1954] 2 Q.B. 118*; see now Matrimonial Causes Act 1973 s.34.

1323. And see *Kearney v Whitehaven Colliery Co [1893] 1 Q.B. 700*; *Furlong v Burns & Co (1964) 43 D.L.R. (2d) 689*; *Ailion v Spiekermann [1976] Ch. 158*.

1324. *[1967] 1 W.L.R. 1110*. This case involved the application of Companies Act 1948 s.54, on which see above, para.16-210 n.1190.

1325. See above, paras 16-194, 16-196 et seq.

1326. Above, para.16-213.

1327. *Kuenigl v Donnersmarck [1955] 1 Q.B. 515, 537* (in this case the conditions for severance were not satisfied).

1328. *Shackell v Rosier (1836) 3 Scott 59, 74*.

1329. *Bennett v Bennett [1952] 1 K.B. 249, 253–254*; *Goodinson v Goodinson [1954] 2 Q.B. 118, 120*.

1330. *Miller v Karlinski (1945) 62 T.L.R. 85*; *Napier v National Business Agency Ltd [1951] 2 All E.R. 264*. cf. *Lincoln v CB Richards Ellis Hotels Ltd [2009] EWHC 2344 (TCC)* where the court did sever a term from a contract involving tax evasion in assessing damages but the evasion was not a central purpose of the contractual arrangement.

1331. *Kuenigl v Donnersmarck [1955] 1 Q.B. 515*.

1332. This passage was cited with approval in *Hyland v J. H. Barker (North West) Ltd [1985] I.C.R. 861, 863–864* where the court held that in determining the continuity of an employee's contract of employment the period during which he was paid an illegal tax-free allowance could not be taken into consideration.

1333. *Czarnikow v Roth, Schmidt & Co [1922] 2 K.B. 478*; *Goodinson v Goodinson [1954] 2 Q.B. 118*.

1334. e.g. *Ronbar Enterprises Ltd v Green [1954] 1 W.L.R. 815*; and see *Mogul S.S. Co Ltd v McGregor, Gow & Co [1892] A.C. 25, 46–47*; *R. v Stainer (1870) L.R. 1 C.C.R. 230*.

1335. But the employee can sever on the ordinary principles so as, e.g. to sue for his whole wages during the continuance of his employment despite the fact that he is subject to an unreasonable restraint: see above, paras 16-211 et seq.; and cf. above, 16-125.

1336. *[1913] A.C. 724, 745*.

1337. *Goldsoll v Goldman [1914] 2 Ch. 603, 613; affirmed [1915] 1 Ch. 292* cited with approval in *Attwood v Lamont [1920] 3 K.B. 571, 595*.

1338. *Francis Delzene v Klee (1968) S.J. 583*; *Lucas & Co Ltd v Mitchell [1974] Ch. 129*; *Stenhouse Australia Co Ltd v Phillips [1974] A.C. 391*. cf. *Ronbar Enterprises v Green [1954] 1 W.L.R. 815, 820*.

1339. *S. Nevanas & Co v Walker and Foreman [1914] 1 Ch. 413, 423* (where it was said that the remarks of Lord Moulton cited above were not intended to apply where parts of a covenant are clearly severed by the parties themselves so as to amount to separate covenants); *Putsman v Taylor [1927] 1 K.B. 637, 641*; *Spink (Bournemouth) Ltd v Spink [1936] Ch. 544*.

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Volume I - General Principles

Part 5 - Illegality and Public Policy

Chapter 16 - Illegality and Public Policy

Section 6. - Pleading and Practice

Presumption of legality

16-221

The party alleging the illegality of the contract bears the legal burden of proving this fact [1340]; therefore if the contract be reasonably susceptible of two meanings or two modes of performance, one legal and the other not the legal burden of proving its illegality is undischarged and that interpretation is to be put upon the contract which will support it and give it operation. [1341] If the contract on the face of it shows an illegal intention, an evidential burden lies upon the party supporting the contract to bring evidence reasonably capable of showing the legality of the intention. [1342]

Pleading of illegality

16-222

Where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; there is no "general principle that the claimant must either plead, give evidence of or rely on his own illegality". [1343] For the principle to apply the claim must arise out of criminal or illegal conduct of the claimant and it has been held that "arises out of" clearly denotes a causal connection with the conduct. [1344] Illegality involves "acts which are contrary to the public law of the state and engage the public interest", [1345] and this is why the judge:

> "may be required to take a point on illegality of his own motion, contrary to the ordinary adversarial practice of the English courts." [1346]

Secondly, where the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded. Thirdly, where unpleaded facts, which, taken by themselves, show an illegal object, have been put in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it. But fourthly, where the court [1347] is satisfied that all the relevant facts are before it and it can clearly see from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not. [1348] It has been said that counsel is not acting improperly in inviting the court to consider the possible, though unpleaded, illegality of a transaction but that on the contrary counsel's duty is to prevent the court from enforcing illegal transactions. [1349]

Costs

16-223

Where a defendant successfully raises a plea of illegality, the ordinary rules as to costs apply. [1350]

1340. *Hire-Purchase Furnishing Co v Richens (1887) 20 Q.B.D. 387, 389*.

1341. *R. v Inhabitants of Haslingfield (1814) 2 M. & S. 558*; *Bennett v Clough (1818) 1 B. & Ald. 461*; *Lewis v Davison (1839) 4 M. & W. 654, 657*: *Mittelholzer v Fullarton (1842) 6 Q.B. 989*; *Edler v Auerbach [1950] 1 K.B. 359, 368*; *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 Q.B. 374, 391–392*. See also above, paras 16-005—16-021.

1342. *Holland v Hall (1817) 1 B. & Ald. 53*.

1343. *Cross v Kirkley [2000] EWCA Civ 426* at [76]; *AB (by his litigation friend CD) v Royal Devon & Exeter NHS Foundation Trust [2016] EWHC 1024 (QB)* at [81].

1344. *[2000] EWCA 426* at [76].

1345. *Bilta (UK) Ltd [2015] 2 W.L.R. 1168* at [100].

1346. *[2015] UKSC 23* at [100].

1347. The rule applies to appellate courts as well as to courts of first instance: *Snell v Unity Finance Ltd [1964] 2 Q.B. 203*.

1348. *Edler v Auerbach [1950] 1 K.B. 359, 371*. See *Holman v Johnson (1775) 1 Cowp. 341*; *Evans v Richardson (1817) 3 Mer. 469*; *Scott v Brown, Doering, McNab & Co [1892] 2 Q.B. 724*; *Gedge v Royal Exchange Assurance Corp [1900] 2 Q.B. 214*; *North Western Salt Co v Electrolytic Alkali Co Ltd [1913] 3 K.B. 422, 424; [1914] A.C. 461, 476, 477*; *Montefiore v Menday Motor Components Co Ltd [1918] 2 K.B. 241*; *Alexander v Rayson [1936] 1 K.B. 169, 190*; *Commercial Air Hire Ltd v Wrightways Ltd [1938] 1 All E.R. 89*; *Palaniappa Chettiar v Arunasalam Chettiar [1962] A.C. 294*; *Snell v Unity Finance Co Ltd [1964] 2 Q.B. 203*; *Mercantile Credit Co Ltd v Hamblin [1965] 2 Q.B. 242, 261–262, 276*; *Crouch and Lees v Haridas [1972] 1 Q.B. 158*; *U.C.M. v Royal Bank of Canada [1983] 1 A.C. 168, 169*; the law is summarised in *Bank of India v Trans Continental Commodity Merchants Ltd [1982] 1 Lloyd's Rep. 427, 429*; *Birkett v Acorn Mechanics Ltd [1999] 2 All E.R. (Comm) 429*; *Pickering v JA McConville [2003] EWCA Civ 554*; *Bim Kemi AB v Blackburn Chemicals Ltd [2004] EWHC 166 (Comm), [2004] EWCA Civ 1490* (court could take notice that agreement was illegal under art.81 of the EC Treaty); *Western Power Investment Ltd v Teeside Power Ltd Unreported February 18, 2005*.

1349. *Mercantile Credit Co Ltd v Hamblin [1964] 1 W.L.R. 423; affirmed on other grounds [1965] 2 Q.B. 242*.

1350. *Sphinx Export Co v Specialist Shippers [1954] C.L.Y. 1440*.