

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 1 - Introduction
Chapter 1 - Introductory
Section 1. - Sources of English Contract Law

Contract law

1-001

❗ As Sir Joseph Chitty observed, the law affecting commerce can be seen both in “the law of nations [and] those municipal institutions of our own country, which are of a public and general nature, and which form the basis of that commercial intercourse which takes place between individuals” and in the law “which relates to commerce itself, strictly so called, as contradistinguished from those measures of state policy by which it is secured and protected”.¹ In the modern law, it remains useful to distinguish between laws which create the legal environment within which parties conclude their contract (which may broadly be termed market regulation) and laws which relate specifically to the conclusion of contracts, their terms, the relative rights and obligations which they create and the remedies which arise on breach (contract law in the narrow and usual sense). The present work is principally concerned with contract law in this usual sense, but on occasion the wider regulatory framework is considered, particularly where the two sets of regulation are closely related.² ❗

The different sources of contract law

1-002

English contract law in this usual sense possesses four legal sources: common law, statute, international convention and EU law.³

^{1.} Sir J. Chitty, *A Treatise on the Laws of Commerce and Manufactures and the Contracts relating thereto* Strahan, London, 1st edn (1824), Vol.III, p.5. This work preceded the first edition of the present work by Sir Joseph Chitty (the younger, died 1838) which was published in 1826.

^{2.} ❗ See especially as regards consumer contracts on which see Vol.II, Ch.38 and especially paras 38-127—38-129 (enforcement of consumer information requirements); 38-145—38-191 (unfair commercial practices and consumer rights to redress); 38-323—38-333 and 38-387—38-394 (enforcement of law on unfair contract terms) and see Whittaker (2017) 133 L.Q.R. 47 esp. at 66–72. See also Vol.II, paras 38-002 et seq. (consumer credit (para.39-005)) and paras 34-215 et seq. (banking).

^{3.} On the sources of English law more generally see J. Bell, “The Sources of Law” in A. Burrows (ed.) *English Private Law*, 2nd edn (2007) Ch.1.


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(a) - The Common Law of Contract

The common law's dominance of the general law

1-003

 Writing in 1879 Sir William Anson observed:

“The law of contract so far as its general principles are concerned has been happily free from legislative interference: it is the product of the vigorous common sense of English judges.” ⁴


The common law (including equity for this purpose) still provides the fundamental rules governing all aspects of the law applicable to contracts generally: English law has not adopted a contract law code nor a “Contract Act”. ⁵  As a result, the common law governs the nature and definition of a contract (including the requirement of consideration ⁶); the grounds of vitiation of contracts (mistake, misrepresentation, duress and undue influence ⁷); the contents of contracts (the incorporation and construction of express terms and the finding of implied terms) ⁸; the general framework treating illegal contracts and a good number of their examples ⁹; performance and the grounds of discharge of contractual obligations ¹⁰; the effects of contracts on third parties (privity of contract) ¹¹ and the remedies available for breach of contract. ¹² Within this wider common law picture, equity has had a fairly restrained impact, though it may be seen in the doctrine of undue influence ¹³ and in examples of wider relief on the ground of unconscionability, ¹⁴ has supplied the important (if fairly restricted) remedies of specific performance and injunction, ¹⁵ and has allowed promissory and proprietary estoppel to qualify the doctrine of consideration and (sometimes) legislative requirements of formality. ¹⁶

Rules governing specific contracts

1-004

There is a much greater diversity in relation to the modern significance of the common law as regards the rules governing specific contracts as contrasted with the law governing contracts in general. In some contexts, the common law (sometimes supported or corrected by equity) still dominates the law governing the relationships between the contracting parties ¹⁷: this is true, inter alia, of contracts of agency, ¹⁸ contracts of insurance ¹⁹ and contracts of suretyship, ²⁰ even though even in these examples the law is sometimes supplemented or corrected by legislation. As will be seen, in other types of contract, the role of the common law has become much diminished, with legislation (whether national or European in origin) becoming increasingly significant, especially as regards the regulation of the consequences of concluding a contract. Finally, in some types of contract, the regulation of the parties' relationship remains all but entirely in the hands of the parties themselves, who may for this

purpose use standard contract terms, whether their own or ones drawn from industry practice.²¹

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4. Principles of the English Law of Contract and of Agency in relation to Contract, 1st edn (1879), Preface.
 5.  Other common law systems have chosen different paths, e.g. the Indian Contract Act of 1873 whose first draft was written by Sir Frederick Pollock. In the 1960s and early 1970s work on drafting an English contract code was undertaken by the English and Scottish Law Commissions, but was later abandoned: see Law Com. No.1 (1965) 6; Law Com. No.4 (1966) 7; Law Com. No.50 (1972) 3. A draft was published by McGregor, *A Contract Code Drawn up on Behalf of the English Law Commission* (1993). See Cartwright (2009) 17 Eur. Rev. Private law 155, 168–169. The modern position of consumer contract law is more arguable as recent legislation has reframed a good deal of the law: see below, para.1-008 and Vol.II, Ch.38. See, however, Burrows, *A Restatement of the English Law of Contract* (2016), whose aim (p.x) is “to provide the best interpretation of the present English law of contract”.
 6. Below, para.1-014, and see Chs 2 and 4.
 7. Below, Chs 3, 6, 7 and 8 respectively.
 8. Below, Chs 13 and 14 respectively.
 9. Below, Ch.16.
 10. Below, Chs 21 (Performance); 22 (Discharge by agreement); 23 (Discharge by frustration); 24 (Discharge by breach) and 25 (Other modes of discharge).
 11. Below, Ch.18.
 12. Below, Chs 26 (Damages) and 27 (Specific performance and injunction).
 13. Below, para.8-057.
 14. Below, para.8-130.
 15. Below, Ch.27.
 16. Below, paras 4-086 et seq., 5-041 et seq.
 17. Here, there is an implicit distinction between the law governing the contract itself and the law governing the market context in which the contract is made: see above, para.1-001. For example, the *business* of insurance is highly regulated by legislation, even though the law governing the parties to contracts of insurance remains dominated by the common law.
 18. See Vol.II, Ch.31.
 19. See Vol.II, Ch.42. In the case of insurance, this position has been qualified by recent legislation: Consumer Insurance (Disclosure and Representations) Act 2012 and Insurance Act 2015, on which see Vol.II, paras 42-031—42-032, 42-046 et seq.
 20. See Vol.II, Ch.45.
 21. See, in particular, as regards construction contracts: Vol.II, paras 37-019—37-023.

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(b) - Statute

Increasing importance of statute

1-005

Statute has become increasingly important in setting the law governing contracts, both in its broad sense of the regulation of markets and in the narrower sense of the law governing the relative rights and obligations of the parties and of third parties. ²² This has manifested itself in two principal ways.

General law

1-006

Some important aspects of the general law of contract have been subject to change by statute, the legislation typically qualifying or supplementing the existing common law position rather than reforming or recasting a particular aspect of contract law systematically. This can be seen as regards the control of exemption clauses and certain related classes of unfair terms, ²³ the law of misrepresentation, ²⁴ the law governing the capacity of minors ²⁵ and persons lacking the mental capacity to contract ²⁶, and the consequences of frustration. ²⁷ Even the Contracts (Rights for Third Parties) Act 1999 merely creates a new (if broad and important) exception to the common law doctrine of privity of contract. ²⁸

Specific contracts

1-007

Statute has been much more important in the regulation of specific contracts. An old example may be found in the Statute of Frauds of 1677, which imposed various requirements of form on particular types of contract, and while the Statute itself survives only as regards contracts of guarantee, ²⁹ its provisions have had an important effect on the classification of contracts. There were various statutes governing aspects of insurance contracts ³⁰ and bills of sale ³¹ in the eighteenth and nineteenth centuries and, in the last quarter of the latter, a series of statutes which sought to "codify" the law governing particular types of contract, as in the case of bills of exchange, ³² contracts of partnership ³³ and contracts for the sale of goods. ³⁴ In the course of the twentieth century, important legislation was introduced governing, inter alia, contracts of tenancy, ³⁵ contracts of employment ³⁶ and contracts of consumer credit. ³⁷

Consumer contracts

1-008

❗ Consumer contracts have long been the object of legislative intervention, with special rules governing exemption clauses,³⁸ unfair contract terms more generally³⁹ and aspects of particular types of consumer contract (such as consumer credit,⁴⁰ sale of goods,⁴¹ package holiday contracts⁴² or timeshare contracts⁴³). There have also been information requirements for contracts concluded in certain circumstances (notably “doorstep selling”⁴⁴ and “distance contracts”⁴⁵), with accompanying short-lived rights of cancellation for the consumer. Earlier legislation was scattered across a series of legislative instruments (some primary legislation, some secondary) and formed part of and/or overlapped with protective rules which could apply other than for the benefit of consumers.⁴⁶ Moreover, the key definitions of the person protected (the consumer) and the other party to the contract (the party acting in the course of business) differed between the various legislative instruments.⁴⁷ However, recent legislation has sought to address the problems of inconsistency between consumer protection legislation and has also sought to mark a clear separation between legislation governing consumer contracts and legislation governing contracts more generally. The central pillar of this new legislative framework is the Consumer Rights Act 2015, whose most important provisions provide for a set of statutory terms governing consumer “goods contracts”, “digital content contracts” and “services contracts” (with sets of special remedies for their breach) and which also provide for the control of unfair terms.⁴⁸ At the same time, the 2015 Act amends earlier, more general, legislation (notably the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977 and the Sale of Goods Act 1979) so that its provisions do not apply where the provisions of the 2015 Act apply.⁴⁹ Moreover, other legislation has reshaped and extended earlier legislative controls so as to place *most* of the information duties on traders in a single set of statutory regulations⁵⁰ and to create new rights to redress for certain unfair commercial practices committed by a trader.⁵¹ The overall result is the creation of a distinct and distinctive body of statutory law governing “consumer contracts” paralleling (but separated from) the law applicable more generally, whether statutory or common law.⁵² ❗ Having said that, however, this body of consumer contract law by no means provides a complete legislative regime governing consumer contracts. First, a good deal of legislation specifically governing consumer contracts remains outside the four main relevant legislative instruments,⁵³ including the very important Consumer Credit Act 1974⁵⁴ and legislation governing consumer insurance contracts.⁵⁵ Secondly, even for those types of contract where the Consumer Rights Act 2015 provides new discrete rules (notably sale of goods), wider general legislation still applies to issues *not* regulated by those new rules.⁵⁶ And, thirdly, many issues arising between parties to a consumer contract (or a would-be consumer contract) are not governed by legislation at all and where this is the case the common law rules (whether applicable to contracts generally or to specific types of contract) apply. The new patterns of legislation governing consumer contracts are the subject of Ch.38 in Vol.II of the present work.⁵⁷

^{22.} Above, para.1-001 and see Burrows (2012) 128 L.Q.R. 232.

^{23.} Unfair Contract Terms Act 1977 and see below, paras 15-066 et seq.

^{24.} Misrepresentation Act 1967 and see below, paras 7-074—7-085; 7-104—7-110; 7-111—7-113; 7-146—7-150.

^{25.} Minors’ Contracts Act 1987 and see below, paras 9-061—9-064.


^{26.} Mental Capacity Act 2005 s.7 and see para.9-096.

^{27.} Law Reform (Frustrated Contracts) Act 1943 and see below, paras 23-074—23-077.

^{28.} Contracts (Rights for Third Parties) Act 1999 and see below, paras 18-090—18-125.

^{29.} See Vol.II, paras 45-042—45-061. Its provisions governing contracts for the sale or other disposition of an interest in land were replaced by s.40 of the Law of Property Act 1925, itself replaced by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, on which see below, paras 5-010 et seq. The 1677 Act’s provision governing contracts for the sale of goods (s.17) were finally abolished by the Law Reform (Enforcement of Contracts) Act 1954 s.4 (repealing Sale of Goods Act 1893 s.4).

- [30.](#) Life Assurance Act 1774, on which see Vol.II, paras 42-010, 42-014.
- [31.](#) Bills of Sale Act 1878 (later amended).
- [32.](#) Bills of Exchange Act 1882, see Vol.II, para.34-006.
- [33.](#) Partnership Act 1890.
- [34.](#) Sale of Goods Act 1893 replaced by the Sale of Goods Act 1979 on which see Vol.II, paras 44-001 et seq.
- [35.](#) e.g. Landlord and Tenant Act 1954.
- [36.](#) Notably, Employment of Children Act; Sex Discrimination Act 1975; Employment Protection Act 1975; Equal Pay Act 1970; Race Relations Act 1976. The law of discrimination was brought together in the Equality Act 2010. See Vol.II, Ch.40.
- [37.](#) Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006): see Vol.II, paras 39-007 et seq.
- [38.](#) Unfair Contract Terms Act 1977 s.3–5, 6(2) and 7(2), 12 (as enacted) on which see below, paras 15-066 et seq.
- [39.](#) Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) on which see Vol.II, paras 38-201 et seq.
- [40.](#) See Consumer Credit Act 1974 and Vol.II, Ch.39.
- [41.](#) See notably, Sale of Goods Act 1979 Pt 5A as inserted by Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) on which see Vol.II, paras 38-405 et seq.
- [42.](#) The Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) on which see Vol.II, paras 38-132—38-135.
- [43.](#) Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) (replacing earlier provisions) on which see Vol.II, paras 38-136—38-142.
- [44.](#) Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117).
- [45.](#) Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334); Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) (on which see Vol.II, para.38-131).
- [46.](#) This was notably the case as regards the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977.
- [47.](#) A key example was the definition of a person “dealing as consumer” within the meaning of the Unfair Contract Terms Act 1977 and “consumer” within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999: see below, paras 15-073—15-078 and Vol.II, paras 38-028 et seq.
- [48.](#) See Vol.II, paras 38-334—38-394, 38-399—38-547. The Consumer Rights Act 2015 Pts 1 and 2 were brought into force on October 1, 2015: see Vol.II, paras 38-197 and 38-335.
- [49.](#) For the details see below, paras 15-064 et seq. and Vol.II, paras 38-336—38-344 and 38-436—38-442.
- [50.](#) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) on which see Vol.II, paras 38-055 et seq.

- [51.](#) Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) inserting, notably, new Pt 4A Consumers' Rights to Redress in Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), on which see Vol.II, paras 38-145 et seq.
- [52.](#)  On the distinctive features of modern consumer contract law see Whittaker (2017) 133 L.Q.R. 47.
- [53.](#) Consumer Protection from Unfair Trading Regulations 2008; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; Consumer Rights Act 2015.
- [54.](#) See Vol.II, Ch.39.
- [55.](#) Consumer Insurance (Disclosure and Representations) Act 2012; Insurance Act 2015 and see Vol.II, paras 42-033 et seq.
- [56.](#) See Vol. II, paras 38-437—38-442.
- [57.](#) Vol.II, Ch.38.

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(c) - International Convention

Generally

1-009

The UK has signed and ratified a number of international conventions which have required it to introduce into English law by statute sets of uniform rules governing aspects of certain types of contract. This can be seen in the case of international carriage of goods and passengers by sea, ⁵⁸ international carriage by air ⁵⁹ and international carriage by land. ⁶⁰ While there is an United Nations Convention on Contracts for the international sale of goods, the UK has yet to ratify it. ⁶¹

European Convention on Human Rights

1-010

The “bringing home” of the majority of rights protected by the European Convention on Human Rights and its protocols by the Human Rights Act 1998 possesses implications for contract law, which will be discussed later in the present chapter. ⁶²

^{58.} See notably Hague Rules and Hague-Visby Rules (goods) introduced into English law by the Carriage of Goods by Sea Act 1971 (on which see below, para.15-134); Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (on which see Vol.II, para.36-064).

^{59.} Vol.II, Ch.35 commencing with the Warsaw Convention on International Carriage by Air of 1929.

^{60.} Vol.II, para.36-003, paras 36-079 et seq.

^{61.} See Vol.II, para.44-014.

^{62.} Below, paras 1-057—1-094.

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(d) - EU Law
(i) - The Current Position

EU law governing contracts: the Union acquis

1-011

⚠ Various elements of EU law have affected the conclusion and the regulation of contracts by English law. As regards the Treaties themselves, one prominent area is the law of competition, which has both a general impact on the environment within which contracts are made and which holds certain categories of contract or contract term unlawful.⁶³ ⚠ EU legislation (principally in the form of directives) has also regulated aspects of a number of types of contract. Consumer contracts have been an important object of attention, with directives requiring rules controlling the fairness of most of their standard terms, rules governing aspects of contracts made in certain circumstances (as with “distance contracts” or “off-premises contracts”) and of certain types (sale of goods, consumer credit, time-share, and package holidays).⁶⁴ ⚠ Outside the consumer context, directives have required rules governing commercial agency contracts⁶⁵ ⚠ and particular aspects of commercial contracts in general (notably, as regards late payment of commercial debts).⁶⁶ ⚠ The public procurement directives have had a major impact on the process of public contracting⁶⁷ ⚠; and a series of employment directives have created or reshaped rights of employees in a number of ways.⁶⁸ ⚠ EU law instruments have also an important impact on international jurisdiction and applicable law in the area of contract law.⁶⁹ ⚠ This catalogue illustrates, however, that EU legislation harmonising contract law has hitherto remained piecemeal, targeting particular situations or particular aspects of the rules governing contracts.

Towards a “European Contract Law”?

1-012

⚠ By the late 1990s, there was growing academic interest in the development of a more general “European contract law” kindled in part by the Lando Commission’s Principles of European Contract Law (a set of legal propositions relating to the conclusion, content, performance and non-performance of contracts agreed by a group of European legal scholars⁷⁰ ⚠) and in part by growing criticism of the “incoherence” of the EC contract law acquis which for continental civil lawyers in particular contrasts sharply with the formal completeness of their national private law codifications.⁷¹ ⚠ Encouraged by the conclusions of the meeting of the European Council at Tampere in 1999⁷² ⚠ and

! in 2001 the European Commission issued the first of a series of communications which called for a debate as to the proper way of addressing these criticisms of European contract law and which sought to encourage means of developing its usefulness for the internal market. ⁷⁴ ! In 2008, further academic work was published which proposed, inter alia, a draft “Common Frame of Reference” for

European contract law. ⁷⁵ ! There have been two expressions of these discussions. ⁷⁶ ! First, some directives of the consumer acquis have been revised and, of these, some made the subject of “full harmonisation” (meaning that Member States are not permitted to maintain or enact legislation which is *more* protective of consumers). ⁷⁷ ! Secondly, the European Commission proposed a more general *optional* “Common European Sales Law”. ⁷⁸ !

The Proposed Common European Sales Law (CESL) ⁷⁹ !

1-013

! In 2011 the Commission proposed the enactment of an EU regulation which would have established the availability of a Common European Sales Law for parties to choose to govern cross-border contracts for the sale of goods, supply of “digital content” and related services. ⁸⁰ ! The Proposal defined “cross-border contracts” distinctly for contracts between traders (“if the parties have their habitual residence in different countries of which at least one is a Member State” ⁸¹ !) and contracts between a trader and a consumer (which for consumers replaces habitual residence with “the address indicated by the consumer, the delivery address for goods or the billing address”). ⁸²




! The Proposal restricted the availability of the CESL to the case where one of the parties is a trader and the other a consumer and to the case where both parties are traders, but at least one is a small or medium-sized enterprise (SME), a category which the Proposal defines. ⁸³ ! The CESL set out two broad categories of rules: rules of general contract law governing the conclusion, validity, contents and interpretation of contracts, damages for breach and interest, restitution on invalidity of contract, and prescription of rights (Pts I to III, VI to VIII CESL respectively) and rules governing the obligations and remedies pertaining to the particular types of contracts to which CESL may apply (Pts IV and Pt V CESL). These rules were prefaced by the setting of three “general principles”: freedom of contract; “good faith and fair dealing”; and co-operation in the performance of obligations. ⁸⁴ ! Within its scope, the CESL was intended to create a uniform law, distinct from national laws, as it provided that:


“[w]here the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules.” ⁸⁵ !

! The definition of the scope (and therefore the exclusive regulation reserved for the CESL) was furthered in two ways. First, the recitals to the Proposal explained that certain issues are outside its scope. ⁸⁶ ! Secondly, the CESL provided that it was “to be interpreted autonomously and in accordance with its objectives and the principles underlying it” ⁸⁷ ! and that

“[i]ssues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.”


⁸⁸ 

However, the proposal met with considerable criticism and opposition, including challenges to its competence under the Treaty, and in December 2014 it was withdrawn, though the Commission announced its intention of bringing forward a modified proposal “to unleash the potential of e-commerce in the digital Single Market”. ⁸⁹  Moreover, despite the withdrawal of the earlier proposal, the substantive provisions of the draft Common European Sales law itself (particularly those intended to govern contracts generally) remain of interest as they may be seen as reflecting an emerging “common European law of contract”. This may be significant for the drafting of future more particular EU legislation, ⁹⁰  and may also be used for the development of autonomous interpretations of undefined concepts in present or future EU legislation in the area of contracts. ⁹¹ 


Its provisions—and especially its three general principles ⁹² —are also likely to be seen as a basis for the European Court of Justice’s identification and development of “general principles of civil law”.

⁹³ 


^{63.}

 Notably, as being an “agreement between undertakings ... which may affect trade between Member States and which [has] as [its] object or effect the prevention, restriction or distortion of competition within the internal market”: art.101 TFEU (ex art.81 EC). On this law, see generally Vol.II, Ch.43, especially paras 43-004 et seq.


^{64.}

 Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts [1993] O.J. L95/29 (see Vol.II, paras 38-199—38-200); Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19; Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31 (the latter two of which were revoked and replaced by Directive 2011/83/EU on consumer rights [2011] O.J. L304/64) (see Vol.II, paras 38-056—38-061); Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/7 (see Vol.II, paras 38-400—38-402); Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 (see Vol.II, para.38-131); Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] O.J. L149/22 (see Vol.II, paras 38-147—38-152); Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] O.J. L133/66 below, Vol.II, para.39-011; Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30 (see Vol.II, para.38-136); Directive 90/314/EEC of June 13, 1990 on package travel, package holidays and package tours [1990] O.J. L158/59 (itself repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 as from July 1, 2018 (arts 28 and 29)) (see Vol.II, para.38-136); Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] O.J. L46/1 (see Vol.II, paras 35-071—35-073); Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] O.J. L2014/34 on which see Vol.II, paras 39-003 and 39-531.

^{65.}

 Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17: see Vol.II, paras 31-017—31-020.

^{66.}

 Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. L48/1 (replacing Directive 2000/35/EC on combating late payment in commercial transactions). The 2011 Directive is implemented in UK law by the Late Payment of Commercial Debts (Interest) Act 1998 as amended by the Late Payment of Commercial Debts Regulations 2013 (SI 2013/395) on which see below, paras 26-232—26-235.

67. **!**In 2004 these were placed into the “Legislative package”: Directive 2004/18/EC of the European Parliament and of the Council of March 31, 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J. L134/114; Directive 2004/17/EC of the European Parliament and of the Council of March 31, 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] O.J. L134/1. The two 2004 directives were repealed and replaced as from April 18, 2016 by Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] O.J. L94/65 (see esp. art.91) and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] O.J. L94/243 (see esp. art.107), which were supplemented by Directive 2014/23/EU on the award of concession contracts [2014] O.J. L94/1. On these see below, paras 11-051—11-052.
68. **!**See Vol.II, Ch.40 especially paras 40-039, 40-112, 40-136, 40-155, 40-156, 40-172, 40-179 and 40-245.
69. **!**Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1 (the “Brussels I Regulation”), especially arts 5(1) (special jurisdiction in “matters relating to a contract”), 8–14 (matters relating to insurance), 15–17 (jurisdiction over consumer contracts), 18–21 (jurisdiction over individual contracts of employment), 23 (jurisdiction agreements). The Brussels I Regulation is itself replaced as from January 10, 2015 by Regulation (EU) 1215/2012 of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”); Regulation 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6, on which see below, paras 30-129 et seq.
70. **!**Formally, the “Commission on European Contract Law”, but often named after Professor O. Lando who chaired it. They are published as Lando and Beale, *Principles of European Contract Law* Parts I and II (1999); Lando, Clive, Prüm and Zimmermann, *Principles of European Contract Law* Part III (2003).
71. **!**e.g. Roth (2002) 10 ERPL 761.
72. **!**Presidency Conclusions, Tampere European Council October 15 and 16, 1999, SI 1999/800.
73. **!**EP Resolution B5–0228, 0229–0230/2000, p.326 at point 28 (March 16, 2000), [2000] O.J. C377/323 (following earlier resolutions in 1989 and 1994 which explicitly concerned the possibility of a codification of substantive private law).
74. **!**Communication from the Commission to the Council and the European Parliament on European Contract Law Com(2001) 398 final; Communication from the Commission to the European Parliament and the Council, “A more coherent European Contract Law, An Action Plan” Com(2003) 68 final; European Contract Law and the revision of the acquis: the way forward Com(2004) 651 final; EU Commission, Green Paper from the Commission on policy option for progress towards a European Contract Law for consumers and businesses COM(2010) 348 final.
75. **!**Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) prepared by the Study Group for a European Civil Code and the Research Group on EC Private Law (Acquis Group) (2010), six volumes.
76. **!**See further Whittaker (2007) *European Review of Contract Law* 381; Whittaker (2009) 125 L.Q.R. 616.
77. **!**Notably, Directive 2011/83/EU on consumer rights (above, n.63).

- [78.](#) **!** Proposal for a Regulation on a Common European Sales Law, Com(2011) 635 final. ("CESL Proposal").
- [79.](#) **!** On the idea of an "optional instrument" for European contract law before the CESL Proposal, see H. Schulte-Nölke (2007) ERCL 332 especially at 348–349; Cartwright (2011) 7 ERCL 335. On the proposal itself see The Law Commission and Scottish Law Commission, Advice to the UK Government, An Optional Common European Sales Law: Advantages and Problems (November 2011) available at <http://lawcommission.justice.gov.uk>. Whittaker (2012) 75 M.L.R. 578; Dannemann and Vogenauer, *The Common European Sales Law in Context, Interactions with English and German law* (2013).
- [80.](#) **!** CESL Proposal art.1. The first part of the proposed regulation sets out the framework of the new scheme (here referred to as "CESL Proposal"); the CESL itself is contained in Annex I and is separately numbered ("CESL Proposal, Annex I").
- [81.](#) **!** CESL Proposal art.4(2).
- [82.](#) **!** CESL Proposal art.4(3).
- [83.](#) **!** CESL Proposal art.7.
- [84.](#) **!** CESL Proposal Annex I arts 1–3 respectively.
- [85.](#) **!** CESL Proposal art.11.
- [86.](#) **!** Notably, CESL Proposal, recitals 27–28. Issues outside the scope of the CESL would be governed by the law applicable as identified by the private international law rules of the forum.
- [87.](#) **!** CESL Proposal Annex I art.4(1).
- [88.](#) **!** CESL Proposal Annex I art.4(2).
- [89.](#) **!** European Commission, Annex 2 to the Commission Work Programme 2015 Com(2014) 910 final, p.12. See also the Communication from the Commission, A Digital Single Market Strategy for Europe, 2015 COM(2015) 192 final, pp.4-5. This strategy has led, inter alia, to a Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2015) 635 final and a Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634.
- [90.](#) **!** cf. the explicit borrowing by Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. L48/1, art.7(1)(a) (as explained by recital 28) of "good faith and fair dealing" from the DCFR (which was an important precursor to the CESL, above, n.74).
- [91.](#) **!** See e.g. (before issuing the Proposal) A.G. Trstenjak's reference to art.167(3) CESL in the context of the 1993 Directive in *Banco Español de Crédito, SA v Calderón Camino* (C-618/10) para.42. cf. *Masdar (UK) Ltd v EC Commission* (T-333/03) [2007] 2 All E.R. 261 where the Court of First Instance accepted reference to the work of the *Study Group on a European Civil Code* in order to develop a EU law of restitution for unjustified enrichment under art.288 (formerly 215) EC; *Hamilton v Volksbank Filder eG* (412/06) A.G. Poires Maturo at [24] (referring to time limits for the exercise of a right as being a "principle common to the laws of the Member States" and citing the possible future DCFR). On these predecessors of the CESL, see above, n.74.

92.

! CESL Proposal Annex arts 1–3.

93.

! Whittaker, *The Future of European Contract Law, Essays in Honour of Ewoud Hondius* (2007), 333; Weatherill (2010) 6 *European Review of Contract Law* 74; Hesselink, *The Involvement of EU Law in Private Law Relationships* (2012). e.g. *Hamilton v Volksbank Filder eG* (C-412/06) [2008] E.C.R. I-2383 at para.42; *Messner v Krüger* (C-489/07) [2009] I-07315 para.26; *E. Friz GmbH v Carsten von der Heyden* (C-215/08) [2010] E.C.R. I-2947, paras 48, 49.

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A note on "Brexit"

1-013A

⚠ After a national referendum held on June 23, 2016 at which a majority voted in favour of the UK leaving the EU, the UK Conservative Government formed on July 16, 2016 declared its intention to end the UK's membership of the EU ("Brexit") and on March 29, 2017 the Prime Minister, the Right Hon. Mrs Theresa May MP, set in motion the process of doing so under art.50 of the Treaty of the European Union (TEU). ⁹⁴ ⚠ The Conservative Government set out its intentions as to the position of existing EU law in the UK in two white papers, *The United Kingdom's exit from and new partnership with the European Union* ⁹⁵ ⚠ and *Legislating for the United Kingdom's withdrawal from the European Union*. ⁹⁶ ⚠

European Union (Withdrawal) Bill 2017

1-013B


⚠ After a general election held on June 8, 2017, the Conservative Government earlier formed by Mrs May remained in government. On July 13, 2017 the European Union (Withdrawal) Bill ("the 2017 Bill" or "the Bill") received its first reading in the House of Commons, its second reading being held on September 7 and 11, 2017 ⁹⁷ ⚠; the 2017 Bill is accompanied by Explanatory Notes ("Explanatory Notes to 2017 Bill"). For the purposes of the likely impact of Brexit on English contract law, the following points arise from the terms of the Bill as presently drafted.

The general preservation of the UK's EU legislative acquis



1-013C



⚠ The Bill would repeal the European Communities Act 1972 on "exit day", ⁹⁸ ⚠ defined as "such day as a Minister of the Crown may be regulations appoint", ⁹⁹ ⚠ but clearly intended to be the day on which the UK leaves the EU. Despite this repeal, the Bill would in principle retain the EU *legislative acquis* as part of UK law. First, in principle "EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day". ¹⁰⁰ ⚠ This provision would preserve much of the UK legislation governing contract law, which


has been enacted as secondary legislation under the European Communities Act 1972, as in the case of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations



2013 ¹⁰¹  and the Timeshare Regulations 2010 ¹⁰²  in the field of consumer contracts or the Commercial Agents (Council Directive) Regulations 1993 in the field of commercial agency. ¹⁰³ 



Secondly, “[d]irect EU legislation, so far as operative immediately before exit day, forms part of

domestic law on or after exit day”. ¹⁰⁴  Such direct EU legislation includes EU regulations ¹⁰⁵  and would therefore concern such instruments affecting contract law as the Brussels Ibis Regulation

¹⁰⁶  or the Rome I Regulation ¹⁰⁷  in the area of private international law, and the Denied



Boarding Regulation in the area of consumer protection ¹⁰⁸  Thirdly, the 2017 Bill contains provision for the preservation of UK primary legislation enacted for the purpose of implementing EU


obligations (such as the Consumer Rights Act 2015 ¹⁰⁹ ) or secondary legislation with the same purpose but made under statutory powers other than those contained in s.2(2) of the 1972 Act. ¹¹⁰ 


Taken together, these laws are referred to as “retained EU law” by the Bill. ¹¹¹  There are, however, two types of qualifications on the resulting preservation in UK law of the EU legislative acquis as the Bill itself sets out certain exceptions for this purpose, and also provides for the later amendment or repeal of legislation (primary or secondary) whose source is in EU legislation either by secondary legislation made by a Minister of the Crown or by a devolved authority (such as the Scottish Ministers), this being referred to as “dealing with deficiencies arising from withdrawal”. ¹¹² 




Further issues arising from Brexit


1-013D

 Three further issues in particular should be noted. First, the 2017 Bill makes provision to ensure that any remaining EU rights and obligations which are not preserved in the way just explained ¹¹³  continue to be recognised and available in domestic law after the UK leaves the EU and these include



directly effective rights contained in the European Treaties themselves. ¹¹⁴  Secondly, on leaving the EU, the 2017 Bill would end the general supremacy of EU law, but this would take effect only prospectively in the sense that any conflict between two pre-exit laws (one EU-derived, one not)

would be resolved in favour of the EU-derived law. ¹¹⁵  Thirdly, provision is made for the future authoritative interpretation of the UK legislation whose source is EU legislation before and after the UK has left the EU (“exit day”). For this purpose a distinction is drawn between the case-law of, or principles laid down by, the Court of Justice of the EU *before* and *after* the UK’s leaving the EU. As


regards the former, “retained EU law” ¹¹⁶  is in principle to be interpreted “in accordance with any retained case law and any retained general principles of EU law, ¹¹⁷  and, having regard (among other things) to the limits, immediately before exit day, of EU competences”. ¹¹⁸ 


However, the Bill then provides that “the Supreme Court is not bound by any retained EU case law” ¹¹⁹  and then explains that “[i]n deciding whether to depart from any retained EU case law, the Supreme Court ...


must apply the same test as it would apply in deciding whether to depart from its own case law”. ¹²⁰

 As the Government’s second white paper earlier foresaw, this would therefore treat “retained EU case law” as “normally binding” but it would allow the Supreme Court to depart from it “when it appears right to do so”. ¹²¹ 

As regards the position of EU case law and principles *after* the UK has left the EU, the Bill provides that “[a] court or tribunal ... is not bound by any principles laid down, or



any decisions made, on or after exit day by the European Court” ¹²²  and adds that “[a] court or tribunal need not have regard to anything done on or after exit day by the European Court, another


EU entity or the EU but may do so if it considers it appropriate to do so”. ¹²³  This position would therefore mean that UK courts would not be required even to *consider* case law of the Court of

Justice made after exit day, though they may do so if they consider it appropriate.¹²⁴  In this respect, the position would differ from the duty of UK courts under the Human Rights Act 1998 s.2(1) of which provides that in determining a question which has arisen in connection with a right under the European Convention on Human Rights a court “must take into account any ... judgment, decision, declaration or advisory opinion of the European Court of Human Rights”.

Present position

1-013E

 However, until the UK leaves the EU (whether two years after March 29, 2017 when the Prime Minister gave the EU notice under art.50 TEU or at some later date with the agreement of the European Council), the UK remains a full member of the EU and the status of EU law remains the same as it has been since the UK's becoming a Member State in 1972 and the enactment of the European Communities Act.¹²⁵  The text of this Supplement continues, therefore, to be written on the premise that the UK is a Member of the EU and that the status of EU law in the UK remains the same until such time as the European Union (Withdrawal) Bill is enacted, the UK leaves the EU and a Minister of the Crown therefore designates “exit day” as presently foreseen by the Bill.


^{94.}  The Prime Minister's authority to do so was given by the European Union (Notification of Withdrawal) Act 2017 s.1.


^{95.}  Department for Exiting the European Union, Cm.9417 (February 2017).


^{96.}  Department for Exiting the European Union, Cm.9446 (March 2017).


^{97.}  See <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>.


^{98.}  European Union (Withdrawal) Bill 2017 (“2017 Bill”) cl.1.

^{99.}  2017 Bill cl.14(1) “exit day”, itself referring to cl.14(2) as regards the time of day.

^{100.}  2017 Bill cl.2(1). Clause 2(2) defines “EU-derived domestic legislation” to include, in particular, any enactment made under s.2(2) of the European Communities Act 1972. The exceptions to this general position are set out by cl.5 and Sch.1.

^{101.}  SI 2013/3134 implementing Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 on which see Main Work, Vol.I, paras 38-057 et seq.

^{102.}  Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) implementing Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30, on which see Vol.II, paras 38-136—38-142.

^{103.}  SI 1993/3053 implementing Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17, on which see Main Work, Vol.II, paras 31-017—31-020.

^{104.}  2017 Bill cl.3(1).

- [105.](#) **!**2017 Bill cl.3(2).
- [106.](#) **!**Regulation (EU) 1215/2012 of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L351/1.
- [107.](#) **!**Regulation 593/2008 on the law applicable to contractual obligations ("Rome I") [2008] O.J. L177/6, on which see Main Work, Vol.I, paras 30-129 et seq.
- [108.](#) **!**Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] O.J. L46/1 on which see Main Work, Vol.II, paras 35-071—35-073.
- [109.](#) **!**The 2015 Act implements Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 (principally in Pt 1, Ch.2 of the Act); the Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts [1993] O.J. L95/29 (principally in Pt 2 of the Act) and certain aspects of Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 (ss.11(4)–(6), 12; ss.36(3)–(4) and 37; and s.50(3)–(4) of the Act). On this see Main Work, Vol.II, paras 38-345 et seq. and 38-402, 38-431 et seq.
- [110.](#) **!**2017 Bill cl.2(2) and see Explanatory Memorandum para.74, which gives as an example domestic health and safety law implementing EU obligations made under powers in the Health and Safety at Work etc. Act 1974 rather than the European Communities Act 1972.
- [111.](#) **!**2017 Bill cl.6(7) defining "retained EU law" by reference to "anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of" cls 2, 3, 4 or 6(3) or (6) of the Bill, "as that body of law is added to or otherwise modified by or under [the Bill] or by other domestic law from time to time".
- [112.](#) **!**2017 Bill heading of cl.7 and Sch.2 Pt 1; Cm.9446 (March 2017) paras 1.14–1.16. and Ch.3. The definition of "devolved authority" is contained in cl.14(1) of the 2017 Bill.
- [113.](#) **!**Above, para.1-013C.
- [114.](#) **!**2017 Bill cl.4 and Explanatory Notes to 2017 Bill, paras 87 et seq.
- [115.](#) **!**2017 Bill cl.5; Cm 9446 (March 2017) paras 2.19–2.20.
- [116.](#) **!**See above, n.92.
- [117.](#) **!**Defined in terms of temporal origin by cl.6(7) of the 2017 Bill as those which are made or laid down immediately before exit day: cl.6(7) "retained EU case law" and "retained general principles of EU law".
- [118.](#) **!**2017 Bill cl.6(3).
- [119.](#) **!**2017 Bill cl.6(4)(a). Further provision is made as regards the (Scottish) High Court of Justiciary.
- [120.](#) **!**2017 Bill cl.6(5).
- [121.](#) **!**Cm 9446 (March 2017) para.2.16 quoting the House of Lords Practice Statement (Judicial

Precedent) of 1966, [1966] 1 W.L.R. 1234; and see also Explanatory Notes to 2017 Bill, para.107.

[122.](#)

!2017 Bill cl.6(1)(a).

[123.](#)

!2017 Bill cl.6(2).

[124.](#)

!Explanatory Notes to 2017 Bill, paras 103-104.

[125.](#)

!This follows from the remaining in force of the European Communities Act 1972 and is acknowledged by Cm.9446 (March 2017) para.1.10.

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Chapter 1 - Introductory

Section 2. - Definitions of Contract

Competing definitions of contract

1-014

⚠ There are two main competing definitions of a contract in the common law. ¹²⁶ The first, which was adopted by the 26th edition of this work, defines a contract as a promise or set of promises which the law will enforce. ¹²⁷ The competing view, which was taken by the 2nd edition of this work, ¹²⁸ is that a “contract is an agreement giving rise to obligations which are enforced or recognised by law”. ¹²⁹ ⚠

There are two main arguments in favour of the definition of contract in terms of promise. First, the idea of contracts as being based on agreement was introduced into English legal discussions only in the nineteenth century, in particular under the influence of Pothier, *Treatise on Obligations* ¹³⁰ and does not accord with the raw material of the common law, in particular in relation to the requirement of consideration. ¹³¹ For English law does not in general enforce gratuitous promises, the element of non-gratuity being expressed technically by the requirement that some consideration must move from the promisee and in lay terms that it enforces bargains rather than agreements. ¹³² Moreover, it is in relation to the requirement of consideration that modern usage most readily relies on the language of promise: what is required is consideration for a party's *promise*, not consideration for the parties' *agreement*. ¹³³ Finally, one of the justifications for the enforcement of contracts is said to lie in the moral obligation of a party to perform his promise. ¹³⁴

Difficulties with “contract as promise”

1-015

⚠ However, analysis of contracts in terms of an enforceable promise or sets of enforceable promises is not entirely satisfactory. First, outside the context of consideration, in general neither courts nor parties to contracts describe the relationships which they create in terms of promises, but rather in terms of agreements, and for the courts this is clearest in the context of the rules as to offer and acceptance which when satisfied form that agreement. ¹³⁵ Moreover, as will be described later, the doctrine of consideration to which the “promise theory” is so closely related, is somewhat under siege: from the legislature, since the enactment of the Contracts (Rights of Third Parties) Act 1999 has limited its traditional domain, ¹³⁶ and from the courts, notably in the decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd.* ¹³⁷ ⚠ Secondly, definition of contracts in terms of sets of promises does not give full force to the interrelationship of the obligations of the parties which exists in many contracts, ¹³⁸ an interrelationship which can be seen particularly in the availability of the remedy of termination for substantial failure in performance, by which an injured party may terminate his own obligations by reason of the failure of the other party to perform his side of the bargain. ¹³⁹

Difficulties with “contract as agreement”

1-016

❗ However, an understanding of modern contracts as agreements does not fit easily with two recognised types of contract. First, in the case of a unilateral contract ¹⁴⁰ where A promises to do something if B does something else, the performance by B of the condition is enough for A to be bound. Here, analysis in terms of doing something of value in return for a promise fits more naturally than does the construction of an acceptance by B's performance of the condition of A's promise. ¹⁴¹ Secondly, promises contained in deeds ¹⁴² are enforceable by the person in whose favour they are made, whether or not that person is aware of them ¹⁴³ and so while a deed may give contractual force to an agreement, agreement is unnecessary for the enforcement of the promises which it contains. And, for Pollock, writing in 1885, the position of contracts under seal made it difficult for him to accept that "proposal and acceptance [form] part of the general conception of contract". ¹⁴⁴ For other writers, however, it has led instead to a denial that the binding force of a promise in a deed depends on contract at all. ¹⁴⁵ ❗ Certainly, although it is true that the action to enforce promises made under seal, the action of covenant, was traditionally classified as arising ex contractu, ¹⁴⁶ this classification cannot be treated as conclusive as to whether promises in deeds should be considered contractual, given that at the time other actions which are clearly not so considered were also included within this category (notably, actions for money had and received, which would now be understood as restitutionary ¹⁴⁷ and actions for detinue whose function before their abolition was clearly proprietary). ¹⁴⁸

Actual agreement not required

1-017

Moreover, even though it is true that the existence of an agreement is in the vast majority of cases a condition for the existence of a contract not contained in a deed, this statement ought to be treated with some caution. First, the existence of an agreement is not an issue merely of fact, to be found by a psychological investigation of the parties at the time of its alleged origin: English law takes an "objective" rather than a "subjective" view of the existence of agreement ¹⁴⁹ and so its starting point is the manifestation of mutual assent by two or more persons to one another ¹⁵⁰.

"Agreement is not a mental state but an act, and, as an act, is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done." ¹⁵¹

Furthermore, for reasons of commercial convenience, the common law regulates what is to be treated as a manifestation of assent capable of giving rise to a contract in its rules relating to offer and acceptance. ¹⁵² For example, a posted acceptance of an offer is said to conclude a contract on posting, rather than on communication to the offeror, and so an acceptance lost in the post will bind the offeror. ¹⁵³ Similarly, if A sends an offer to B by post, and then changes his mind and sends a letter revoking his offer, but B posts an acceptance of the offer after A posted his letter of revocation, but before B received it, there may be a contract, though the parties were never ad idem. ¹⁵⁴ Another example of common law regulation of what constitutes an agreement may be found in the general rule that silence in an offeree cannot be treated as acceptance. ¹⁵⁵ And it has been held that the traditional analysis in battle of forms cases will not be displaced unless it is shown that it was the parties' common intention (as objectively construed from their words or conduct) that some other terms were intended to prevail. ¹⁵⁶

Agreement and consideration not sufficient

1-018

Secondly, the presence of an agreement supported by consideration is not always sufficient to establish the existence of a contract. This is notably the case where the parties agree in

circumstances in which it is considered inappropriate for the law to impose legal obligations, for example, in a social or domestic context, and is justified on the basis that the parties cannot be considered to have intended to create a legal relationship.¹⁵⁷ However, the courts have used the requirement that the parties must possess an intention to create legal relations to exclude other types of nongratuitous agreement from the domain of contract.¹⁵⁸ Furthermore, even if a transaction fulfils these three conditions of agreement, consideration and an intention to create legal relations, it may be defeated by the presence of other factors such as the absence of a particular form,¹⁵⁹ mistake,¹⁶⁰ misrepresentation,¹⁶¹ duress,¹⁶² undue influence,¹⁶³ incapacity¹⁶⁴ or illegality.¹⁶⁵ Some of these factors will render the contract void,¹⁶⁶ others voidable,¹⁶⁷ and others still will render it unenforceable against one or both contracting parties.¹⁶⁸

Enforcement of agreements under other rules

1-019

Thirdly, even though contracts are in general to be defined as agreements, this does not mean that all enforceable agreements (or enforceable promises) are contracts. This is particularly noticeable in relation to promissory and proprietary estoppel and constructive trust. In the case of promissory estoppel, A may be prevented from going back on a promise not to rely on his legal rights against B, subject to the condition that B has relied on A's promise (possibly, to B's detriment).¹⁶⁹ B does not need to furnish consideration for A's promise for it to be enforceable under this doctrine and although the requirement of reliance by B suggests some element of acceptance on the latter's part of the benefit of the promise, there is no need for this to be communicated to or known by A.¹⁷⁰ The doctrines of proprietary estoppel and constructive trust may also enforce promises or agreements, even though these elements form merely part of the factual circumstances which attract their application. For example, in *Crabb v Arun DC*,¹⁷¹ A made an assurance to B that it would grant a right of way to B over its land to and from B's land and B acted in reliance on this assurance. B's claim for a declaration that he was entitled to the right of access succeeded by way of estoppel, even though apparently B could not have established the existence of a contract on the ground of its uncertainty.¹⁷² So too, as will be seen, constructive trust, and possibly also proprietary estoppel, can be used by the courts to give some legal effect to agreements for the sale or other disposition of an interest in land which do not constitute contracts for lack of the proper form.¹⁷³ On the other hand, sometimes constructive trust is used not so as to allow an agreement not counting as a contract to be enforced between its parties but rather so as to allow it to affect the position of third parties. For example, in *Binions v Evans*,¹⁷⁴ A had been given permission by B to occupy a cottage on B's land for the rest of her life. B sold the land to C expressly subject to A's tenancy of the cottage, but a few months later C gave A notice to quit. It was accepted by the majority of the Court of Appeal¹⁷⁵ that the agreement between A and B had contractual force, but for Lord Denning, M.R. in the circumstances of the case it would also give rise to a constructive trust so as to bind C.¹⁷⁶

EU law definitions of contract

1-020

The definitions which we have so far discussed have been those which have arisen from analysis of the common law, equitable and statutory material native to English law or the legal systems which have developed from it. However, as earlier noted,¹⁷⁷ legislation of the EU has now had a very considerable effect on the law governing English contracts. In these areas, the relevant EU legislation often makes the application of legislation contingent on the existence of a contract, but the question arises whether this notion should be interpreted according to the understanding of the various Member State laws or instead on the basis of an "autonomous" definition to be formulated by the Court of Justice of the EU. It is submitted that there is not likely to be any single answer to be given to this question and that different answers may be given according to the context of the legislation in question, these turning on a variety of considerations, but particularly on the degree of juristic integration which the Court of Justice thinks desirable and practicable in that context. However, where the Court of Justice considers it right to take an autonomous view of "contract" for the purposes of EU legislation, it may well take as its starting-point the definition of contract set out in the Proposed Regulation on a Common European Sales Law, which defines "contract" as "an agreement intended

to give rise to obligations or other legal effects". ¹⁷⁸ It is to be noticed, in particular, that this definition makes no requirement of reciprocity or provision of value such as is found in the doctrine of consideration with the result that, in principle, purely gratuitous agreements could fall within its scope. ¹⁷⁹ The following paragraphs consider the approach to definitions of "contract" following existing case law of the European Court.

EU private international law

1-021

⚠ The Court of Justice itself has had occasion to hold that a European and "autonomous" view should be taken of the understanding of what constitutes a contractual as opposed to an extra-contractual action for the purposes of jurisdictional rules under the Brussels Convention (now brought within EU law as the Brussels Ibis Regulation), ¹⁸⁰ ⚠ and this has meant that an action classified in one Member State (France) as contractual has been held extra-contractual for these purposes. ¹⁸¹ The European Court decided that:

"... the phrase 'matters relating to a contract' within the meaning of Article 5(1) of the Convention should not be understood to cover a situation where there is no obligation freely entered into by one party to another. Where a sub-buyer of goods which are bought from an intermediate seller brings an action against a manufacturer for damages on the sole ground that the goods are not in conformity, it is important to observe that there is no contractual link between the sub-buyer and the manufacturer because the latter has not undertaken a contractual obligation of any kind to the former." ¹⁸²

As regards the EU instruments governing applicable law, the Rome II Regulation on the law applicable to non-contractual obligations specifies that "the concept of non-contractual obligation" must be understood as an "autonomous concept" ¹⁸³ and includes certain areas of law (notably, "product liability" and precontractual liability ("culpa in contrahendo")) which in some national laws fall within contract and sometimes outside it. ¹⁸⁴ The scope of the Rome I Regulation (replacing the earlier Rome Convention) on the law applicable to *contractual* obligations is to be interpreted in a way consistent with the earlier Rome II Regulation. ¹⁸⁵ For this purpose, the Court of Justice of the EU has held that "the concept of 'contractual obligation' [under the Rome I Regulation] designates a legal obligation freely consented to by one person towards another". ¹⁸⁶ ⚠

European definition of "worker"

1-022

As to the various legislative provisions governing contracts of employment and contracts under which "workers" act, clearly their concern is not with "contract", but rather with "employment contract" or "worker", but in this respect some of the EU legislation clearly invites the courts of the Member States to refer to a conception of contract drawn from their own legal system, while other provisions have attracted a European conception. So, for example, Directive 91/533 which makes certain requirements as to the information to be given by employers to their employees as to the conditions of employment expressly provides that it shall apply "to every paid employee having a contract or employment relationship defined by the law in force in a Member State". ¹⁸⁷ On the other hand, the European Court of Justice made clear as early as 1964 that "worker" for the purposes of the principle of freedom of movement of workers contained in art.48 (later art.39) of the EC Treaty (now art.45 TFEU) must be given a European understanding ¹⁸⁸ the fleshing out of this being the matter for a series of subsequent judgments. ¹⁸⁹


"Consumer contract"

1-023

Finally, while it is clear that certain aspects of the notion of “consumer contract” for the purposes of the Directive on Unfair Terms in Consumer Contracts 1993¹⁹⁰ are to be interpreted “autonomously”, it is less clear whether the notion of “contract” itself will also be so interpreted by the Court of Justice of the EU or will instead fall to be governed by the legislation or case law of the Member States.¹⁹¹ If it were interpreted autonomously, then the significance of “contract” may well differ from that given by English law, notably as regards the latter’s requirement of consideration, a requirement which is not shared by the other Member States except the Republic of Ireland. Furthermore, in coming to a view as to what constitutes “a contract” for this purpose, the Court of Justice is likely to be inspired by the definition already noted in the Proposal for a Regulation on a common European sales law.¹⁹²


“Contract” in EU public procurement law

1-024

 The Court of Justice has adopted an autonomous European view of “contract” for the purposes of the public procurement directives. In *Teckal Srl v Comune di Viano*¹⁹³ the Court recognised that the conclusion of an agreement by a public authority and a company which, although a separate entity, is in substance a department of the authority falls outside the requirements of these directives.¹⁹⁴ According to the Court:

“As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.


In that regard, ... it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.”¹⁹⁵

As A.G. Stix-Hackl observed in the *TREA Leuna Case*, “in *Teckal* the court ... narrowed the concept of “contract” by interpreting it teleologically”.¹⁹⁶ Subsequent case law in the European Court (as reviewed by the Supreme Court in *Risk Management Partners Ltd v Brent LBC*) makes clear that the “*Teckal* exception” does not “depend on the meaning to be given to particular words or phrases in the Directive, such as those to be found in the definition of ‘public contracts’”, but rather on fundamental policies pursued both by the procurement directives and by the EC Treaty itself.¹⁹⁷ 


^{126.} This sentence was referred to with apparent approval in *Engel v Joint Committee for Parking and Traffic Regulation Outside London* [2013] I.C.R. 1086, [2013] I.R.L.R. 787 at [6].

^{127.} Chitty on Contracts, 26th edn (1989), Vol.I, para.1; Pollock, *Principles of Contract*, 13th edn (1950), p.1; cf. Pollock, *Principles of Contract at Law and in Equity*, 1st edn (1876), p.5. The American Law Institute’s Restatement of Contracts, 2nd edn, para.1, adopts substantially the same definition.


^{128.} Chitty, *A Practical Treatise on the Law of Contracts* (1834), pp.1–2.


^{129.}  Peel, *Treitel on The Law of Contract* 14th edn (2015), para.1–001. cf. Burrows, *A Restatement of the English Law of Contract* (2016), para.2 which defines “contract” as an



agreement that is legally binding because it is supported by consideration or made by deed, certain and complete, made with the intention to create legal relations, and complies with any formal requirement needed for the agreement to be legally binding; and see the commentary at pp.44–55.

- [130.](#) Pothier, *Treatise on Obligations* (trans. Evans, 1806) and see Simpson (1975) 91 L.Q.R. 247, 257–262; Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p.399; Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), Ch.6.
- [131.](#) cf. Nicholas, *The French Law of Contract*, 2nd edn (1992), p.144.
- [132.](#) According to the Restatement of Contracts at para.3, a bargain is an agreement, whereby two or more persons exchange promises, or exchange a promise for a performance. However, the word “bargain” is seldom used in any technical sense in the law of contract: Atiyah, *Essays on Contract* (1986), Essay 8, p.207; and see Eisenberg (1982) 95 H.L.R. 741. It is sometimes said that the requirement of consideration means that contracts are *exchanges*. This suggests some element of reciprocity between the parties to the contract and while this is often the case, a promise by A to do work for B can support a promise by C of payment for it: see below, para.4-005. According to Gordley above, n.97 at pp.137–139, the systematisation of the doctrine of consideration took place at the same time as the acceptance of civilian theories of contract and was intended to act as a control device on the ambit of contract.
- [133.](#) See below, para.4-001.
- [134.](#) Goodhart, *English Law and the Moral Law* (1953), p.101; Fried, *Contract as Promise* (1983); Harris (1983) 3 Int. Rev. Law & Econ. 69; Burrows (1985) C.L.P. 141. cf. Atiyah (1978) 94 L.Q.R. 193; Promises, Morals and Law (1981); *Essays on Contract* (1986), Essays 2 and 6; Raz, *Law, Morality and Society* (1977), Ch.12; Smith, *Contract Theory* (2004), Chs 2–4.
- [135.](#) See below, Ch.2.
- [136.](#) And see The Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com. No.242 (1996), para.6.8 and below, Ch.18.
- [137.](#)  *Williams v Roffey Bros Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1 and see below, para.4-069. See also *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 (appeal to SC pending) on which see below, para.4-119A.
- [138.](#) cf. Atiyah, *An Introduction to the Law of Contract*, 5th edn (1995), pp.38–39.
- [139.](#) See below, paras 24-035—24-048. This is not to say that the availability of this remedy cannot be expressed in terms of independent or dependent promises, but the term “promise” here is used synonymously with that of obligation and can apply to obligations imposed on a contractor by law, which are not a matter of “promise” at all. Thus, a buyer of goods can terminate the contract, and thereby extinguish his own obligation to pay the price, for breach of the term that they are of satisfactory quality, a term imposed by s.14 of the Sale of Goods Act 1979 on sellers selling goods in the course of business, and see Vol.II, paras 44-066 and 44-093.
- [140.](#) See below, para.1-107.
- [141.](#) There is some doubt as to whether an offeree of a unilateral offer must be aware of that offer on performance of the condition for a contract to arise: see below, para.2-040. If the offeree need not be so aware, then no agreement can be constructed from performance of the condition. It is clear that the offeree of a unilateral offer does not in general have to communicate his acceptance to the offeror before he fulfills the condition and the contract arises: *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256, and see below, para.2-046.
- [142.](#) After the abolition by the Law of Property (Miscellaneous Provisions) Act 1989 s.1(1) of the requirement of sealing for the validity of deeds made by individuals, it is more appropriate to refer to promises in deeds rather than the former “promises under seal”: see below, paras

1-114 et seq.

- [143.](#) *Xenos v Wickham* (1866) L.R. 2 H.L. 296, 312; *Macedo v Stroud* [1922] 2 A.C. 330.
- [144.](#) Pollock, *Principles of Contract at Law and in Equity*, 4th edn (1885), p.9 and cf. p.5.
- [145.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.3–170. cf. Burrows, *A Restatement of the English Law of Contract* (2016), paras 2 and 8(1), commentary on pp.63–64, which includes agreements supported by a deed within its definition of contract, but distinguishes deeds which contain agreements and those which do not (deeds poll).
- [146.](#) Bacon, *A New Abridgment of the Law*, 7th edn (1832), Vol.I, p.55 included debt, detinue, account, covenant, assumpsit, quantum meruit, quantum valebat and annuity in his treatment of actions ex contractu. cf. Chitty and Chitty, *A Treatise on the Parties to Actions and on Pleading*, 6th edn (1836), pp.98–125.
- [147.](#) See below, para.29-006; Birks, *An Introduction to the Law of Restitution* (1985), pp.29–39.
- [148.](#) Technically, detinue protected the plaintiff's right to possession of personal property. For further discussion of the classification of actions at common law, see below, para.1-146. Detinue was abolished by the Torts (Interference with Goods) Act 1977 s.2.
- [149.](#) Howarth (1984) 100 L.Q.R. 265 and 528; Vorster (1987) 103 L.Q.R. 274; Goddard (1987) 7 L.S. 263; de Moor (1990) 106 L.Q.R. 632 and see *The Hannah Blumenthal* [1983] 1 A.C. 854; *The Leonidas D.* [1985] 1 W.L.R. 925; Beatson (1986) 102 L.Q.R. 19; Atiyah (1986) 102 L.Q.R. 363 and below, para.2-002.
- [150.](#) Restatement of Contracts at para.3.
- [151.](#) Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th edn (2007), p.38.
- [152.](#) See below, paras 2-003 et seq.
- [153.](#) *Household Fire Insurance Co v Grant* (1879) 3 Ex. D. 216, overruling *British and American Telegraph Co Ltd v Colson* (1871) L.R. 6 Ex. 108. See below, paras 2-047 et seq.
- [154.](#) *Byrne v Van Tienhoven* (1880) 5 C.P.D. 344; below, para.2-094.
- [155.](#) *Felthouse v Bindley* (1862) 11 C.B.(N.S.) 869, affirmed (1863) 1 N.R. 401 and see below, paras 2-068 et seq.
- [156.](#) *Tekdata Interconnections Ltd v Amplenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 especially at [11], [21], [25] and [30].
- [157.](#) See below, paras 2-177—2-184.
- [158.](#) See below, paras 2-188—2-193.
- [159.](#) See below, Ch.5.
- [160.](#) See below, Chs 3 and 6.
- [161.](#) See below, Ch.7.
- [162.](#) See below, paras 8-003—8-056.
- [163.](#) See below, paras 8-057—8-129.
- [164.](#) See below, Chs 9 and 10.

- [165.](#) See below, Ch.16.
- [166.](#) See below, para.1-108.
- [167.](#) See below, para.1-110.
- [168.](#) See below, para.1-112.
- [169.](#) See below, paras 4-130 et seq.
- [170.](#) See below, para.4-094.
- [171.](#) [1976] Ch. 179 and see below, para.4-143.
- [172.](#) [1976] Ch. 179, 195 and see below, para.4-143.
- [173.](#) Below, paras 5-040—5-049 discussing *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 and *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776.
- [174.](#) [1972] Ch. 359.
- [175.](#) [1972] Ch. 359 at 367, 371.
- [176.](#) [1972] Ch. 359 at 367–368. Megaw and Stephenson L.JJ. preferred to protect A's position by holding her to be a tenant for life within the meaning of the Settled Land Act 1925.
- [177.](#) Above, para.1-011.
- [178.](#) Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales, Law Com(2011) 635 final art.2(a). On the Proposal, see above, para.1-013.
- [179.](#) This is confirmed by the inclusion within those contracts for which the Common European Sales Law would be available of "contracts for the supply of digital content ... irrespective of whether the digital content is supplied in exchange for the payment of a price": Proposal Com(2011) 635 final, art.5(b).
- [180.](#)  *Kalfelis v Schröder* (C-189/87) [1988] E.C.R. 5565 especially at 5577 (A.G. Darmon), 5585; *ÖFAB, Östergötlands Fastigheter AB v Koot* (C-147/12) July 18, 2013 at para.33; *Brogsitter v Fabrication de Montres Normandes EURL* (C-548/12) March 13, 2014 at para.18; *ERGO Insurance SE v If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14) January 21, 2016 at para.43; *Kolassa v Barclays Bank Plc* (C-375/13) January 28, 2015 at para.43; *Granarolo SpA v Ambrosi Emmi France SA* (C-196/15) July 14, 2016 at para.19. The Brussels Convention was replaced as from March 1, 2002 by the Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L012/1 ("Brussels I Regulation"), which is itself replaced as from January 10, 2015 by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Brussels Ibis Regulation"). And see below, para.1-199.
- [181.](#) *Jakob Handte & Co GmbH v Société Traitements Mécano-chimiques des Surfaces (TMCS)* (C-26/91) [1993] I.L.Pr. 5 and see below, para.1-199.
- [182.](#) [1993] I.L.Pr. 5 at 22.
- [183.](#) Regulation 864/2007 of the European Parliament and of the Council law applicable to noncontractual obligations ("Rome II Regulation") [2007] O.J. L199/40 recital 11.
- [184.](#) Rome II Regulation arts 5 and 12 respectively.

- [185.](#) Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6 recital 7. See below, Ch.30 and especially para.30-133.
- [186.](#)  *ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14) January 21, 2016* para.44; *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15) July 28, 2016* esp. at para.60 (action for cessation of use of unfair contract terms falls under Rome II as concerning a non-contractual obligation, though the assessment of the terms falls under Rome I as concerning a contractual obligation following the nature of these terms whether this arises in an action for cessation or in an individual action between a trader and a consumer); *Committeri v Club Mediterranee SA [2016] EWHC 1510 (QB)* at [45]–[48].
- [187.](#) Directive 91/533 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] O.J. L288/32 art.1(1). Similarly, Framework Agreement on Part-time Work cl.2(1) “[t]his Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State”, Annex to Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] O.J. L14/9.
- [188.](#) *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (C-75/63) [1964] E.C.R. 177.*
- [189.](#) See Craig and de Búrca, *EU Law*, 6th edn (2015), Ch.21.
- [190.](#) See Vol.II, paras 38-199—38-200.
- [191.](#) Whittaker (2000) 116 L.Q.R. 95 and see Vol.II, paras 38-014, 38-210—38-211. cf. the position under the Consumer Rights Directive 2011 art.6(5), on which see Vol.II, paras 38-059—38-061.
- [192.](#) Above, para.1-020.
- [193.](#) *C-107/98 [1999] E.C.R. I-8121.*
- [194.](#) At the time, Council Directive 1992/50/EEC relating to the co-ordination of procedures for the award of public service contracts; Directive 93/36/EEC of June 14, 1993 co-ordinating procedures for the award of public supply contracts.
- [195.](#) *C-107/98 [1999] E.C.R. I-8121* at paras 49 and 50.
- [196.](#) *Stadt Halle & RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energierverwertungsanlage (C-26/03) [2005] E.C.R. I-1* at [52].
- [197.](#)  *Risk Management Partners Ltd v Brent LBC [2011] UKSC 7, [2011] 2 A.C. 34* at [22], per Lord Hope of Craighead D.P.S.C. and see further *[2011] UKSC 7* at [38]. The conclusion of public contracts between entities in the public sector (which forms the context of this case-law) has been the subject of regulation by the Public Contracts Directive 2014: Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] O.J. L94/65 art.12 and recitals 31 and 32.

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Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
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Section 3. - Fundamental Principles of Contract Law

1-025

There are a number of norms of the English law of contract of a generality, pervasiveness and importance to have attracted the designation of principle, though such a designation does not have a technical legal significance. A number of legal norms could be advanced as included within such a category of principle, including the principle of privity of contract, ¹⁹⁸ the principle of “objectivity” in agreement, ¹⁹⁹ and principles of contractual interpretation. ²⁰⁰ However, two linked principles remain of fundamental importance, viz the principles of freedom of contract and of the binding force of contract. ²⁰¹ By these two principles, English law has expressed its attachment to a general vision of contract as the free expression of the choices of the parties which will then be given effect by the law. However, while the modern law still takes these principles as the starting-point of its approach to contracts, it also recognises a host of qualifications on them, some recognised at common law and some created by legislation. ²⁰² Moreover, some commentators have argued that these various qualifications should not be seen merely as the expression of particular reasons or considerations of policy special to their context, but should instead be seen as themselves reflecting a further, central principle, sometimes put in terms of a principle of good faith in contract or a principle of contractual fairness. ²⁰³ EU law also recognises the importance of freedom of contract and the binding force of contracts, but, unlike English common law, also appears to be moving towards the recognition of a principle of good faith or “good faith and fair dealing”. ²⁰⁴

^{198.} See below, Ch.18, para.18-003.

^{199.} See below, para.2-002.

^{200.} See below, paras 13-041 et seq. and especially *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 W.L.R. 896 at 912–913, per Lord Hoffmann.

^{201.} See below, paras 1-026—1-035, 1-036—1-038.

^{202.} See below, paras 1-027, 1-031 et seq.

^{203.} See below, paras 1-039 et seq.

^{204.} Below, paras 1-042—1-043.

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Volume I - General Principles

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Chapter 1 - Introductory

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(a) - Freedom of Contract

Freedom of contract in the nineteenth century

1-026

In the nineteenth century, freedom of contract was regarded by many philosophers, economists and judges as an end in itself, finding its philosophical justification in the “will theory” of contract and its economic justification in laissez faire liberalism. ²⁰⁵ Thus, the parties were to be the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it. In particular, its validity should not be challenged on the ground that its effect was unfair or socially undesirable (as long as it was not actually illegal or immoral, the latter of which was understood in a restrictive sense) ²⁰⁶ and it was immaterial that one party was economically in a stronger bargaining position than the other. Nowhere can this attitude be seen more clearly than in the attitude of the courts to clauses which attempted to regulate the damages payable on breach of contract. For, the courts held that parties to a contract were able to limit or exclude liability in damages not merely for breach of contract, but also in tort. ²⁰⁷ The courts’ attitude to freedom of contract can also be seen in their treatment of an exception to it, for while they accepted that penalty clauses were ineffective even if agreed by the parties, they did so only owing to the force of established precedent to this effect and with considerable reluctance. ²⁰⁸



Freedom of contract in the modern common law

1-027

⚠ Freedom of contract as a general principle of the common law retains considerable support. For example, in 1966, Lord Reid rejected the idea that the doctrine of fundamental breach was a substantive rule of law, negating any agreement to the contrary (and capable of being used to strike down an exemption clause) ²⁰⁹ on the ground, inter alia, that this would restrict “the general principle of English law that parties are free to contract as they may think fit”. ²¹⁰ In 1980, in the same context, Lord Diplock observed ²¹¹ that:

“A basic principle of the common law of contract ... is that parties to a contract are free to determine for themselves what primary obligations they will accept.” ²¹²


This support remains particularly strong in commercial contexts. So Lord Bingham of Cornhill stated that “[l]egal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting”. ²¹³ ⚠ Moreover, English courts have proved unwilling to strike down contracts on the ground simply that one of the parties suffered from an “inequality of bargaining power”. ²¹⁴ Conversely, the House of Lords held that it would not *add* to the agreement which the parties have made by implying a term merely because it would be reasonable to do so, but only


where it is “necessary”, ²¹⁵  nor will the courts put a meaning on the words of a contract different from that which they clearly express. ²¹⁶ Even while taking a broad approach to the implication of terms (in particular interpreting the requirement of “necessity” as merely explaining that “the proposed implied term must spell out what the contract actually means” ²¹⁷ ) , for Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd*:


“the court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means ... It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would be reasonably be available to the audience to whom the instrument is addressed.” ²¹⁸

Moreover, Lord Hoffmann has further observed (in a commercial context) that it is:

“... logical to found liability in damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken. It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market, would not reasonably be considered to have undertaken.” ²¹⁹

Even where the common law recognises an exception to freedom of contract, as in the case of the law controlling penalty clauses, ²²⁰  the courts have distinguished between the nature of this control and wider controls of contracts on the ground of fairness. According to Lord Neuberger P.S.C. and Lord Sumption J.S.C. (with whom Lord Carnwath J.S.C. agreed) in *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis*:

“There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men’s bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party’s primary obligations, not the primary obligations themselves.” ²²¹ 

In the view of the Supreme Court, the true test whether a contract term imposes a “penalty” on the party in default is whether “it imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”. ²²²  For this purpose,

“the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.”

²²³ 

And the bargaining position of the parties more generally may be relevant. ²²⁴ 

Freedom of contract in EU law

1-028

! The “principle of freedom of contract” has been recognised by the European Court of Justice. ²²⁵ According to A.G. Kokott:

“Contractual freedom is one of the general principles of Community law. It stems from the freedom to act for persons. It is inseparably linked to the freedom to conduct a business [protected by art.16 of the EU Charter of Fundamental Rights]. In a Community which must observe the principle of an open market economy with free competition, contractual freedom must be guaranteed.” ²²⁶

Freedom of contract has also been set by the European Commission as a fundamental point of reference for the development of European contract law ²²⁷ and was placed by it as a “general principle” in its Proposal for a Regulation on a Common European Sales Law, ²²⁸ it being explained that “[p]arty autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection”. ²²⁹ The principle of “party autonomy” is also important in EU private international law. ²³⁰ !

Alemo-Herron v Parkwood Leisure Ltd

1-029

The decision of the Court of Justice in *Alemo-Herron v Parkwood Leisure Ltd* provides a striking illustration of the use of art.16 of the EU Charter of Fundamental Rights to give effect to its vision of freedom of contract. ²³¹ There, the UK Supreme Court asked the Court of Justice whether a Member State is prohibited by the Transfer of Undertakings Directive ²³² from extending to employees, in the event of a transfer of an undertaking or business, a “dynamic” protection as a result of the recognition by domestic contract law of the effectiveness of a contract term in the employees’ individual contracts of employment that their pay may be determined from time to time by a third party, there a public sector collective negotiating body (the “dynamic pay clause”). If such a dynamic protection were permitted, then in the particular case the transferee (a private sector company which had bought the undertaking from a local authority) would in effect be bound by a collective agreement to whose negotiation it could not be party. ²³³ The Transfer of Undertakings Directive provides that:

“the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing *on the date of a transfer* shall, by reason of such transfer, be transferred to the transferee”

but also that Member States have the right to apply or introduce laws “which are more favourable to employees or to promote or permit collective agreements between social partners more favourable to employees”. ²³⁴ While acknowledging this right in Member States, the Court of Justice held that the aim of the directive was not solely to safeguard the interests of employees on the transfer of an undertaking, but to ensure a fair balance between their interests and the interests of the transferee employer, which “must be in a position to make the adjustments and changes necessary to carry on its operations”, notably where the transfer of the undertaking was from the public sector to the private sector. ²³⁵ Giving effect to the dynamic pay clause would undermine this fair balance. ²³⁶ Moreover, the fundamental freedom to conduct a business laid down in art.16 of the EU Charter of Fundamental Rights “covers, inter alia, freedom of contract”. ²³⁷ In the light of the Directive’s provision that the transferee of an undertaking must give effect to the rights of employees existing at the date of its transfer,

“[i]t is apparent that, by reason of the freedom to conduct a business, the transferee

must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity.”²³⁸

This is not the case where a transferee cannot participate in the collective bargaining body identified by the dynamic pay clause and so, in this situation, “the transferee’s contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.”²³⁹

The Court of Justice therefore held that the Directive cannot be interpreted as “entitling Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business”.²⁴⁰ So, in effect, the need to preserve the transferee employer’s freedom of contract trumps the freedom of contract of the contracting parties to the original contracts of employment who had agreed to set the employees’ pay by a third party.²⁴¹ In doing so, the Court of Justice interpreted restrictively the reference in the Directive to “the transferor’s ... obligations arising from a contract of employment ... existing on the date of a transfer”, treating the relevant obligation as the obligation to pay the employee’s wages rather than a wider obligation to honour the contract’s terms governing the determination of pay, including its future determination.

Freedom of Contract and the ECHR

1-030

While the European Convention on Human Rights does not refer to freedom of contract, the European Court of Human Rights has held that the extent to which a State interferes with an owner of property’s freedom of contract relating to the property is relevant to the assessment of its compliance with its duties in respect of the right to property under art.1 of the First Protocol.²⁴²

Qualifications on freedom of contract

1-031

However, the principle of freedom of contract is subject to many qualifications in modern English law. These qualifications may affect a person’s decision as to whether and with whom to contract; the parties’ choice as to the terms on which their contractual relations are to be governed and more generally as to their legal consequences. Furthermore, even where it does not bear directly on the mutual rights and duties of the contracting parties, modern legislation has also regulated the contractual environment in which the parties to some types of contract negotiate, conclude and perform their contracts.

(i) Refusal to enter contracts

1-032

Even at common law, an innkeeper or common carrier was not entitled to refuse to accommodate a would-be customer without sufficient excuse.²⁴³ Companies which supply what used to be called public utilities such as water, gas and electricity, in some circumstances are under a statutory duty to supply the commodity in question,²⁴⁴ though in this type of case the existence of the duty has led the courts to hold that the relationship so created is not contractual.²⁴⁵

(ii) The law of discrimination

1-033

Moreover, modern discrimination law has forbidden a person to refuse to contract in certain situations and has provided more widely for the prevention of discrimination. This was first the case as regards discrimination on the grounds of sex ²⁴⁶ and racial group, ²⁴⁷ and was later extended to discrimination on the grounds of disability of the would-be contractor, ²⁴⁸ and, in the context of employment, prohibitions on discrimination on the ground of a person's sexual orientation, ²⁴⁹ religion or belief, ²⁵⁰ and age. ²⁵¹ However, the Equality Act 2010 subjected this earlier law of discrimination to considerable legislative consolidation, reframing and reform. A full discussion of the scope of this important legislation would be beyond the scope of the present work, but the general scheme of the new legislation is as follows. A key new concept is "protected characteristics", which are set out by the Act: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. ²⁵² The Act then defines and explains "prohibited conduct" in relation to these protected characteristics, which includes "direct and indirect discrimination, harassment and victimisation". ²⁵³ The Act sets out the extent to which and how the various "protected characteristics" are protected against the different types of prohibited conduct, notably, for present purposes, in relation to the provision of public services (which includes goods and facilities) ²⁵⁴; the disposal of premises ²⁵⁵; work, including provisions governing employment and partnerships ²⁵⁶; education ²⁵⁷; and associations. ²⁵⁸ Provision is made for the relationship of the Act's rules on discrimination and contracts, ²⁵⁹ including a general provision to the effect that:

"[a] term of a contract is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by this Act." ²⁶⁰

(iii) Restricted freedom as to terms

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❗ Moreover, even where, as in the majority of cases, a person is free to decide whether to enter a particular contract, he or she is not free to determine on what terms to do so. First, many contracts, whether between two commercial parties or between such a party and a consumer, are made on the written standard terms of one of the parties in such circumstances that it is all but impossible for them to be varied, ²⁶¹ a phenomenon which led French commentators to refer to such transactions as *contrats d'adhésion*. Similarly, the terms of employees' contracts of employment may be determined by agreement between their trade union and their employer, ²⁶² or by a statutory scheme of employment. ²⁶³ However, in both the latter situations, despite the lack of real freedom of the parties to do other than accept or reject the whole package as it is offered to them, these types of transactions are still treated as contracts. ²⁶⁴ Secondly, even while the courts formally stated the need for a term to be "necessary" before it will be implied into a contract, ²⁶⁵ the courts have over the years found many such implied terms, often in situations where it is difficult to see how this test is fulfilled, ²⁶⁶ thereby creating for many types of contracts the "legal incidents of those ... kinds of contractual relationship". ²⁶⁷ ❗ According to one author:

"Faced with a problem in contract, the Common lawyer is as likely as not to try to solve it with an implied term. [In contrast,] the Civil lawyer will probably resort to a rule, whether it be a broad and fundamental precept such as the German requirement of good faith ²⁶⁸ ... or one derived from the nature of obligation or contract ... or, finally, one derived from the nature of the particular contract in question." ²⁶⁹

While some judicially implied terms have been recognised by statute, ²⁷⁰ many remain a matter of common law, where they constitute an important part of the regulation of many contractors' relations. ²⁷¹ Thirdly, the effects of many modern contracts are regulated by statute, sometimes by way of statutory insertion of an implied term, ²⁷² but sometimes by attaching a legal consequence directly to the conclusion of a particular type of contract. This is particularly noticeable as regards some types of

contracts made by consumers, notably contracts for the sale of goods, hire purchase and consumer credit,²⁷³ where the protection which the law thereby ensures is often not capable of avoidance by an expression of contrary intention.²⁷⁴ Contracts of employment and between a landlord and tenant have also been subjected to considerable legislative regulation, to the extent that the voluntary aspect of the contract appears only to be whether or not to enter the contract, a decision which then triggers a set of obligations which are determined by the law.²⁷⁵





(iv) Regulation of the contractual environment






1-035

Other statutory techniques for the regulation of contracts are less direct. For example, one aim of modern competition law is to help ensure that no company is able to impose what terms it likes on those with whom it deals because of its “dominant position” in the market.²⁷⁶ This can be seen either as an intervention in the market (and therefore as interfering with the principle of freedom of contract²⁷⁷) or as a mechanism for ensuring that the market functions properly (and therefore as promoting freedom of contract). Another modern technique is for legislation to set up a system of regulation for a particular type of business. For example, under the Financial Services and Markets Act 2000, there is a general prohibition on the carrying on without authorisation or exemption of a regulated investment activity,²⁷⁸ and doing so may constitute an offence and give rise to civil liability.²⁷⁹ The Act gives to the Financial Conduct Authority very considerable rule-making powers for the conduct of investment business,²⁸⁰ and breach of a rule so made is actionable at the suit of a private person who suffers loss as a result, though it will not constitute a criminal offence.²⁸¹ Clearly, this system of regulation affects the way in which contracts relating to investment business are concluded, even though breach of the rules does not affect the validity of any such contract.²⁸² A further example of the regulation of contractual behaviour is to be found in the Unfair Commercial Practices Directive 2005, implemented in UK law by the Consumer Protection from Unfair Trading Regulations 2008.²⁸³ The Directive sets a very broad standard of commercial behaviour in relation to consumers in a “general clause” which prohibits practices which contrary to “professional diligence”, “materially distort the economic behaviour” of an average consumer.²⁸⁴ This general standard frames particular protections given to consumers by existing EU directives and is fleshed out by the 2005 Directive itself by the setting of two main examples of unfair commercial practices: misleading actions and omissions and aggressive commercial practices.²⁸⁵ The Directive also provides a black list of particular commercial practices which “are in all circumstances [to be] considered unfair”.²⁸⁶ On the other hand, the concern of the Directive is to prohibit unfair commercial practices, and it explicitly provides that it is “without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”²⁸⁷ and the UK’s initial implementing regulations reflected this feature and provided explicitly that “an agreement shall not be void or unenforceable by reason only of a breach of these regulations”²⁸⁸ though they said no more as to the wider lack of effect of the Regulations on the “law of contract”, apparently on the basis that they set out the consequences of the new controls and do not need to set out other non-consequences. However, in 2014 the 2008 Regulations were amended so as to create a series of “rights to redress” for consumers against traders in respect of some categories of unfair commercial practices.²⁸⁹


^{205.} See Dicey, *Law and Opinion in England*, 2nd edn (1914), pp.150–158; *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462 at [465], per Jessel M.R.; *Manchester, Sheffield and Lincolnshire Ry v Brown* (1883) 8 App. Cas. 703 at [716]–[720], per Lord Bramwell; *Salt v Marquis of Northampton* [1892] A.C. at 1 [18]–[19], per Lord Bramwell. It is instructive to observe that Lord Bramwell, who was one of the foremost judicial champions of freedom of contract, also believed in the necessity for a real as opposed to an apparent consent: see his judgment in *British and American Telegraph Co Ltd v Colson* (1871) L.R. 6 Ex. 108, and his dissenting judgment in *Household Fire Insurance Co v Grant* (1879) 4 Ex. D. 216, 232. See further, Atiyah, *The Rise and Fall of Freedom of Contract* (1979) and cf. Gordley, above, n.97 at pp.214–217.

^{206.} See below, paras 16-004 et seq.

- [207.](#) *Nicholson v Willan* (1804) 5 East 507. Lord Ellenborough C.J., at 513, rejected the plaintiff's argument that the attempt of the defendant, a common carrier, to exclude his liability for the loss of goods carried beyond the value of £5 was: "contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by ... act of God [or] the King's enemies".
- [208.](#) *Ranger v G.W. Ry Co* (1854) 5 H.L.C. 72, 94–95, 118–119; Atiyah, *The Rise and Fall of Freedom of Contract* (1979), pp.414–415.
- [209.](#) See *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 and below, paras 15-023—15-027.
- [210.](#) [1967] 1 A.C. 361 at 399.
- [211.](#) *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 848.
- [212.](#) And see *Eurico SpA v Philipp Brothers* [1987] 2 Lloyd's Rep. 215, 218 (term to do the impossible valid).
- [213.](#)  *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2003] 3 W.L.R. 711 at [57]; *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] A.C. 436 at [47] (contractual recital of fact known by both parties to be untrue enforceable in principle); *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [31] and [34], following dicta in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601, esp. at [100] and [119] (the general principle that parties are free to agree whatever terms they choose to undertake allows them to vary by contract an earlier contract containing an "anti-oral variation" clause); *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [28] ("the principle of freedom of contract is still fundamental to [English] commercial law").
- [214.](#) *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686, 708, disapproving the dictum of Lord Denning M.R. in *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 339; and see below, para.8-143. cf. paras 8-130 et seq. (unconscionable bargains).
- [215.](#)  *Liverpool City Council v Irwin* [1977] A.C. 239, 254; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80, 104-105; and see below, paras 14-001 et seq. especially at 14-011—14-012; *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 W.L.R. 1843 at [14]–[21] and [77].
- [216.](#) See below, paras 13-041 et seq.
- [217.](#)  *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [22]. On the views of the Supreme Court on Lord Hoffmann's approach to implied terms, see *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 W.L.R. 1843.
- [218.](#) [2009] UKPC 10 at [27], per Lord Hoffmann on behalf of the PC and see *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531, [2009] 1 C.L.C. 909 at [8]–[18] and below, para.14-006.
- [219.](#) *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 at [12], [2009] 1 A.C. 61 at [12] and see below, paras 26-107 et seq.
- [220.](#)  *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [33] ("[t]he penalty rule is an interference with freedom of contract", per Lord Neuberger and Lord Sumption); at [257] per Lord Hodge. On this decision see below, paras 26-178 et seq.

- [221.](#)  [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [13]; and see similarly at [73].
- [222.](#)  [2015] UKSC 67 at [32] per Lord Neuberger P.S.C. and Lord Sumption J.S.C. (with whom Lord Carnwath J.S.C. and Lord Clarke J.S.C. agreed. See similarly per Lord Mance J.S.C. at [152] per Lord Mance J.S.C. and [249] and [255] per Lord Hodge J.S.C.
- [223.](#)  [2015] UKSC 67 at [35] Lord Neuberger P.S.C. and Lord Sumption J.S.C. (with whom Lord Carnwath J.S.C. and Lord Clarke J.S.C. agreed. See similarly at [75]. For discussion of this point, see below, para.26-214.
- [224.](#)  [2015] UKSC 67 at [35].
- [225.](#) *Spain v European Commission (C-240/97) [1999] E.C.R. I-6571* at [99] (common agricultural policy); *Société thermale d'Eugénie-les-Bains v Ministère de l'Economie, des Finances et de l'Industrie (C-277/05) [2007] E.C.R. I-6415* at [21], [24], [28] and [29] (VAT); Opinion of A.G. Wahl in *Kásler v OTP Jelzálogbank Zrt (C-26/13) February 12, 2012* at [3] referring to art.4(2) of Directive 93/13/EEC on unfair terms in consumer contracts as “safeguarding, to some extent, the principles of freedom of choice and freedom of contract”. The CJEU’s judgment of April 30, 2014 did not refer to art.4(2) in this way.
- [226.](#) *European Commission v Alrosa Co Ltd (C-441/07) [2010] 5 C.M.L.R. 11* at AG para.225.
- [227.](#) EC Commission, First Annual Progress Report on European Contract Law and the Acquis Review COM(2005) 456 final, para.2.6.3.
- [228.](#) Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Com(2011) 635 final, Annex I, art.1 CESL.
- [229.](#) CESL Proposal recital 30.
- [230.](#)  See Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] O.J. L177/6, art.3 and Vol.I, paras 30-169 et seq.; Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”) art.23 (on jurisdiction agreements) and recital 14, on which see Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (2014), paras 12–099 et seq.
- [231.](#) *C-426/11, July 18, 2013*. For the UK Supreme Court judgment of referral see [2011] UKSC 26, [2011] 4 All E.R. 800.
- [232.](#) Directive 2001/23 relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] O.J. L82/16 implemented in UK law by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246). The case itself concerned earlier UK regulations implementing an earlier EEC directive, but the relevant provisions were essentially identical.
- [233.](#) *C-426/11* at para.8.
- [234.](#) Directive 2001/23 art.3(1) and (8) respectively (emphasis added).
- [235.](#) *C-426/11* at paras 25 and 26.
- [236.](#) *C-426/11* at paras 28–29.
- [237.](#) *C-426/11* at para.32.
- [238.](#) *C-426/11* at para.33.

- [239.](#) C-426/11 at para.35.
- [240.](#) C-426/11 at para.36.
- [241.](#) cf. *Alemo-Herron v Parkwood Leisure Ltd* [2011] UKSC 26 at [9], Lord Hope referring to the argument in favour of the binding nature of a third party pay determination clause as “entirely consistent with the common law principle of freedom of contract”.
- [242.](#) *Hutten-Czapska v Poland App. No.35014/97* (2006) 42 E.H.R.R. 15 at [151]; *Edwards v Malta App. No.17647/04* at [69]–[71]; *Gauci v Malta App. No.47045/06* (2011) 52 E.H.R.R. 25 at [58].
- [243.](#) *Clarke v West Ham Corp* [1909] 2 K.B. 858, 879, 882. See Vol.II, para.36-008 on the ways by which a carrier could “abdicate” this status by giving notice that he would not accept custom from the public.
- [244.](#) Gas Act 1986 s.10; Electricity Act 1989 s.16 (as substituted by Utilities Act 2000 s.44); Electricity Act 1989 Sch.6 para.3 (as substituted by Utilities Act 2000 s.51 and Sch.4) (deemed contracts in respect of the supply of electricity in certain cases).
- [245.](#) *Read v Croydon Corp* [1938] 4 All E.R. 631; *Norweb Plc v Dixon* [1995] 1 W.L.R. 637 (on which see Peel (ed.), *Treitel on The Law of Contract*, 13th edn (2011), para.1-037 n.37). cf. *Oceangas (Gibraltar) Ltd v Port of London Authority* [1993] 2 Lloyd’s Rep. 292 (no contract in respect of compulsory pilotage services); cf. *Rushton v Worcester City Council* [2001] EWCA Civ 367, [2002] H.L.R. 9 (no contract between council and tenant exercising “right to buy” under scheme created by Pt V of the Housing Act 1985); *R. (on the application of Data Broadcasting International Ltd) v Office of Communications* [2010] EWHC 1243 (Admin), [2010] All E.R. (D) 289 (May) at [88]–[94] (broadcasting licences given to broadcasting companies under Broadcasting Act 1990 are not contractual giving rise to private law rights and obligations).
- [246.](#) Sex Discrimination Act 1975 s.6(1)(c).
- [247.](#) Race Relations Act 1976 ss.4(1)(c), 17, 20 and 21.
- [248.](#) Disability Discrimination Act 2005.
- [249.](#) Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661).
- [250.](#) Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).
- [251.](#) Employment Equality (Age) Regulations 2006 (SI 2006/1031).
- [252.](#) Equality Act 2010 ss.4-12. The main provisions concerning discrimination in the workplace and in the provision of goods, facilities and services took effect from October 1, 2010: Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (SI 2010/2317). A summary of the commencement dates of the provisions of the 2010 Act may be found at <http://www.homeoffice.gov.uk/equalities/equality-act/commencement>. The statutory provisions noted above at nn.206–211 are superseded on the coming into force of the relevant provisions of the Equality Act 2010, which repeals and replaces, inter alia, the Equal Pay Act 1970; the Sex Discrimination Acts 1975 and 1986; the Race Relations Act 1976; and the Disability Discrimination Act 2005: Equality Act 2010 Sch.27 Pt 1. See also below, paras 2-191, 2-192, 2-193, 27-026, 40-009, 40-039, 40-094, 40-125—40-129, 40-132—40-138 and 40-174.
- [253.](#) Equality Act 2010 ss.13-27.
- [254.](#) Equality Act 2010 Pt 3 ss.28-31.
- [255.](#) Equality Act 2010 Pt 4 ss.32-38.
- [256.](#) Equality Act 2010 Pt 5 ss.39-83.

- [257.](#) Equality Act 2010 Pt 6 ss.84-97.
- [258.](#) Equality Act 2010 Pt 7 ss.100–106.
- [259.](#) Equality Act 2010 Pt 10 ss.142-148.
- [260.](#) Equality Act 2010 s.142(1).
- [261.](#) Sales (1953) 16 M.L.R. 318; Law Commission, Unfair Terms in Contracts, Law Com No.292 (2005), especially parts 4 and 5. Where both parties to the contract are in business, each may attempt to impose its own conditions on the other, and this sometimes gives rise to what is known as a “battle of forms”: see below, paras 2-033—2-036.
- [262.](#) See Vol.II, paras 40-047 et seq.
- [263.](#) cf. *Barber v Manchester Regional Hospital Board* [1958] 1 W.L.R. 181, 196; *Roy v Kensington & Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 304.
- [264.](#) cf. below, paras 1-224 et seq. on the question of the availability of public law remedies in this sort of case.
- [265.](#) See above, para.1-027 and below, para.14-005.
- [266.](#) See below, para.14-003.
- [267.](#)  *Mears v Safecar Securities Ltd* [1983] Q.B. 54, 78, per Stephenson L.J. The learned Lord Justice specifically accepted, however, that “the obligation must be a *necessary* term; that is, required by their relationship”. A legislative regime governing a particular category of contracts may require the implication of an appropriate term by the courts: see, e.g. contracts governed by the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) and *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, [2015] 1 W.L.R. 2961 esp. at [23].
- [268.](#) cf. below, paras 1-042 et seq.
- [269.](#) Nicholas (1974) 48 Tulane L.R. 946, 950.
- [270.](#) See, e.g. *Jones v Just* (1868) L.R. 3 Q.B. 197 and Sale of Goods Act 1893 s.14 (now Sale of Goods Act 1979 s.14 and Consumer Rights Act 2015 ss.9 and 10).
- [271.](#) See, below, Ch.14. The contract of employment has proved particularly fertile ground for the implication of terms: see Vol.II, paras 40-059—40-068, 40-072—40-073.
- [272.](#) See Equality Act 2010 s.66(1); Sale of Goods Act 1979 ss.12-15; Supply of Goods (Implied Terms) Act 1973 ss.8-11. cf. Consumer Rights Act 2015 ss.9-14, 17, 34-37, 39-41, 49-52 referring to the contracts to which they apply as “treated as including” terms of differing contents.
- [273.](#) See Vol.II, Chs 39 and 44 (on the law generally applicable) and paras 38-399 et seq. (on the law applicable to consumer contracts).
- [274.](#) Other contracts made with consumers, for example contracts of insurance and guarantee, were for long left unregulated in this way, but important changes were made in this respect by the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159); revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) and due to be replaced on the coming into force of the Consumer Rights Act 2015 Pt 2: see below, Vol.II, paras 38-192 et seq.

- [275.](#) Hepple (1986–1987) 36 King's Counsel 11.
- [276.](#) See art.101 TFEU (ex 81 EC), art.102 TFEU (ex 82 EC); Vol.II, Ch.43, especially paras 43-004 et seq.
- [277.](#) See, e.g. *European Commission v Alrosa Co Ltd (C-441/07)* [2010] 5 C.M.L.R. 11 at AG para.225.
- [278.](#) Financial Services and Markets Act 2000 s.19(1). "Regulated activities" are defined by s.22.
- [279.](#) ss.23, 20(3), respectively.
- [280.](#) Financial Services and Markets Act 2000 Pt IXA (inserted by Financial Services Act 2012).
- [281.](#) Financial Services and Markets Act 2000 ss.138D(2), 138E(1) (inserted by Financial Services Act 2012).
- [282.](#) Financial Services and Markets Act 2000 s.138E(2) (inserted by Financial Services Act 2012).
- [283.](#) Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) implementing Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, on which see Vol.II, paras 38-145 et seq.
- [284.](#) Unfair Commercial Practices Directive art.5; Consumer Protection from Unfair Trading Regulations 2008 reg.3(3).
- [285.](#) Unfair Commercial Practices Directive arts 6 and 7; Consumer Protection from Unfair Trading Regulations 2008 regs 5, 6 and 7.
- [286.](#) Unfair Commercial Practices Directive art.5(5) referring to Annex I; Consumer Protection from Unfair Trading Regulations 2008 reg.3(4)(d), Sch.1.
- [287.](#) Unfair Commercial Practices Directive art.3(2) on which see Whittaker in Weatherill and Bernitz at Ch.8.
- [288.](#) 2008 Regulations reg.29.
- [289.](#) Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) on which see Vol.II, paras 38-160 et seq.

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Part 1 - Introduction
Chapter 1 - Introductory
Section 3. - Fundamental Principles of Contract Law
(b) - The Binding Force of Contract

General significance

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! A concomitant of the doctrine of freedom of contract is the binding force of contracts, ²⁹⁰ a force which the French Civil Code compares to the binding force of the law itself ²⁹¹ ! and which has been recognised by the European Court of Justice as a “general principle of civil law”. ²⁹² English law has also long recognised this principle, which suits the needs of commerce as well as the expectations of parties to contracts more generally. However, care must be taken in interpreting what is meant by the “binding force” of contracts in English law. Some authors argue that:

“[g]enerally speaking the law does not actually compel the performance of a contract, it merely gives a remedy, normally damages, for the breach” ²⁹³

an approach which echoes Oliver Wendell Holmes’ famous statement that the law leaves a contractor “free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses”. ²⁹⁴ However, four arguments can counter such an approach. First, the courts sometimes do enforce the primary obligations of a contract: apart from the equitable remedies of specific performance and injunction, ²⁹⁵ this is clearest in relation to the action for the agreed contract price, a remedy available at common law and as of right which enforces a party’s primary contractual obligation to pay money. ²⁹⁶ Moreover, the special statutory consumer right to repair and replacement of goods or digital content, and the right to repeat performance of services, similarly seek to ensure that one party (the consumer) obtains a conforming performance from the other (the trader). ²⁹⁷ Secondly, the purpose of many awards of damages for breach of contract, and the one which is particular to it, ²⁹⁸ is to put the injured party in the position as though the contract had been performed. ²⁹⁹ While this approach to damages is not without its restrictions ³⁰⁰ (notably, those imposed by the rules as to remoteness ³⁰¹ and mitigation of damage), ³⁰² where an award of damages is made on this basis, it can be seen as reflecting the idea that the obligations created by the contract *should* have been performed. Thirdly, a concern with the apparent injustice of allowing a party to break his contract without sanction where the breach has occasioned no loss but has allowed him to make a profit can be seen to lie behind the recognition of the remedy of an “account of profits” on breach based on the principle of unjustified enrichment. ³⁰³ Fourthly, English law recognises the binding force of contracts in another way, it being a tort for a third party knowingly ³⁰⁴ to induce a party to a contract to break his obligations to his co-contractor. ³⁰⁵ While a third party may be liable in damages for such a tort of interference with a contractual relationship, its commission may also be prevented by injunction in an appropriate case. ³⁰⁶ And finally, and at a much more general level, the argument that English law does not recognise the truly obligational character of contracts often rests on the absence of a particular form of sanction for a breach of contract—viz the threat of punishment for contempt of court, a sanction which exists in the contractual context only in relation to a failure to conform to a judicial order for specific performance or injunction. However, to this it may be countered that there is no reason to tie the question of the truly binding character of a contract to the presence of a particular

type of sanction for its breach and that many English lawyers are content to use the language of obligation to describe the consequences of contracts, which suggests that they see contract terms as set up and to be used as guides for the conduct of the contracting parties. ³⁰⁷

1-037

However, rather than alluding to the variety of sanctions which are available if a contract is broken, the notion of the binding force of contracts is often used instead to draw attention to the general refusal of the courts to deny them effect on the ground of unfairness or inequality, for example where an inadequate price has been stipulated for the sale of property. ³⁰⁸ This refusal is also reflected in the development of the law of frustration. Until 1863, the general rule was that a party who contracted in absolute terms remained liable, notwithstanding a change of circumstances between the time of making the contract and the time for performance, ³⁰⁹ but in that year this harsh rule was mitigated by the doctrine of frustration, ³¹⁰ which for many years was reconciled with principle by the device of implying a term into the contract, to which both parties could be supposed to have agreed, and which provided for its discharge in the event of a given thing or state of things ceasing to exist. However, the doctrine came to be applied in circumstances where it was obvious that both parties would never have agreed to any such term and in *Davis Contractors Ltd v Fareham Urban DC*, ³¹¹ this basis for relief on frustration was firmly rejected. While some judges had relied simply on the notion of justice to justify the doctrine, ³¹² this decision of the House of Lords also made clear that its proper basis is the construction of the contract. ³¹³ By so doing, reliance is again placed on what the parties agreed or rather on what they did not agree, viz to perform the contract in such radically different circumstances from those which obtained when it was made. However, even if the view were taken that the rationale for the doctrine of frustration is simply that in the circumstances the law decides that it would be unfair to keep the parties to the terms of their agreement, this does not mean that simple unfairness is the test of frustration. Again, in *Davis Contractors Ltd* ³¹⁴ Lord Radcliffe made clear that the proper test for frustration is whether performance of the contract is radically different from that which was undertaken by the contract ³¹⁵ and this test has been consistently upheld, ³¹⁶ the courts refusing to grant relief for frustration merely because performance of the contract is more onerous than was envisaged by the parties on contract. ³¹⁷

Limits on binding force of contracts


1-038

⚠ Nevertheless, recognition of the principle of the binding force of contracts does not mean that contracts, or particular terms of contracts, will always be enforced. This is clearest in cases of illegal contracts, ³¹⁸ but another exception to the principle exists at common law in the case of penalty clauses. ³¹⁹ As regards the latter, the Supreme Court has recently clarified the limits of the law which renders a contract term unenforceable as a penalty, holding that a contract term which stipulates the payment of a sum of money on breach of contract will be classed as a penalty clause (and so unenforceable) only if it “imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”. ³²⁰ ⚠ Furthermore, very important changes on the binding force of contract terms were introduced as a result of modern legislative intervention, of which the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 ³²¹ and, on its coming into force, the Consumer Rights Act 2015, are particularly prominent. ³²² First, the Unfair Contract Terms Act 1977 as enacted declares exemption clauses totally ineffective in certain situations, notably where they attempt to exclude business liability for death or personal injuries caused by negligence ³²³ and where they attempt to exclude or limit liability for breach of the terms as to quality and fitness for purpose implied by s.14 of the Sale of Goods Act 1979 as against someone dealing as consumer. ³²⁴ Furthermore, it gives to the courts a discretion in a wide category of other cases to deny effectiveness to an exemption clause unless it is proven to be “fair and reasonable” by the person who seeks to rely upon it. ³²⁵ Secondly, the Unfair Terms in Consumer Contracts Regulations 1999 impose a system of control of the terms of consumer contracts on the ground of unfairness which is not restricted to exemption, limitation and indemnity clauses, but extends to most terms ³²⁶ which have not been individually negotiated and:


“... which contrary to the requirement of good faith causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.” ³²⁷

As will be explained, on its coming into force, the Consumer Rights Act 2015 amends the 1977 Act so as no longer to apply to the terms of consumer contracts, ³²⁸ and creates its own controls on the terms of consumer contracts replacing and amending the 1999 Regulations as well as incorporating the substance of some of the provisions of the 1977 Act. ³²⁹ Another very striking inroad into the binding force of contracts may be found in provisions of the Consumer Credit Act 2006 which replaced earlier provisions governing extortionate credit bargains in the Consumer Credit Act 1974 with very broad provisions concerning “unfair relationships” arising from a consumer credit agreement. ³³⁰ These provisions empower a court to make a range of orders (including requiring the creditor to repay any sums paid by the debtor, to reduce or discharge any sum payable by the debtor and to alter the terms of the agreement) ³³¹ in connection with a consumer credit agreement:

“... if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor”

in one or more of a number of ways. ³³² According to the Supreme Court, this provision “is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application ... It is not possible to state a precise or universal test for its application, which must depend on the court’s judgment of all relevant facts”, though the Supreme Court offered some general points which courts should take into account for this purpose. ³³³ 

^{290.} This has been termed the “sanctity of contracts”: see Hughes Parry, *The Sanctity of Contracts in English Law* (1959).

^{291.}  French Civil Code art.1134.1 (inspired by D. 16.3.1.6; D. 50.17.23 (both attributed to Ulpian)). Logically, this Code recognised the effectiveness of penalty clauses, whose purpose is to ensure the performance of a contract: arts 1152, 1226. The law relating to penalty clauses was changed in 1975, when the courts were given a discretion to modify them where otherwise their effect would be “manifestly excessive or derisory”: see new art.1152.1, C. civ. As from October 1, 2016 the provisions in the French Civil Code governing general contract law are reformed: Ordonnance No.2016/131 of February 10, 2016. The equivalent provision of art.1134.1 of the Civil Code as promulgated appears in art.1103 of the Civil Code as reformed; the latter’s provisions on penalty clauses are contained in art.1231-5 of the Civil Code as reformed.

^{292.} *Société thermale d'Eugénie-les-Bains v Ministère de l'Economie, des Finances et de l'Industrie* (C-277/05) [2007] E.C.R. I-6415 at [24].

^{293.} Atiyah, *An Introduction to the Law of Contract*, 5th edn (1995), p.37.

^{294.} The Common Law (1881), p.301.


^{295.} See below, Ch.27.

^{296.} See below, para.26-008.


^{297.} See Consumer Rights Act 2015 ss.23 (goods), 43 (digital content) and 55 (services) and 58 (powers of the court) on which see Vol.II, paras 38-422 and 38-485, 38-518 and 38-520, and 38-541 and 38-543.

^{298.} In particular, a contrast is drawn here with the basis of awards of damages in tort: see below,

paras 1-193—1-195.

- [299.](#) See below, para.26-001. Such an award is sometimes said to be made to protect the injured party's expectation interest or performance interest. An award of damages may be made on other bases, in particular in order to protect what is known as the reliance interest of the injured party: below, paras 26-019—26-021.
- [300.](#) A practical as opposed to a legal restriction is that a claim for damages on the basis of an injured party's performance interest may be difficult to show: see below, para.26-024.
- [301.](#) See below, paras 26-107 et seq.
- [302.](#) See below, paras 26-079 et seq.
- [303.](#) See *A.G. v Blake* [2001] 1 A.C. 268 and below, paras 26-055—26-057.
- [304.](#) See Clerk & Lindsell on Torts, 21st edn (2014), paras 24-14 et seq.
- [305.](#) See *Lumley v Gye* (1853) 2 E.B. 216 and below, para.1-202.
- [306.](#) e.g. *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch. 106.
- [307.](#) cf. Hart, *The Concept of Law* (1961), pp.79-88, who distinguishes the situation where a person is under an *obligation* and where a person is *obliged*.
- [308.](#) This can be seen in those cases which hold that the consideration for a promise need not be adequate: below, paras 4-014—4-021.
- [309.](#) *Paradine v Jane* (1647) Aleyn 26.
- [310.](#) *Taylor v Caldwell* (1863) 3 B.S. 826; see below, Ch.23.
- [311.](#) [1956] A.C. 696, 720–729.
- [312.](#) e.g. *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 275; *British Movietonews Ltd v London and District Cinemas Ltd* [1951] 1 K.B. 190, 202 (reversed [1952] A.C. 166).
- [313.](#) [1956] A.C. 696, 720–721; and see below, para.23-011.
- [314.](#) [1956] A.C. 696.
- [315.](#) [1956] A.C. 696, 729; and see below, para.23-012.
- [316.](#) See below, para.23-013.
- [317.](#) *British Movietonews Ltd v London and District Cinemas Ltd* [1952] A.C. 166, 185; *Davis Contractors Ltd v Fareham Urban DC Ltd* [1956] A.C. 696; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] A.C. 93.
- [318.](#) See below, Ch.16.
- [319.](#) See below, paras 26-178 et seq. Another exception is to be found in the inability of the parties to a contract to fetter the discretion of the court in deciding whether to grant the remedy of specific performance: *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] B.C.L.C. 442, 451, 452.
- [320.](#)  *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [32] per Lord Neuberger of Abbotsbury P.S.C. and Lord Sumption J.S.C. (with

whom Lord Carnwath and Lord Clarke of Stone-cum-Ebony JJ.S.C. (at [291] agreed); and see similarly at [152] (Lord Mance J.S.C.) and [255] (Lord Hodge J.S.C., with whom Lord Toulson J.S.C. at [292] agreed on this issue). On this decision see paras 26-178 et seq.

- [321.](#) SI 1999/2083 implementing Directive 93/13 on unfair terms in consumer contracts. On the coming into force of the 2015 Act, the 1999 Regulations are revoked and replaced by the Act's own provisions implementing the directive in Pt 2. Pts 1 and 2 of the 2015 Act came into force on October 1, 2015: see generally Vol.II, paras 38-192 et seq.
- [322.](#) See below, paras 15-062 et seq.
- [323.](#) Unfair Contract Terms Act 1977 s.2(1).
- [324.](#) s.6(2).
- [325.](#) Unfair Contract Terms Act 1977 ss.2(2), 3, 6(3) and 11; and see below, paras 15-096 et seq.
- [326.](#) The most important exception is found in the “core exclusion” in the 1999 Regulations reg.6(2) on which see Vol.II, paras 38-224—38-241; the Consumer Rights Act 2015 s.64 makes similar provision on which see Vol.II, paras 38-363—38-369 respectively.
- [327.](#) Unfair Terms in Consumer Contracts Regulations 1999 reg.5(1).
- [328.](#) See below, paras 15-064 et seq.
- [329.](#) See Vol.II, paras 38-334 et seq.
- [330.](#) Consumer Credit Act 1974 ss.140A–140D as inserted by Consumer Credit Act 2006 ss.19-22. See Vol.II, paras 39-212—39-228.
- [331.](#) Consumer Credit Act 1974 s.140(B)(1) as inserted by Consumer Credit Act 2006 s.20.
- [332.](#) Consumer Credit Act 1974 s.140(A)(1) as inserted by Consumer Credit Act 2006 s.19. On these provisions see Vol.II, paras 39-213—39-228.
- [333.](#)  *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 W.L.R. 4222 at [10] per Lord Sumption J.S.C. (with whom Baroness Hale of Richmond D.P.S.C., Lord Clarke of Stone-cum-Ebony, Lord Carnwath and Lord Hodge J.J.S.C. agreed).

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(c) - A Principle of Good Faith or of Contractual Fairness?

No general principle of good faith

1-039

Use by EU legislation of the notion of good faith or “good faith and fair dealing” has made more prominent the question whether English law requires that a party to a contract exercise his rights in good faith, whether the right in question concerns the creation of a contract, its performance or its non-performance. ³³⁴ Such a question may be expressed in different ways and may use a variety of language: put negatively, it may be asked whether a party's *bad faith* should affect his exercise of rights or whether his “unconscionable conduct” in the creation or performance of a contract should affect its validity. ³³⁵ Put more positively, the question may be posed in terms of a general requirement or series of more particular requirements that a person act in good faith, reasonably and fairly. ³³⁶ In 1766, in the context of recognising the duty of disclosure in contracts of insurance, ³³⁷ Lord Mansfield C.J. stated that:

“The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon.” ³³⁸

⚠ Nevertheless, the modern view is that, in keeping with the principles of freedom of contract and the binding force of contracts, in English contract law there is no legal principle of good faith of general application, although some authors have argued that there should be. ³³⁹ ⚠ As Bingham L.J. famously observed:

“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.” ³⁴⁰

! The fact that at least some English judges have not been attracted by the idea of a general ground for relief for unfairness is also clear from judicial treatment of the attempt of Lord Denning M.R. to construct a general principle of “inequality of bargaining power” in *Lloyds Bank Ltd v Bundy*³⁴¹ and the House of Lords’ refusal in *Walford v Miles*³⁴² to imply a term in a “lock-out” agreement that a party to it be obliged to continue to negotiate in good faith. Indeed, in that case, Lord Ackner stated that:

“... the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations³⁴³ ... [and] ... unworkable in practice.”³⁴⁴

Similarly, Potter L.J. observed in denying relevance to a injured party's motive in termination of a contract, that:

“There is no general doctrine of good faith in the English law of contract. The [injured parties] are free to act as they wish, provided that they do not act in breach of a term of the contract.”³⁴⁵ !

And, very recently, Moore-Bick L.J. has observed that:

“the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some ‘general organising principle’ drawn from cases of disparate kinds ... There is ... a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.”

³⁴⁶ !

Moreover, according to Rix L.J. in *ING Bank NV v Ros Roca SA*:

“Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune.”³⁴⁷

1-040

! A very stark example of the preference of English judges for the strict application of the terms of a contract rather than tempering their effect on the grounds of fairness may be found in *Union Eagle Ltd v Golden Achievement Ltd*.³⁴⁸ There, the Privy Council refused specific performance of a contract for the sale of land to its purchaser who had paid the price 10 minutes late, time having been made expressly of the essence for performance of this obligation. It rejected the argument that the courts enjoyed a discretion to relieve a party from the contractual consequences of late performance (stemming from its jurisdiction to relieve from forfeitures in equity). According to Lord Hoffmann:

“The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority ... but also upon considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty.” ³⁴⁹

It is to be noted, though, that Lord Hoffmann recognised that “the same need for certainty is not present in all transactions”. ³⁵⁰

Moreover, the House of Lords has had occasion to hold that a party is not prevented from relying on the formal invalidity of a contract on the ground merely that it would be “unconscionable” to do so, in the absence of an unambiguous representation of the contract’s validity (not being the promise to be enforced itself) on which to base an estoppel. ³⁵¹ In the words of Lord Clyde:

“Without entering into questions of categorisation of different classes of estoppel, it seems to me that some recognisable structural framework must be established before recourse is had to the underlying idea of unconscionable conduct in the particular circumstances.” ³⁵²

Similarly, in *Cobbe v Yeoman’s Row Management Ltd* ³⁵³ (which concerned claims, inter alia, for proprietary estoppel and/or constructive trust arising from an oral agreement to develop another person’s land intended to be binding “in honour alone”), Lord Scott of Foscote observed that:

“... unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present ... To treat a ‘proprietary estoppel equity’ as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.” ³⁵⁴

Similarly, Lord Walker of Gestingthorpe considered that no cases cited before the House:

“... cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.” ³⁵⁵

Moreover, the courts do not generally allow a party to a contract to rely on public law defences (such as one based on its legitimate expectation) against its contractual partner where the latter’s claim is fundamentally for the enforcement of a commercial bargain, even if that partner was a public authority acting under statutory powers, though it has been accepted that they could do so where “a true public law defence vitiates a contractual claim”. ³⁵⁶ For this purpose, in the view of Lewison L.J., it cannot “usually be an abuse of power [in a public body] to exercise contractual rights freely conferred, even if the result may appear to be a harsh one”. ³⁵⁷

Good faith in other common law systems

1-041

As Lord Brown-Wilkinson has observed:

“... throughout the common law world it is a matter of controversy to what extent obligations of good faith are to be found in contractual relationships”, ³⁵⁸

and other common law systems have taken varying positions as to the relevance of good faith in the creation or the performance of contracts. ³⁵⁹ Perhaps the most extensive use is taken by lawyers in the United States, the Restatement (Second) of Contracts requiring that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement”. ³⁶⁰ In Australia too, courts and writers are generally quite open to the use of good faith, holding that an agreement to negotiate in good faith may be contractually enforceable, ³⁶¹ and willing to find implied terms requiring co-operation in performance, if not always good faith, between the parties. ³⁶² Moreover, although earlier Canadian cases show considerable hesitation in accepting a general duty of good faith in either negotiation or performance of contract, ³⁶³ the Canadian Supreme Court has recently ruled that there is “a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance” and that “as a further manifestation of this organizing principle of good faith, ... there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.” ³⁶⁴ However, the Canadian Supreme Court acknowledged that “the principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual selfinterest.” ³⁶⁵

Good faith in civil law systems

1-042

As Bingham L.J.’s observations quoted x above illustrate, ³⁶⁶ in modern discussions of the English position contrasts are often drawn with use of the concept of good faith in civil law systems, i.e. those whose private law has derived substantially from doctrines and rules of Roman law. The practical interest of this use is heightened by the increasing reference to good faith or “good faith and fair dealing” in European legislation in the area of contract law and the possibility of the Court of Justice of the EU drawing on its existing significance in the laws of the Member States in interpreting its significance there. ³⁶⁷ In this respect, though, it is helpful to note that, even restricting the discussion to the legal systems of western Europe, there are very considerable divergences in both the significances given to “good faith” and its supposed linguistic equivalents and in the uses to which they are put within each legal system. So, in some (but not in all) systems, good faith has provided the basis of some pre-contractual grounds of relief or compensation (notably, as regards duties of disclosure and information and breaking-off from negotiations); the addition of “supplementary” obligations to those expressly provided either by the parties or by legislation; the control of unfair contract terms; the toughening of the sanction of deliberate breaches of contract; the control of the exercise of a party’s contractual right; and relief on account of supervening circumstances or the substantively unfair nature of the contract as a whole. ³⁶⁸ In the result:

“... the notion of good faith (or its equivalents in the various languages ...) actually means different things both *within* a particular legal system and *between* the legal systems.” ³⁶⁹

And while in those legal systems which possess a general requirement of good faith:

“... good faith is not devoid of meaning, a pious hope or incantation or simply a supertechnique waiting to be put to whatever legal end a legal system wishes (though it may act as a super-technique if required) ... even where a particular meaning of good faith is accepted in two systems, this does not entail that they will take the same

view of what it in fact requires in any given situation.” ³⁷⁰

Moreover, the extent of the use to which a legal system puts a potentially corrective principle such as good faith depends on the extent to which it is dissatisfied with its more particular, established laws of contract, on the availability of other legal techniques which have a similar corrective possibility and on the perceived appropriateness of judicial as opposed to legislative intervention in the area in question. For English law, the difference between resort to the “piecemeal solutions” mentioned by Bingham L.J. and recognition of a legal *principle* of good faith in contract is likely to be that the latter would tend not merely to give a juridical unity to existing examples of situations in which good faith or fairness is considered relevant, but also to invite future courts to add further examples in new situations by way of application of the principle. ³⁷¹ Given the remarkably open-textured nature of good faith, this would lead to a very considerable degree of legal uncertainty, and could be seen as trespassing too far into the legislative domain.

“Good faith” and “good faith and fair dealing” in EU law

1-043

I EU legislation has had increased recourse to the concept of good faith in setting standards for various legal purposes. In this respect, a particularly prominent example is found in the reference to the “requirement of good faith” in the test of unfair terms in consumer contracts under the Directive of 1993. ³⁷² The concept of “good faith and fair dealing” has also been used in the directive on late payment in commercial transactions as part of its control on unfair terms. ³⁷³ Moreover, good faith has been used for legal purposes other than the control of unfair terms. So, the Financial Services Distance Marketing Directive of 2002 refers to the “principles of good faith in commercial transactions” in setting the information which a supplier must provide to a consumer prior to the conclusion of the contract ³⁷⁴ and the Unfair Commercial Practices Directive of 2005 sets as its general test of an “unfair commercial practice” in part by reference to the “requirements of professional diligence”, which is then itself defined as:

“the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.” ³⁷⁵

Finally, “good faith” is used by Commercial Agents Directive 1986 to set the standard of the agents’ duties to their principals, providing that the “agent must ... act dutifully and in good faith”. ³⁷⁶ Apart from these particular examples of the use of “good faith” by EU legislation, the European Court of Justice has referred to good faith as a “principle of civil law”, although in a way which is not explicitly clear whether this principle is a principle of EU law or merely of the national law before the court. ³⁷⁷ Support for the existence of such a general principle may be found in the earlier proposal for a Common European Sales Law, art.2 of which provided that:

“1.

Each party has a duty to act in accordance with good faith and fair dealing.

2.

Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.



3.

The parties may not exclude the application of this Article or derogate from or vary its effects.”³⁷⁸

The Proposed Regulation defined “good faith and fair dealing” as

“a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.”³⁷⁹

The proposed optional Common European Sales Law would have been available only to contracts for the sale of goods, the supply of digital content and related services,³⁸⁰ but many of its provisions were equally appropriate to contract law in general. Apart from the general principle of good faith and fair dealing, the proposed Common European Sales Law made specific use of good faith and fair dealing in its provisions governing duties of information in commercial contracts,³⁸¹ mistake,³⁸² fraud,³⁸³ contractual interpretation,³⁸⁴ the implication of terms³⁸⁵ and unfair contract terms.³⁸⁶ However, the

CESL Proposal was withdrawn by the Commission in 2014,³⁸⁷  and the legislative proposals put forward by the EU Commission instead are of much narrower scope than the CESL and do not refer to the concept of good faith.³⁸⁸ 



Good faith, fairness or reasonableness relevant exceptionally in English law

1-044

The following paragraphs set out a number of ways by which English law takes into account considerations of fairness which qualify the position established either by the general law or by a contract to govern the creation or the regulation of contractual relationships. Some of these refer explicitly to the notion of good faith, as is the case in contracts arising from fiduciary relations, contracts of partnership and of employment, and contracts of insurance (which are said to be of the utmost good faith) though the significance of this is much altered by recent legislation.³⁸⁹ Sometimes, the law gives effect to the notion of good faith by way of the application of an exceptional rule and sometimes by the implication of a term. Moreover, other qualifications on the strictness of the express terms of the contract or on contract law itself do not refer explicitly to good faith, preferring rather to use the language of fairness, equitableness or reasonableness.

(i) Duties to consider other party’s interest

1-045

 First, some particular types of contract attract rules (usually considered to be of law, though sometimes justified by reference to the implied intentions of the parties) which impose duties on one party to act other than in their own interest. This is most clearly the case in contracts under which a person assumes fiduciary duties, as is notably the case as regards agents, for a fiduciary must act honestly and must not allow his own interests to conflict with those of his principal.³⁹⁰ Indeed, the Commercial Agents (Council Directive) Regulations 1993, echoing the EU Directive that they implement, put the duties of agents to their principals expressly in terms of good faith.³⁹¹ So too, it has been said that partnership is a “contract of good faith”³⁹² and held that this means that prospective partners owe each other a duty to disclose all material facts of which each has knowledge and of which the other negotiating parties may not be aware.³⁹³ Another example may be found in relation to mortgages. Thus, the Privy Council has recognised that a mortgagee of property must exercise his powers in good faith and for the purpose of obtaining repayment of the debt, though given this purpose these powers may be exercised in such a way that disadvantageous consequences accrue to the borrower.³⁹⁴  And at common law the parties to contracts of

insurance owe each other duties of “the utmost good faith”, the most important consequence of which is the imposition of extensive obligations of disclosure, though this law has been partly abrogated and widely amended by statute. ³⁹⁵ Moreover, a contract may give rise to fiduciary duties in one party to the other in other circumstances. So, for example, in a contract of joint venture for the development of premises under which A provided finance and B managed the development and the disposal of its funds and the parties were to share the profits, B was held to owe a fiduciary duty of good faith to A in respect of the venture assets, with the result that B was prohibited from using or paying to itself any part of the proceeds except as regards the venture expenses or in accordance with the agreement. ³⁹⁶ On the other hand, while a contractual and a fiduciary relationship may co-exist between the same parties in this way, it has been said that:

“the courts must be careful not to distort the parties’ contractual bargain by the inappropriate introduction of equitable principles. In a commercial context wider duties will not lightly be implied. Fiduciary duties do not commonly arise outside the settled categories of fiduciary relationships, not least because independently contracting parties do not undertake normally to subordinate their own commercial interests to another.” ³⁹⁷

For this purpose, while a fiduciary must act in good faith, the existence of an express contract term requiring good faith in one or more parties does not necessarily mean that a fiduciary relationship exists. ³⁹⁸ Moreover, any fiduciary duties which do exist in a party or parties to a contract must “be moulded to fit the contractual framework”. ³⁹⁹

(ii) Express terms as to good faith or fairness

1-046

Sometimes, the express terms of a contract require one or both of the parties to act fairly or in good faith towards the other in a particular context or respect or more generally.

Express term to negotiate in good faith

1-047

In the case of good faith, the validity of such a term remains doubtful owing to the view expressed by Lord Ackner in *Walford v Miles* that a duty to negotiate in good faith is “unworkable in practice”. ⁴⁰⁰ This view has been followed by some later courts, which have seen an express agreement to negotiate in good faith as an (unenforceable) agreement to agree. ⁴⁰¹ However, a rather more liberal approach was taken to this question in *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)*. ⁴⁰² In that case the Court of Appeal considered that Lord Ackner’s observations were not appropriate (nor binding on it ⁴⁰³) to determine the validity of an express obligation to negotiate in good faith contained in a complex concluded contract which had been drafted by City of London solicitors. The term in question formed part of a contract supplementing a complex series of contractual arrangements relating to the purchase, “upgrading” and hire of an oil production platform, and provided for the negotiation in good faith of the cost of the upgrading of the platform for use on a particular oil field. On the loss by fire of the platform, the question arose, inter alia, of the applicability and enforceability of the term as to negotiation in good faith. Having held it inapplicable as a matter of construction, ⁴⁰⁴ Longmore L.J. nevertheless considered whether the term would have been enforceable. In this respect, he noted that there were three traditional objections to enforcing an obligation to negotiate in good faith:

“(1) ... that the obligation is an agreement to agree and thus too uncertain to enforce, (2) that it is difficult, if not impossible, to say where, if negotiations are brought to an end, the termination is brought about in good or in bad faith, and (3) that, since it can never be known whether good faith negotiations would have produced an agreement

at all or what the terms of any agreement would have been if it would have been reached, it is impossible to assess any loss caused by breach of the obligation.” ⁴⁰⁵

In the view of the learned Lord Justice, the first of these objections carried little weight in the context as the express obligation to negotiate in good faith was contained in a contract which it was accepted was generally enforceable; and the third objection could be overcome as the obligation to negotiate in question related to a limited aspect of the extra costs involved in the upgrade of the platform and so, if agreement were not reached, the court could itself ascertain the losses arising, these being likely to be the same as the reasonable cost of the upgrade. ⁴⁰⁶ Rather:

“It is the second objection that is likely to give rise to the greatest problem viz that the concept of bringing negotiations to an end in bad faith is somewhat elusive. But the difficulty of a problem should not be an excuse for the court to withhold relevant assistance from the parties by declaring a blanket unenforceability of the obligation.”

However, he added that in the absence of fraud, it would be unlikely that there would be a finding of bad faith. ⁴⁰⁷ Overall, therefore, given the inclusion of a term of “comparatively narrow scope” which had been “deliberately and expressly” entered by the parties to a professionally drafted commercial contract, Longmore L.J. concluded that it would be “a strong thing to declare [it] unenforceable” as this would “defeat the reasonable expectations of honest men”. ⁴⁰⁸ This approach has been followed at first instance so as to allow the enforcement of a contract term to seek to resolve any dispute or claim by “friendly discussions” for a period of four weeks before proceeding to arbitration. ⁴⁰⁹

Express term to act in good faith

1-048

! In a series of recent cases the courts have considered the proper approach to express terms which require one or more of the parties to a contract to act in good faith or with the utmost good faith. ⁴¹⁰

! In *Berkeley Community Villages Ltd v Pullen* ⁴¹¹ a property developer contracted with owners of land to use its expertise to maximise the potential for development of a substantial part of the land in return for a fee payable in certain circumstances. The contract contained an express term that:


“... [i]n all matters relating to this Agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times.”

Although the developer made efforts to promote the owners’ land (including towards obtaining a Planning Consent of considerable value), the owners wished to sell the land in question to a third party for a very large sum. The developer, which argued that the would-be sale price reflected the significant improvement in its planning prospects, applied for an injunction to prevent the owners from selling or otherwise disposing of the land. Morgan J. agreed to grant such an injunction, holding first that, as a matter of construction, the express term imposed on the owners:

“... a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also [required] faithfulness to the agreed common purpose and consistency with the justified expectations of the [developer].” ⁴¹²

He held, secondly, that in the circumstances the intended sale would amount to breach of the owners’ obligation of good faith on the grounds that: the developer had invested considerable time and incurred expense as a result of which the value of the land had been significantly enhanced; on the


terms of the contract, the owner was not obliged to pay a reasonable fee to the developer on the sale; in any event, the developer's expectations were that they would promote the land to obtain planning consent and sale in the open market (whereupon they would be entitled to a fee under the express terms of the contract); the third party buyer would not be bound by the terms of the contract; and, finally, the owner put forward no extenuating circumstances or hardship. ⁴¹³ *Berkeley Community Villages Ltd v Pullen* was considered in *Gold Group Properties Ltd v BDW Trading Ltd*. ⁴¹⁴ There A, a property developer, agreed by contract to construct dwellings on land owned by B; B was then to sell the dwellings, sharing the revenue with A. Minimum sale prices for each of the properties were agreed together with revenue sharing provisions. An express term of the contract required each of the parties "at all times to act in good faith towards the other and use all reasonable endeavours to ensure the observance by themselves of the terms of this Agreement ...". A failed to develop the land and was sued for damages for repudiatory breach of contract by B, to which A countered that B was in repudiatory breach of this express term requiring good faith by refusing to countenance any negotiation or revision of their agreement so as to address the difficulties caused by a fall in the property market and insisting that the minimum prices which it contained were for its benefit alone. ⁴¹⁵ Having cited the dictum of Morgan J. in *Berkeley Community Villages Ltd v Pullen* quoted above, Judge Stephen Furst Q.C. quoted the observations of Barrett J. in the Supreme Court of New South Wales in *Overlook v Foxtel* to the effect that:

"... the party subject to the obligation [of good faith] is not required to subordinate the party's own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become) ... 'nugatory, worthless or, perhaps, seriously undermined' ... the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary ... The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms." ⁴¹⁶ 

In applying this approach to the meaning of good faith on the facts before him, Judge Stephen Furst Q.C. concluded that,

"good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract." ⁴¹⁷


He therefore found for the landowners B, holding that the owners were not in breach of their obligation to act in good faith in refusing to accept or negotiate on the basis of the developer's (A's) offer to delay the development for two years or to revise the revenue sharing agreement in the contract. ⁴¹⁸

 The approach of Morgan J. in *Berkeley Community Villages Ltd v Pullen* was followed by Vos J. in *CPC Group Ltd v Qatari Diar Real Estate Investment Co*. ⁴¹⁹ This case concerned a number of issues arising from a contract of joint venture for the development of a large site in London, including alleged breaches of an express term which required its parties to:


"act in the utmost good faith towards each other in relation to the matters set out [in the contract] and [the defendant] shall use all reasonable but commercially prudent endeavours to enable the achievement of the various threshold events and Payment Dates [for the benefit of the claimant] ...".

In Vos J.'s view, in the context:


“the obligation of utmost good faith in the [contract] was to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Development Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties.” ⁴²⁰

While the learned judge did not require “to decide whether this obligation could only be broken if [the defendant or the claimant] acted in bad faith”, he considered that “it might be hard to understand, as Lord Scott said in *Manifest Shipping*, how, without bad faith, there can be a breach of a ‘duty of good faith, utmost or otherwise’”. ⁴²¹  On the facts, however, he found that there had been no breach of the obligation of utmost good faith as so interpreted. ⁴²²

1-049

 In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* ⁴²³ the Court of Appeal considered the significance of an express term in a detailed contract for the supply of catering and cleaning services for a seven-year period by a contractor to an NHS Trust at one of its hospitals. The term in question provided that:

“The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust ... to derive the full benefit of the Contract.”

At first instance, it had been held that “it accorded with commercial common sense for there to be a general obligation on both parties to co-operate in good faith” and that the Trust’s behaviour constituted breach of this obligation. ⁴²⁴ The Court of Appeal disagreed, reversing the decision below. First, on its proper construction the term did not create a general obligation to co-operate in good faith which “qualifies or reinforces all of the obligations of the parties in all situations where they interact”, but rather the term was “specifically focused upon the two purposes stated in the second half of that sentence”. ⁴²⁵  As Beatson L.J. observed, “care must be taken not to construe a general and potentially opened obligation such as the obligation to ‘co-operate’ or ‘to act in good faith’ as covering the same ground as other, more specific provisions, lest it cut across those more specific provisions and any limitations in them”. ⁴²⁶ Secondly, the Court of Appeal considered that “it is clear from the authorities that the content of a duty of good faith is heavily conditioned by its context” ⁴²⁷ and in the context the relevant term means that the “parties will work together honestly endeavouring to achieve the two stated purposes”. ⁴²⁸ Having so decided, the Court of Appeal held that the behaviour complained of by the contractor related to neither of the purposes set by the term; nor had there been any finding of dishonesty by the Trust. ⁴²⁹ As a result, the Trust was not in breach of its obligation under this express term.

Express term to act fairly

1-050

In a very different context, in *Gray v Marlborough College* ⁴³⁰ the Court of Appeal considered the significance of an express term in the standard contract between an independent school and the parent of one of its pupils which required the headmaster of the school to consult the pupil’s parents and generally to act fairly before requiring the pupil’s removal from the school. For this purpose, in the view of Auld L.J.:

“... fairness is a flexible principle and highly fact-sensitive in its application. That is so

whether a duty to act fairly is one of public law or contractual in nature. Much depends on the context of and procedural framework in which a decision is made, the nature of the decision, who made it, how it was made, what is at stake and the contribution, if any, by those affected by it to the chain of events leading to it.” ⁴³¹

As will be seen, the courts have sometimes also seen some *implied* contractual duties to act fairly as analogous to public law duties, though sometimes this analogy has been rejected. ⁴³²

(iii) Contractual interpretation

1-051

⚠ Considerations of fairness and reasonableness are more generally relevant to the way in which English courts treat the consequences of making contracts in several different ways. First, the fairness or reasonableness of the result reached is clearly relevant to the interpretation of the express terms which the parties have made. The courts have long made clear that, in general, they should look to the intention of the parties rather than the strict letter of a contract’s stipulations ⁴³³ and in interpreting their intention, the courts look at the factual matrix of the contract:

“... modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result.” ⁴³⁴

As Lord Reid earlier observed, “[t]he more unreasonable the result the more unlikely it is that the parties can have intended it”. ⁴³⁵ The Supreme Court has recently confirmed in the context of a commercial guarantee that “[i]f there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”, although it added that “[w]here the parties have used unambiguous language, the court must apply it”. ⁴³⁶ Furthermore, while the Supreme Court in *Arnold v Britton* recently reaffirmed that the meaning of words in a contract must be seen in their “documentary, factual and commercial context”, including “commercial common sense”, ⁴³⁷ ⚠ the latter and the surrounding circumstances “should not be

invoked to undervalue the importance of the language of the provision which is to be construed” ⁴³⁸

⚠: “[t]he purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed”. ⁴³⁹ ⚠

On the other hand, other principles governing the relationship of the parties also find their formal source in the construction of the contract: so, for example, the courts accept that, in general, a party in default under a contract cannot take advantage of his own wrong, ⁴⁴⁰ an idea which in some other legal systems is put in terms of the adage *nemo auditur turpitudinem suam allegans*. Another example of English law’s occasional imposition of a requirement of fairness may be found in the situation where a contract on its terms provides that a particular act of one of its parties (or their agent) will result in or affect a liability in the other: here, the courts have held that this act must be made fairly to have this effect. This result has been long established in the context of the issuing of certificates by an owner’s agent (for example, his architect) in respect of building work having been properly executed: here, the certification holds good only if the agent acts fairly as between the two parties to the contract. ⁴⁴¹ Similarly, where a charterparty provided that the ship’s master’s “notice of readiness” to receive cargo would, after a delay, start “notice time” running so as to allow its owner to claim demurrage, it was observed that:

“... a notice of readiness proved to be given by the master or chief officer with knowledge that it was untrue, that is to say in the knowledge that the vessel was not then ready would be ineffective to start time running. There must by implication be a

requirement of good faith.” ⁴⁴²

(iv) Implied terms

1-052

⚠ As has been indicated, ⁴⁴³ the common law often resorts to the implication of a term in a contract in a case which could otherwise be considered to be a matter of “good faith in the performance of a contract”. Thus, for example, the House of Lords accepted that a term is to be implied in contracts of employment to the effect that the:



“... employer [will] not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.” ⁴⁴⁴


The courts sometimes refer to this as an implied term requiring good faith and loyalty in both employer and employee. ⁴⁴⁵ Sometimes, indeed, an implied term imposes a duty on an employer to act positively in the interests of the employee. So, for example, in *Scally v Southern Health and Social Services Board*, ⁴⁴⁶ the House of Lords held that an employer who knew that its employees had a valuable right under the terms of their contracts of employment (here, relating to the enhancement of their pension rights), in a situation where it was reasonable for the employee to be unaware of that right (as it stemmed from a collective agreement), was under a duty to take reasonable steps to inform those employees of their rights. And again in the context of employment, it has been accepted that where an employee bonus scheme gives the employer a very wide discretion as to the payment and size of bonus, this discretion must nevertheless be exercised bona fide, rationally and not perversely. ⁴⁴⁷ An example drawn from another context may be found in the courts’ implication of a term in a contract of sale of the goodwill of a business that the seller is not entitled to solicit the business’s former customers, it being “not an honest thing to pocket the price and then to recapture the subject of sale”, ⁴⁴⁸ though the courts do not go further and accept that the seller is not entitled to compete with his purchaser in the absence of express provision. ⁴⁴⁹ And where a buyer has returned defective goods to their seller for inspection and, if possible, repair (it not being clear as to the nature of the problem), and the seller has repaired them, the latter has been held to bear an implied obligation to inform the buyer about the nature of the defect and what has been done to repair it, as this information was necessary in the circumstances of the case for the buyer to make a properly informed choice between accepting and rejecting the goods as it was entitled to do under the contract of sale. ⁴⁵⁰ And the courts have been willing to imply duties of honesty and good faith in contracts for joint business ventures and similar types of contract. ⁴⁵¹ On the other hand, it has been said that a court should not imply a term requiring good faith in a party to a contract where it would be “inconsistent with the express terms which set out the parties’ mutual obligations”, though this leaves a duty of honesty. ⁴⁵² Moreover, even in those types of contract which involve “a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty”, in which the courts may be willing to imply a duty of good faith, this will depend on the terms of the particular contract ⁴⁵³ ⚠: “an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it”. ⁴⁵⁴ ⚠




A general implied term to perform in good faith?

1-053

⚠ In *Yam Seng Pte Ltd v International Trade Corp Ltd* ⁴⁵⁵ ⚠ Leggatt J. considered, obiter, that a contract for a licence to distribute and for the supply of branded goods contained an implied term of

good faith in its performance which had the significance in the context of not *knowingly* providing false information on which the other party was likely to rely. ⁴⁵⁶ While this decision may be fitted easily into established case-law on the implication of terms of good faith in particular circumstances or as regards particular types of contract, ⁴⁵⁷ in the course of a lengthy discussion of implied terms as to good faith, Leggatt J. appeared on occasion to go further and argue in favour of the implication of a term requiring good faith in performance not merely in what he referred to as “relational contracts” ⁴⁵⁸ but in most, if not all, commercial contracts on the ground of the expectations of their parties. ⁴⁵⁹ In his view, for this purpose, while good faith may have the significance of honesty, “not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include ‘improper’, ‘commercially unacceptable’ or ‘unconscionable’”. ⁴⁶⁰  With respect, the implication of such an implied term applicable generally (or even widely) to commercial contracts would undermine to an unjustified extent English law’s general position rejecting a general legal requirement of good faith. ⁴⁶¹ Subsequent judicial comments on Leggatt J.’s discussion have suggested that it should not be seen as establishing a principle of general application to all commercial contracts, but rather as recognising a particular example of a contract where a term as to good faith (meaning honesty) should be implied. In particular, in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* Jackson L.J. noted that, while there is no general doctrine of “good faith” in English contract law, a duty of good faith may be implied by law as an incident of certain categories of contract, citing *Yam Seng Pte Ltd* as an example. ⁴⁶²  Similarly, in *Greenclose Ltd v National Westminster Bank Plc* Andrews J. observed that:

“there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms’ length.” ⁴⁶³ 

In Andrew J.’s view, *Yam Seng Pte Ltd* is not to be regarded as laying down any general principle applicable to all commercial contracts, but rather “the implication of an obligation of good faith is heavily dependent on the context,” as Leggatt J. expressly recognised. ⁴⁶⁴  Moreover, the approach of the Supreme Court to the implication of terms in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* ⁴⁶⁵  may lead to a greater reluctance in the courts to imply terms requiring good faith in at least some commercial contracts: as Lord Neuberger of Abbotsbury P.S.C. there observed, “a term should not be implied into a detailed commercial contract merely because it appears fair”. ⁴⁶⁶ 

Implied restrictions on broad contractual powers

1-054

The courts have also sometimes used the implication of a term to restrict the ambit of a unilateral discretionary power conferred on one of the parties by the contract. ⁴⁶⁷ In *Paragon Finance Plc v Nash* ⁴⁶⁸ a mortgage company possessed a power expressed in very general terms to vary the interest rates in a contract of consumer credit. Drawing on analogies from public law, the Court of Appeal held that this power was “not completely unfettered” ⁴⁶⁹ and implied a term that “it should not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily”. ⁴⁷⁰ While the court was prepared to imply a term that the interest rate would not be set in a way that “no reasonable lender, acting reasonably, would do”, this was not the same as saying that the lender could not impose unreasonable rates. ⁴⁷¹ On the other hand, in *Paragon Finance Plc v Pender* ⁴⁷² it was held that this approach should not mean:

“... that a lender may not, *for a genuine commercial reason*, adopt a policy of raising interest rates to levels at which its borrowers generally, or a particular category of its borrowers, may be expected to consider refinancing their borrowings at more favourable rates of interest offered by other commercial lenders. Save as otherwise

expressly agreed with its borrowers, a commercial lender is ... free to conduct its business in what it genuinely believes to be its best commercial interest.” ⁴⁷³

In a different context, in *Lymington Marina Ltd v MacNamara* ⁴⁷⁴ the Court of Appeal accepted that it should imply some limitations on the exercise of a contractual power in one of the parties drawn in very broad terms, but it considered that the standard to be applied should not be too onerous, nor should it rest on public law principle. ⁴⁷⁵ The case concerned a contractual licence to berth a yacht at a marina, the express terms of which provided that the licensee was entitled to authorise a third party to exercise his rights for a period of between one month and one year “provided that such party first be approved” by the licensor who operated the marina. In these circumstances, the Court of Appeal was clear that the grounds on which approval of the sub-licence might be withheld were limited to those relating to the sub-licensee himself and his proposed use, and more generally could not be “wholly unreasonable” or be made “arbitrarily”, “capriciously” or “in bad faith”. ⁴⁷⁶ However, it refused to imply a term in the contract that the approval should be “objectively justifiable” as this was neither so obvious that the parties would not have thought it necessary to mention nor necessary to give the contract business efficacy. ⁴⁷⁷

❗ Similarly, in *Socimer International Bank Ltd v Standard Bank London Ltd* ⁴⁷⁸ in the context of an express contractual discretion in a seller of securities on a forward basis to value assets on default of payment by the buyer, Rix L.J. observed that:

“... a decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time.” ⁴⁷⁹


Rix L.J. agreed with the observation of Laws L.J. in the course of argument that:

“... pursuant to the *Wednesbury* rationality test, the decision remains that of the decision maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself.” ⁴⁸⁰


The Court of Appeal therefore rejected the contention that the seller’s decision as to valuation of the assets had to be exercised with reasonable care (an implied term which was both unnecessary and of uncertain content in the context), ⁴⁸¹ rejecting also for this purpose the analogy (accepted by the court below) between the position of the parties to the commercial contract before it and the relationship between a mortgagor and a mortgagee. ⁴⁸² And in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* ⁴⁸³ ❗ the Court of Appeal considered whether the decision-making of a party under particular terms of its contract was impliedly subject to a term that it should not do so “in an arbitrary, capricious or irrational manner”. Jackson L.J. (with whom Lewison and Beatson L.J.J. agreed) reviewed the authorities that accepted such a qualification on the exercise of a contractual discretion, notably *Socimer International Bank Ltd v Standard Bank London Ltd*, ⁴⁸⁴ ❗ but distinguished the contractual terms with which these cases dealt and the relevant terms before the court:

“[a]n important feature of the ... authorities is that in each case the discretion does not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking


into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so.”⁴⁸⁵


In the contract before the Court of Appeal, an NHS Trust had agreed to employ the respondent to supply catering and cleaning services for seven years for one of its hospitals. Under the contract, the Trust was entitled to award “service failure points” in respect of failures in the provision of the services, the contract specifying both how these points should be calculated and their consequences for the contractor in terms of deductions from its remuneration and possible termination of the contract. This being the case, the Court of Appeal held that the contract left no room for discretion in the calculation of the “service failure points” nor in their deduction from the remuneration and, as a result, there could be no implied term not to act in relation to this calculation or deduction in an arbitrary, irrational or capricious manner when assessing these matters.⁴⁸⁶ As Lewison L.J. observed, while “it was up to the Trust to decide whether or not to levy payment deductions; and whether or not to award [service failure points]”, in doing so “[e]ither the Trust was right or wrong in its application of the contract terms to the facts of the case”.⁴⁸⁷ In these circumstances, the Trust had no discretion to exercise in these matters.⁴⁸⁸ 

1-054A

 Most recently, in *Braganza v BP Shipping Ltd* an employer had a power under the contract of employment to determine the facts surrounding the death of its employee while serving on its vessel at sea; the employer had decided that he had committed suicide, with the result that no death-in-service payments were payable to his widow under the contract.⁴⁸⁹ The Supreme Court was agreed on the principles applicable. According to Lady Hale D.P.S.C.:




“Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.”⁴⁹⁰

In this respect, the Supreme Court approved Rix L.J.’s view of the authorities in *Socimer International Bank Ltd*⁴⁹¹ and accepted the parallel earlier drawn with the control of decision-making by public bodies under a statutory or prerogative power,⁴⁹² while noting the “understandable reluctance” of the courts to adopt the “fully developed rigour of the principles of judicial review of administrative action in a contractual context” and their difficulty in articulating the difference.⁴⁹³ In this particular context the Supreme Court held that the contractual power in the employer to decide the facts surrounding the employee’s death was subject to an implied term that “the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose”.⁴⁹⁴ This meant that “both limbs of the *Wednesbury* formulation in the rationality test” applied, i.e. imposing requirements both as to the decision-making process (considerations properly to be taken into account and ones not to be taken into account)⁴⁹⁵ and as to the outcome (the result not being “so outrageous that no reasonable decision-maker could have reached it”).⁴⁹⁶  In the case before them, the majority of the Supreme Court held that the employer should not simply have accepted the conclusion of its investigators’ report (whose purpose

was to determine if its systems could be improved) in deciding whether its employee had committed suicide, and had relied on insubstantial evidence and had failed to take all relevant matters into account.⁴⁹⁷ As a result, the decision of the employer could not stand and the employee's widow was entitled to the death-in-service payment.⁴⁹⁸ 

(v) Reasonableness and legitimate interest in relation to remedies for breach

1-055

 A number of the rules governing remedies for breach of contract take into account what is reasonable and this can leave considerable room for a court to assess the fairness or appropriateness of the remedy. This is the case notably as regards restrictions on the availability of damages based on the cost of re-instatement,⁴⁹⁹ the injured party's duty to mitigate⁵⁰⁰ and the law of remoteness of damage.⁵⁰¹ Furthermore, the ability of an injured party faced with a repudiatory breach by the other party to affirm, perform and recover the price is subject to the injured party having a legitimate interest in doing so.⁵⁰²  And the Supreme Court has held that a contract term stipulating payment of a sum of money on breach of contract will be a penalty clause at common law (and so unenforceable) only if the term does not serve a legitimate interest and if in the circumstances its amount is extravagant, exorbitant or unconscionable.⁵⁰³  Finally, the availability of some of the special remedies for consumers in respect of breach of the statutory (implied) terms (for example of the satisfactory quality of goods) require consideration of the proportionality of the remedy as compared to other possible remedies.⁵⁰⁴

(vi) Equitable and statutory discretions

1-056

General considerations of fairness are also relevant to the availability of certain equitable doctrines which are significant in the contractual context, notably promissory and proprietary estoppel,⁵⁰⁵ as well as to the equitable remedies of specific performance and injunction which are sometimes available on breach.⁵⁰⁶ To these, modern statutes have added discretions given to the courts to act according to the dictates of justice, equity or reasonableness (as the case may be) in relation to the exercise of other remedies by parties to contracts, notably, in relation to rescission for misrepresentation⁵⁰⁷ and termination for breach in contracts of sale of goods⁵⁰⁸ and also in relation to contracts which have been frustrated.⁵⁰⁹


^{334.} Above, para.1-038.



^{335.} See below, paras 8-130 et seq.

^{336.} art.1:201(1) of the Principles of European Contract Law provides that "[e]ach party must act in accordance with good faith and fair dealing". cf. the provision in the proposed Common European Sales Law (above, para.1-013), art.1(1) which provides that "Each party has a duty to act in accordance with good faith and fair dealing": see further below, para.1-043.

^{337.} See Vol.II, paras 42-030 et seq.

^{338.} *Carter v Boehm* (1766) 3 Burr. 1905, 1910.




^{339.}  Bridge (1984) 9 Can. Bus. L.J. 385; Collins, *The Law of Contract*, 4th edn (2003), Chs 13 and 15; Finn in Finn, *Essays on Contract Law* (1987), p.104; Lücke in Finn, *Essays on Contract Law*, p.155; Steyn (1991) Denning L.J. 131; Carter and Furmston (1994) 8 J.C.L. 1; Brownsword (1994) 7 J.C.L. 197; Staughton (1994) 7 J.C.L. 193; Beatson and Friedmann, *Good Faith and*


- Fault in Contract Law* (1995), especially the essays by Beatson and Friedmann, p.3; Cohen, p.25; McKendrick, p.305; Friedmann, p.399; Brownsword in Deakin and Michie, *Contracts, Co-operation and Competition* (1997), p.255; Stein (1997) 113 L.Q.R. 433; Teubner (1998) 6 M.L.R. 11; Brownsword [1997] C.L.P. 111; McKendrick, *Contract Law*, 6th edn (2014), Ch.15; Smith, *Atiyah's Introduction to the Law of Contract*, 6th edn (2006), pp.164-166. Burrows, *A Restatement of the English Law of Contract* (2016) considers that it remains clear that there is no free-standing rule imposing a duty to perform in good faith in English law, though notes that English law sometimes comes to the same result by implying a term: commentary to s.5, p.50; commentary to ss.15(3)–(4), p.93; on the latter, see Vol.I, paras 1-052—1-054A.
340. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433, 439. Bingham L.J. gave as illustrations of these solutions equity's striking down of unconscionable bargains (see below, paras 8-130 et seq.), statutory control of exemption clauses (see below, paras 15-066 et seq.) and hire-purchase (see Vol.II, paras 39-356 et seq.) and the ineffectiveness of penalty clauses (see below, paras 26-178 et seq.). See similarly, *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 A.C. 507 at [17] (Lord Bingham of Cornhill), on which see Vol.II, para.38-249.
341. [1975] Q.B. 326, 339; and see below, para.8-143.
342. *Walford v Miles* [1992] 2 A.C. 128, 138. cf. *Little v Courage Ltd*, *The Times*, January 19, 1994; *Cobbe v Yeomans Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964 at [4]. The CA's decision on the facts applying the doctrine of proprietary estoppel was overturned by the House of Lords: see [2008] UKHL 55 and below, paras 4-161—4-162.
343. [1992] 2 A.C. 128, 138. The agreement was held unenforceable on the grounds of uncertainty, and see below, paras 2-143—2-145.
344. [1992] 2 A.C. 128, 138. In *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 772 (affirmed on other grounds [1990] 2 All E.R. 947), Slade L.J. rejected Steyn J.'s formulation of the content of the ambit of the duty of disclosure on insurers based simply on the question "did good faith and fair dealing require a disclosure?" on the ground that: "[I]n the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent". See further Vol.II, paras 42-030 et seq.
345.  *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* Unreported April 8, 1998 CA (Civ Div). See similarly *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977, [2004] 2 Lloyd's Rep. 352 at [113]; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [30]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105]; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All E.R. (Comm) 483 at [45]. cf. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526 at [121]–[154] where Leggatt J. discussed, obiter, the arguments in favour of and against the recognition of an apparently general implied duty of good faith in the performance of contracts. On the latter see below, para.1-053.
346.  *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45]. The judge at trial was Leggatt J., who had earlier given judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526, discussed in Vol.I, para.1-053.
347. [2011] EWCA Civ 353, [2011] All E.R. (D) 39 (Apr) at [92]. Having stated this as a general rule, Rix L.J. held that, in the circumstances, the relationship between the parties and the unconscionable conduct of the silent party justified the latter being estopped from relying on the contract as concluded: at [93]–[107], [111]. Carnwath L.J. agreed on the basis of estoppel by convention ([66]–[71]). Stanley Burton L.J. agreed with both judgments: [2011] EWCA Civ 353 at [76].




- [348.](#) [1997] A.C. 514.
- [349.](#) [1997] A.C. 514 at 518.
- [350.](#) [1997] A.C. 514 at 519. cf. *O'Neill v Phillips* [1999] 1 W.L.R. 1092, 1098 where Lord Hoffmann observed in the context of contracts of partnership and a company's duty not to engage in conduct "unfairly prejudicial" to its members that: "One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith." See also the significance of "unconscionability" in the context of the law of duress in *Borrelli v Ting* [2010] UKPC 21, [2010] Bus. L.R. 1718, below, para.8-011.
- [351.](#) *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 All E.R. 615 especially at [16]–[20], [51] and see below, para.5-039.
- [352.](#) [2003] 2 All E.R. 615 at [34].
- [353.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752, on which see below, paras 4-161—4-162.
- [354.](#) [2008] UKHL 55 at [16].
- [355.](#) [2008] UKHL 55 at [81].
- [356.](#) *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [29] per Lewison L.J. (with whom Treacy and Gloster L.J.J. agreed) (local authority able to enforce covenant in lease as to re-conveyance of freehold transferred under option on the failure of a condition as to obtain timely planning permission).
- [357.](#) *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123 at [49], who noted (at [50]) that in the case before the court, private law mechanisms which preclude a person from relying on his strict legal rights such as promissory estoppel had not been pleaded.
- [358.](#) *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All E.R. (Comm) 849 (PC) at [54].
- [359.](#) See also works noted above, at n.299.
- [360.](#) Restatement (Second) of Contracts para.205. cf. Uniform Commercial Code s.1-203 and see for a general introduction Summers in Zimmermann and Whittaker, *Good Faith in European Contract Law* (2000), Ch.4; White and Summers, *Uniform Commercial Code*, 6th edn (up to date to 2011), Vol.1, Ch.4.
- [361.](#) *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 N.S.W.L.R. 1 at 21-27.
- [362.](#) Carter, *Contract Law of Australia*, 6th edn (2012), Ch.2.
- [363.](#) Waddams, *The Law of Contract*, 6th edn (2010), paras 17, 210, 498-508, 550.
- [364.](#) *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 495 at [33] per Cromwell J. giving the judgment of the S.C. of Canada, which reviews earlier Canadian cases and wider common law literature. An "organizing principle" was defined by the court as one which "states in general terms a requirement of justice from which more specific legal doctrines may be derived" and is "not a freestanding rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations": *Bhasin v Hrynew* at [64]. However, the list of these specific legal doctrines "is not closed": *Bhasin v Hrynew* at [66]. The Supreme Court of Canada saw the duty of honest performance as a "general doctrine of contract law" rather than as an implied term, thereby operating "irrespective of the intentions of the parties": *Bhasin v Hrynew* at [74]. As a result, the duty was mandatory and was not affected by an express entire agreement clause in the contract, though there may be circumstances in which it could be influenced by the agreement of the contracting parties: *Bhasin v Hrynew* at [75]–[78].

- [365.](#) 2014 SCC 71 at [70].
- [366.](#) Above, para.1-039.
- [367.](#) Below, para.1-043.
- [368.](#) For an overview see Whittaker and Zimmermann in Zimmermann and Whittaker, *Good Faith in European Contract Law* (2000), Ch.1.
- [369.](#) Whittaker and Zimmermann at p.690 and cf. *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 A.C. 507 at [17], per Lord Bingham of Cornhill (Member States “have no common concept of ... good faith”).
- [370.](#) Whittaker and Zimmermann at p.699.
- [371.](#) Whittaker and Zimmermann at pp.687–690. cf. Supreme Ct of Canada in *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 495 at [64], noted above, n.321.
- [372.](#) art.3(1), implemented by the Unfair Terms in Consumer Contracts Regulations (SI 1999/2083) reg.5(1) and (as regards contracts made on or after October 1, 2015) the Consumer Rights Act 2015 s.62(4) (on which see Vol.II, paras 38-242—38-251 and 38-358—38-359 respectively).
- [373.](#) Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. 48/1 art.7(1)(a) (“any gross deviation from good commercial practice, contrary to good faith and fair dealing” relevant to whether a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is grossly unfair to the creditor). Directive 2011/7/EU is implemented in UK law by the Late Payment of Commercial Debts Regulations 2013 (SI 2013/395) amending the Late Payment of Commercial Debts (Interest) Act 1998, on which see below, paras 26-232—26-234.
- [374.](#) Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16, art.3(2) implemented by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.7(2). Article 3(2) provides that the information to be supplied (as earlier specified by art.3(1)): “the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors”. On these Regulations see Vol.II, para.38-131.
- [375.](#) Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] O.J. L149/16 art.5(2) and art.2(h) implemented by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) regs 3(3) and 2(1) “professional diligence”. The 2005 Directive prohibits unfair commercial practices business-to-consumer but does not itself affect “contract law” in the sense of the rules governing the relative rights of the contracting or would-be contracting parties (including in relation to the formation and validity of the contract): 2005 Directive art.3(2) and see Vol.II, paras 38-145 and 38-148. However, the UK government has given contractual significance to some of the UK provisions implementing the directive in the 2008 Regulations by creating “rights to redress” for the consumer in respect of *certain* unfair commercial practices (misleading actions and aggressive practices): the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) amending the 2008 Regulations). In doing so, the consumer is not given any rights against the trader in respect of a commercial practice unfair under the general test which refers to professional diligence and, therefore, to good faith: 2008 Regulations reg.27A(4)(a), 27B and see Vol.II, paras 38-160 et seq.
- [376.](#) Directive 86/653 on the co-ordination of the laws of the Member States relating to selfemployed commercial agents [1986] O.J. L382/17: art.3(1), implemented in UK law by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) reg.3(1) and see *Rosetti Marketing Ltd v Diamond Sofa Co Ltd* [2011] EWHC 2482 (QB), [2012] 1 All E.R. (Comm) 18 at [41]–[42]




and Vol.II, paras 31-017 and 31-118.

- [377.](#) *Messner v Krüger (C-489/07) [2009] E.C.R. I-7315 para.26. cf. Case 464/01 Gruber v Bay Wa AG [1997] E.C.R. I-3767 at [53] where the European Court used good faith in the application of the special jurisdiction provisions in art.13 of the Brussels Convention.*
- [378.](#) Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Com(2011) 635 final Annex I, CESL Proposal Annex I, art.2 CESL. On the CESL Proposal generally, see above, paras 1-013.
- [379.](#) Proposal for a Regulation, n.335, art.2(b).
- [380.](#) CESL Proposal art.1 above, para.1-013.
- [381.](#) CESL Proposal Annex I, art.23(2) CESL.
- [382.](#) CESL Proposal Annex I, art.48 CESL.
- [383.](#) CESL Proposal Annex I, art.49 CESL.
- [384.](#) CESL Proposal Annex I, art.59 CESL.
- [385.](#) CESL Proposal Annex I, art.68 CESL.
- [386.](#) CESL Proposal Annex I, arts 83, 86 and 170 CESL.
- [387.](#)  European Commission, Annex 2 to the Commission Work Programme 2015 Com(2014) 910 final, p.12. See also the Communication from the Commission, A Digital Single Market Strategy for Europe, 2015 COM(2015) 192 final, pp.4–5.
- [388.](#)  Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2015) 635 final and Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634.
- [389.](#) Consumer Insurance (Disclosure and Representations) Act 2012; Insurance Act 2015 and see Vol.II, paras 42-030 et seq.
- [390.](#) See Vol.II, paras 31-118 et seq.
- [391.](#) SI 1993/3053 reg.3(1), implementing Directive 86/653 art.3(1), above, para.1-042.
- [392.](#) *O'Neill v Phillips [1999] 1 W.L.R. 1092, 1098, per Lord Hoffmann and see Blisset v Daniel (1853) 10 Hare 493; Floyd v Cheney, Cheney & Floyd [1970] Ch. 602, 608. cf. the position of parties to a contract setting up a limited liability partnership: F & C Investments (Holdings) Ltd v Barthelemy [2011] EWHC 1731 (Ch), [2012] 3 W.L.R. 10 at [207]-[254] (reversed on costs order [2012] EWCA Civ 843).*
- [393.](#) *Conlon v Simms [2006] EWCA Civ 1749, [2007] 3 All E.R. 802 at [127].*
- [394.](#)  *Downsview Ltd v First City Corp Ltd [1993] A.C. 295, 312 and see also Albany Home Loans Ltd v Massey [1997] 2 All E.R. 609, 612-613; Alpstrem AG v PK Airfinance Sarl [2015] EWCA Civ 1318, [2016] 2 P. & C.R. 2 at [115].*
- [395.](#) Consumer Insurance (Disclosure and Representations) Act 2012; Insurance Act 2015 especially ss.5 and 14, and see Vol.II, paras 42-030 et seq.
- [396.](#) *Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910, [2014] 1 B.C.L.C. 545 at [64] and [93].*

- [397.](#) *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), 153 Con. L.R. 203 at [126], per Carr J., referring, inter alia, to *Re Goldcorp Exchange Ltd (In Receivership)* [1995] 1 A.C. 74 at 98 (Lord Millett); *Ross River Ltd v Cambridge City Council* [2008] 1 All E.R. 1004 at [197] (though the court held that there was a fiduciary duty on the facts); *F & C Alternative Investment (Holdings) Ltd v Barthelemy* [2011] EWHC 1731, [2013] Ch. 613 at [223] and [225]; *John Youngs Insurance Services Ltd v Aviva Insurance Service UK Ltd* [2011] EWHC 1515 (TCC), [2012] 1 All E.R. (Comm) 1045 at [94]; *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910, [2014] 1 B.C.L.C. 545 at [40], [56] and [59] (upholding a fiduciary duty of good faith as consistent with the contract made).
- [398.](#) *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) at [133].
- [399.](#) *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) at [123], referring, inter alia, to *Hospital Products Ltd v United States Surgical Corp* (1984) 156 C.L.R. 41 at [70] (HC Aus, Mason J.); *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 206 (on which see below, para.1-166).
- [400.](#) [1992] 2 A.C. 128.
- [401.](#) *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 especially at [44]-[46].
- [402.](#) [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121. In *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (Comm) at [23] Leggatt J. observed that, "notwithstanding the decision of the House of Lords in *Walford v Miles*" it is now generally accepted that a binding contract to regulate the parties' negotiations "may impose an obligation on one or both parties to conduct negotiations in good faith", citing *Petromec Inc* as an example.
- [403.](#) [2005] EWCA Civ 891 at [121].
- [404.](#) [2005] EWCA Civ 891 at [45], [112]-[113] and [124].
- [405.](#) [2005] EWCA Civ 891 at [117].
- [406.](#) [2005] EWCA Civ 891 at [117]. cf. *Shaker v Vistajet Group Holding SA* [2012] EWHC 1329 (Comm) at [17] where the court distinguished this aspect of the position in *Petromec Inc* on the basis that in the latter case there were objective criteria by which the extra costs could be assessed in the absence of an agreement of which the obligation to negotiate in good faith was the object.
- [407.](#) [2005] EWCA Civ 891 at [119].
- [408.](#) [2005] EWCA Civ 891 at [121] echoing *Steyn* (1997) 113 L.Q.R. 433.
- [409.](#) *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104, [2015] 1 W.L.R. 1145 especially at [26], Teare J. considering that such a contract term imports an obligation to resolve disputes in good faith at [51]-[52], [63]-[64] and reviewing extensively the authorities.
- [410.](#)  See also Peel in Burrows and Peel, *Contract Formation and Parties* (2010) Ch.2. See also *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), [2017] 1 Lloyd's Rep. 476 at [62]-[72] (Leggatt J.) (express contractual obligation to use all reasonable endeavours to achieve particular result held enforceable, though not broken on the facts).
- [411.](#) [2007] EWHC 1330 (Ch), [2007] 3 E.G.L.R. 101.
- [412.](#) [2007] EWHC 1330 (Ch) at [97], relying in particular on the judgment of French J. in *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 at [92]-[93] (decided outside the context of contract, though itself quoting the US Restatement of Contracts (2nd) para.205).

- [413.](#) [2007] EWHC 1330 (Ch) at [109].
- [414.](#) [2010] EWHC 1632 (TCC), [2010] All E.R. (D) 18 (Jul).
- [415.](#) [2010] EWHC 1632 (TCC) at [74].
- [416.](#)  [2002] NSWSC 17; (2002) Aust. Contract R. 90-143 at [65]-[67]; [2010] EWHC 1632 (TCC) at [90]. As was noted in *Gold Group Properties Ltd*, this dictum was quoted with approval by Hasluck J. in the Supreme Court of Western Australia in *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286 at 357. See also *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 at [401] per Simon Bryan QC (“good faith does not normally require a party to surrender contractual rights”).
- [417.](#) [2010] EWHC 1632 (TCC) at [91].
- [418.](#) [2010] EWHC 1632 (TCC) at [92]–[103].
- [419.](#) [2010] EWHC 1535 (Ch), [2010] C.I.L.L. 2908. See also *F & C Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch) at [255]–[259] (clause in agreement setting up LLP that “[e]ach Member shall at all times show the utmost good faith to the LLP”).
- [420.](#) [2010] EWHC 1535 (Ch) at [246].
- [421.](#)  [2010] EWHC 1535 (Ch) at [246], quoting Lord Scott in *Manifest Shipping Co v Uni-Polaris Shipping Co* [2003] 1 A.C. 469 at [111] (which concerned the obligation of utmost good faith in s.17 of the Marine Insurance Act 1906). See also *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 at [379]–[382].
- [422.](#) [2010] EWHC 1535 (Ch) at [277].
- [423.](#) [2013] EWCA Civ 200, [2013] B.L.R. 265. See similarly *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) especially at [42] (express duty to act reasonably in all matters governed by the contract held on its proper construction in the context not to constrain the exercise of an apparently unfettered express right to terminate in one of the parties). In *Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA Civ 302, [2014] Bus. L.R. D15 at [15], [16] a contract of guarantee contained an express power of termination subject to the consent of the guarantor, “such consent to be determined by the Guarantor in a commercially reasonable manner”. This was held to require that the manner of the determination, rather than its outcome, had to be commercially reasonable and that, while it was intended to impose a control on the determination, the guarantor was entitled to have primary regard to his own commercial interests. cf. *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), 153 Con. L.R. 203 at [152] where it was observed that, in a detailed contract, “clear words” would be expected for there to be an express duty of good faith. For the CA’s decision in the *Mid Essex Hospital Services* case on an alleged implied term not to act “in an arbitrary, capricious or irrational manner” under an express term, see para.1-053, below.
- [424.](#) [2013] EWCA Civ 200 at [99]–[101], Jackson L.J. reporting the decision of Cranston J.
- [425.](#)  [2013] EWCA Civ 200 at [106] per Jackson L.J., with whom Lewison and Beatson L.JJ. agreed. See similarly *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC) at [92]–[96]. However, the HC accepted (at [110]–[112]) that the exercise of a party’s decision-making power under the contract which affected the other party’s rights was subject to an implied term that it would be exercised honestly, on proper grounds and not in a manner that is arbitrary, irrational or capricious, on which cf. below, paras 1-054–1-054A. See also *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm), 169 Con. L.R. 141 (express term requiring one party to act in good faith while performing its contractual obligations requires other party to prove the identification of one or more such obligations and their breach by not acting in good faith in a particular way at a particular time or times; there was no “freestanding obligation of good faith” (at [403] per Simon Bryan QC); and on the facts no such breach was

established: at [409]).

- [426.](#) [2013] EWCA Civ 200 at [154].
- [427.](#) [2013] EWCA Civ 200 at [109] and see similarly [2013] EWCA Civ 200 at [150] where Beatson L.J. cited in support *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) at [141], [144], [147], on which see para.1-053, below.
- [428.](#) [2013] EWCA Civ 200 at [112].
- [429.](#) [2013] EWCA Civ 200 at [114], [116].
- [430.](#) [2006] EWCA Civ 1262, [2006] E.L.R. 516. See also *Berkley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) especially at [86]–[97], [2007] 3 E.G.L.R. 101 above, para.1-047 (express term requiring “utmost good faith” interpreted as requiring the “observance of reasonable commercial standards of fair dealing”).
- [431.](#) [2006] EWCA Civ 1262 at [54].
- [432.](#) Below, para.1-054.
- [433.](#) e.g. *Solley v Forbes* (1820) 2 Brod. & B. 28, 48, per Dallas C.J.
- [434.](#) *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 W.L.R. 461, 468, per Potter L.J. and see the important speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 W.L.R. 896, 912–913, explaining *Prenn v Simmonds* [1971] 1 W.L.R. 1381 especially at 1383–1384 and *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313 especially at 387–388; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 at [3], [33]–[39]; *Oceanbulk Shipping SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 A.C. 662 and see further below, paras 13-041 et seq.
- [435.](#) *Wickman Machine Tool Sales Ltd v Schuler A.G.* [1974] A.C. 235, 251. For examples of this sort of approach in the context of rights of termination of a contract see *Ringway Roadmarking v Adbruf Ltd* [1998] 2 B.C.L.C. 625; *Rice (t/a The Garden Guardian) v Great Yarmouth BC* (2001) 3 L.G.L.R. 4, CA; *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* [2010] EWHC 1193 (Ch), [2010] N.P.C. 63.
- [436.](#) *Rainy Sky SA v Kookmin Bank* [2001] UKSC 50, [2011] 1 W.L.R. 2900 at [21] and [23] respectively per Lord Clarke of Stone-cum-Ebony J.S.C. with whom the other JJSC agreed. cf. *OMV Supply and Trading AG v Kazmunaygaz Trading AG* [2014] EWCA Civ 75. [2014] 1 C.L.C. 113 at [18] rejecting a construction which would have made the contract “grossly unfair” to a point which “borders on the absurd” (with supporting further reasons).
- [437.](#)  [2015] UKSC 36, [2015] A.C. 1619 at [15] per Lord Neuberger of Abbotsbury P.S.C. (with whom Lord Sumption and Lord Hughes JJ.S.C. agreed); Lord Hodge J.S.C. in a separate judgment also agreed with Lord Neuberger, at [66]). See also *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 W.L.R. 1095 at [8]–[15].
- [438.](#)  [2015] UKSC 36 at [15].
- [439.](#)  [2015] UKSC 36 at [20] per Lord Neuberger of Abbotsbury P.S.C.; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [62].
- [440.](#) *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587.
- [441.](#) *Pawley v Turnbull* (1861) 3 Giff. 70; *Hickman & Co v Roberts* [1913] A.C. 229. cf. *Skidmore v Dartford & Gravesham NHS Trust* [2003] UKHL 27, [2003] 3 All E.R. 292 at [15]–[16] (power to decide on disciplinary procedure in employment).

442. *Colbelfret NV v Cylclades Shipping Co Ltd (The Linardos)* [1994] 1 Lloyd's Rep. 28, 32, per Colman J.
443. See above, para.1-034 and see generally below, Ch.14.
444. *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20 but see *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518 (no term to be implied not to dismiss employee without good cause or in an unfair manner as inconsistent with the statutory system of unfair dismissal and see below, Vol.II, para.40-153) and cf. *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 (implied term in contract of membership of British Athletic Federation under which Federation agreed to provide a disciplinary hearing to provide a fair result overall).
445. *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518 at [24]. *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 A.C. 503 at [4]–[6], [51]; cf. *Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd* [2011] EWHC 960 (Ch), [2011] Pens. L.R. 239 at [140]–[153] (obligation of good faith on employer in relation to decision-making under employee pension scheme); *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 (QB), [2011] I.R.L.R. 138 at [148]–[159] (distinction between employee's general duty of good faith and loyalty and employee's fiduciary duty, which would arise where "the particular functions of an employee may require him to pursue the interests of his employer to the exclusion of other interests, including his own" ([2010] EWHC 2878 at [152], per Hickinbottom J.); *Threlfall v ECD Insight Ltd* [2012] EWHC 3543 (QB) at [112]–[115]. See generally Bogg (2011) 32 Comparative Labor Law and Policy Journal 729. cf. *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch) (no implied condition of mutual trust and confidence in contract setting some terms and acting as precursor for development contract).
446. [1992] 1 A.C. 294. cf. *University of Nottingham v Eyett* [1999] 1 W.L.R. 594.
447. *Horkulak v Cantor Fitzgerald* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [46]–[47]; *Commerzbank AG v Keen* [2006] EWCA Civ 1536, [2007] I.C.R. 623 at [53]–[59].
448. *Trego v Hunt* [1896] A.C. 7 at 25, per Lord Macnaghten.
449. [1896] A.C. 7 at 20.
450. *J.H. Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9, [2007] 1 W.L.R. 670 especially at [18], [36]–[37] (on appeal from Ct. of Sess).
451. *Nathan v Smilovitch (No.2)* [2002] EWHC 1629 (Ch) at [9]; *Training in Compliance Ltd v Dewse* [2004] EWHC 3094 (QB), [2004] All E.R. (D) 377 (Dec) (implied terms of honesty and good faith in contracts for joint business venture); *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All E.R. (Comm) 849 at [57] (PC not ruling out implied obligation of good faith in franchise contract); but cf. *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 451 at [51], relying on *Bedfordshire CC v Fitzpatrick Contractors Ltd* [1998] 62 Con. L.R. 64 (Dyson J.) (court refused to imply a term of trust and loyalty owed by a franchisor to a franchisee since such a relationship is "much closer to an ordinary commercial relationship, than one between employer and employee"); *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch) at [106]–[112] (no implied terms of good faith etc. in franchise agreements). But cf. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), below, para.1-053.
452. *Bernhard Schulte GmbH & Co K.G. v Nile Holdings Ltd* [2004] EWHC 977 (Comm), [2004] 2 Lloyd's Rep. 352 at [113]–[114]. See also *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (Comm) at [23] and especially at [24]–[29] in which the HC refused to imply a term to negotiate in good faith to govern the period after the expiry of an exclusivity period set by a contract which contained an express term to negotiate in good faith, on the basis that this would be inconsistent with the parties' agreement which disapplied the "default position" of no legal duty to negotiate in good faith for limited period.

- [453.](#) **!** *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [67].
- [454.](#) **!** *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [68] per Beatson L.J.
- [455.](#) **!** [2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526; Whittaker (2013) 129 L.Q.R. 463; Campbell (2014) 77 M.L.R. 475.
- [456.](#) [2013] EWHC 111 (QB) at [156]. See for the acceptance (by the parties and the court) of a similar implied term of honesty and integrity *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB), at [174]–[176] (contract under which contractor dealt over a relatively lengthy period with the recovered property of members of the public acting on behalf of the police authority). cf. *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 495 (above, para.1-041) where the Supreme Court of Canada held that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.
- [457.](#) See the cases noted in n.405 above.
- [458.](#) [2013] EWHC 111 (QB) at [143]. Leggatt J. saw as examples of this category of contract joint venture agreements, franchise agreements and long-term distributorship agreements, on which cf. above, n.405.
- [459.](#) [2013] EWHC 111 (QB) at [132], [135]–[136].
- [460.](#) **!** [2013] EWHC 111 (QB) at [138]. cf. *Hamsard 3147 Ltd (trading as "Mini Mode Childrenswear") v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [87]–[88] where the HC observed (obiter) that a term requiring good faith in the operation of a contract would only have imposed on the parties "a duty to deal with one another on an open and collaborative basis" and not an "obligation to maximise profit" and did not qualify a party's implied right of termination on reasonable notice limiting it to exercise only in "good faith". cf. *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), [2017] 1 Lloyd's Rep. 476 in which Leggatt J. observed (at [98]) that "[a] duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people", considering it therefore a "lesser duty" than an express contractual "positive obligation to use all reasonable endeavours to achieve a specified result".
- [461.](#) Whittaker (2013) 129 L.Q.R. 463.
- [462.](#) **!** [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105] and see also at [150]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), especially at [46]; *Hamsard 3147 Ltd (trading as "Mini Mode Childrenswear") v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [83]–[84] (where the HC refused to imply a term requiring good faith in the implicit contract brought about by force of circumstance as an interim arrangement subsequent to a contract of joint venture containing an express term requiring good faith in relation to the operation of the contract); *Bristol Groundschool Ltd v Whittingham* [2014] EWHC 2145 (Ch) at [196] (contract which combined joint venture and product distribution agreement held to contain implied term requiring honesty, judged in terms of commercially unacceptable behaviour); *Acer Investment Management Ltd v Mansion Group Ltd* [2014] EWHC 3011 (QB) at [101]–[109]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 at [67]; *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2017] 1 All E.R. (Comm) 1009 at [249]–[259]; *Apollo Window Blinds Ltd v McNeil* [2016] EWHC 2307 (QB) (no implied term in contract of franchise requiring one party (the franchisor) to inform the other (the franchisee) of its contractual rights); *National Private Air Transport Services Co (National Air Services) Ltd v Creditrade LLP* [2016] EWHC 2144 (Comm) at [132]–[136] (no implied term in aircraft lease as not a "relational" contract and lessor was entitled to redelivery

in compliance with contract terms (obiter)). See also *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All E.R. (Comm) 483 at [45] (disapproving of the establishment of a general principle of good faith, contrary to the suggestion by Leggatt J. at trial).

463.

! [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep. 169 at [150]; *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at [250] and [276] (where in addition an implied term requiring good faith would have been inconsistent with express terms excluding equitable or fiduciary duties).

464.

! [2014] EWHC 1156 (Ch) at [150], referring to [2013] EWHC 111 (QB) at [147]. cf. *Hockin v Royal Bank of Scotland* [2016] EWHC 925 (Ch) at [44]–[47] (no strike out of claim for breach of implied term as to the exercise of a right/discretion under a contract in the absence of factual matrix to be established at trial).

465.

! [2015] UKSC 72, [2015] 3 W.L.R. 1843.

466.

! [2015] UKSC 72 at [21] and see for an example of this approach being adopted in the context of good faith: *Hockin v Royal Bank of Scotland* [2016] EWHC 925 (Ch) at [46] (high threshold for the implication of a term in a standard commercial contract). On the decision of the SC in *Marks & Spencers Plc* generally, see below, para.14-007.

467.

cf. *Johnstone v Bloomsbury Health Authority* [1992] Q.B. 334 (express discretionary power in employer read subject to duty not to harm employee's health), below, para.1-182.

468.

[2001] EWCA Civ 1466, [2002] 1 W.L.R. 685.

469.

[2002] 1 W.L.R. 685 at [30], per Dyson L.J.

470.

[2002] 1 W.L.R. 685 at [32].

471.

[2002] 1 W.L.R. 685 at [40].

472.

[2005] EWCA Civ 760, [2005] 1 W.L.R. 3412.

473.

[2005] EWCA Civ 760 at [120] (original emphasis).

474.

[2007] EWCA Civ 151, [2007] Bus. L.R. D29, Morgan [2008] Lloyd's Maritime and Commercial Law Quarterly 523. cf. *Eastleigh BC v Town Quay Developments Ltd* where, while it was accepted (by agreement of the parties) that there is no general principle that, whenever a contract requires the consent of one party to be obtained by the other, there must be a term implied that such consent shall not be unreasonably withheld, in the circumstances a term should be implied that consent to the exercise of a right over land would not be unreasonably withheld: [2009] EWCA Civ 1391, [2010] 2 P. & C.R. 2 at [20], [36]–[39].

475.

[2007] EWCA Civ 151 at [36]–[37].

476.

[2007] EWCA Civ 151 at [42]–[44].

477.

[2007] EWCA Civ 151 at [43], per Arden L.J. (with whom Pill L.J. and Sir Martin Nourse agreed). See similarly *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB) at [33]–[34]. cf. *Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA Civ 302, [2014] 1 C.L.C. 342 at [19]–[21], holding that an express term as to the giving of consent by a guarantor to termination of a guarantee "in a commercially reasonable manner" did not on its proper construction mean that the guarantor had to give priority to the other party's commercial interest over its own: [2014] EWCA Civ 302 at [21]–[22].

478.

[2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558. cf. *Prudential Staff Pensions Ltd v Prudential*

Assurance Co Ltd [2011] EWHC 960 (Ch), [2011] Pens. L.R. 239 at [140]–[153] (obligation of good faith on employer in relation to decision-making under employee pension scheme).

479. [2008] EWCA Civ 116 at [66] (with whom Laws and Lloyd L.J.J. agreed).

480. [2008] EWCA Civ 116 at [66].

481. [2008] EWCA Civ 116 at [107]–[121] (Rix L.J.).

482. [2008] EWCA Civ 116 at [122] (Rix L.J.); [147]–[157] (Lloyd L.J.), with both of whom Laws L.J. agreed: [2008] EWCA Civ 116 at [158].

483. **!** [2013] EWCA Civ 200, [2013] B.L.R. 265. For other cases discussing similar qualifications on the exercise of a broad contractual discretion see *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 at [14] (satellite television service contracting to supply a provider of television shopping channels with two shopping channels on its platform and having discretion under the contract in the allocation of logical channel numbers); *Mckay v Centurion Credit Resources LLC* [2012] EWCA Civ 1941, especially at [17], [21]–[22] (term for advance of funds on demand of borrower); *WestLB AG v Nomura Bank International Plc* [2012] EWCA Civ 495, especially at [30], [32] (discretion as to valuation of fund); *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) (no implied term of good faith restricting the exercise of an apparently unfettered right in party to terminate contract); *Brogden v Investec Bank Plc* [2014] EWHC 2785 (Comm), [2014] I.R.L.R. 924 at [91], [95]–[102] (term in employment contract for payment of bonus); *Greenclose Ltd National Westminster Bank Plc* [2014] EWHC 1156 (Ch), [2014] 1 C.L.C. 562 at [144]–[151] (no implied qualifications on express “unqualified right” to extend the term of an interest rate hedging transaction); *Myers v Kestrels Acquisitions Ltd* [2015] EWHC 916 (Ch) at [40]–[41], [50]–[63] (no implied term that a power in a loan-note instrument to modify its terms had to be exercised in good faith). *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC) at [110]–[112]; *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2017] 1 All E.R. (Comm) 1009 at [261]–[275]. In *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] 4 All E.R. 907 at [37] Lord Sumption J.S.C. observed that, although the matter remains a matter of construction, it is “well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously”. See also *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 W.L.R. 1661, below, para.1-054A.

484. **!** [2008] EWCA Civ 116, [2008] 1 Lloyd’s Rep. 558. See also *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The “Product Star”)* [1993] 1 Lloyd’s Rep. 397 esp. at 404; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [66]; *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 at [14].

485. [2013] EWCA Civ 200 at [83].

486. [2013] EWCA Civ 200 at [84]–[92].





487. [2013] EWCA Civ 200 at [138].

488. **!** [2013] EWCA Civ 200 at [138]–[139]; applied in *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [2017] 1 All E.R. (Comm) 1009 at [261]–[275] (contractual right to terminate a contract not a discretion and may be exercised irrespective of the party’s reasons for doing so); *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm) at [52]–[60].

489. [2015] UKSC 17, [2015] 1 W.L.R. 1661.

490. [2015] UKSC 17 at [18] with whom Lord Kerr agreed generally. Lords Wilson, Hodge and Neuberger agreed with Lady Hale in this respect: [2015] UKSC 17 at [52]–[53], [102]–[103].

491. *Socimer International Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116 at [60]–[66], below, para.15-054 and see [2015] UKSC 17 at [22] and [102].

- [492.](#) [2015] UKSC 17 at [19].
- [493.](#) [2015] UKSC 17 at [20] per Lady Hale and see also at [28], [53] (Lord Hodge) and [103] (Lord Neuberger). It was considered unnecessary to conclude finally on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action: [2015] UKSC 17 at [31] (Lady Hale).
- [494.](#) [2015] UKSC 17 at [30]. Lady Hale and Lord Kerr considered that the fact that contracts of employment contain an implied obligation of trust and confidence is relevant for this purpose: [2015] UKSC 17 at [32]; Lord Hodge agreed (at [61]), though he did not rely on this as it had not been argued and cf. at [54]–[55]. cf. Lord Neuberger considered that such an implied term did not add anything once the implied term based on *Wednesbury* rationality had been accepted: [2015] UKSC 17 at [104].
- [495.](#) [2015] UKSC 17 at [30] and cf. at [24]; similarly at [53] (Lord Hodge) [103] (Lord Neuberger).
- [496.](#)  [2015] UKSC 17 at [24]. cf. *Patural v DB Services (UK) Ltd* [2015] EWHC 3659 (QB), [2016] I.R.L.R. 286 at [61].
- [497.](#) [2015] UKSC 17 at [38]–[42] (Lady Hale and Lord Kerr); [49]–[50], [58]–[59], [62] (Lord Hodge). In this respect, Lords Neuberger and Wilson dissented, considering that the employer was justified in finding that the employee had committed suicide based on a combination of cogent reasons: [2015] UKSC 17 at [114] and [126].
- [498.](#)  *Watson v Watchfinder.co.UK Ltd* [2017] EWHC 1275 (Comm), concerned a contractual option to purchase shares in a company which formed part of a wider commercial relationship between the parties and which was contingent on the consent of that company's board. The High Court held that the company board had a discretion as to the consent which must be exercised in a way which was not arbitrary, capricious or irrational, following the SC's decision in *Braganza*: [2017] UKSC 1275 at [102]–[103] and [116] et seq. cf. *Property Alliance Group Ltd v Royal Bank of Scotland* [2016] EWHC 3342 (Ch) at [277], where it was explained that a discretion “requires the contracting party to make some kind of assessment or to choose from a range of options” and this exercise of power justifies the implication of a term as to its exercise arbitrarily, etc.; no such discretions were found in the contract between bank and its commercial customer (at [272]–[280]).
- [499.](#) *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344 and see below, paras 26-036–26-038.
- [500.](#) See below, paras 26-079 et seq.
- [501.](#) Below, paras 26-107 et seq.
- [502.](#)  *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413 and see below, para.24-010. While this law was seen by Leggatt J. in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 1 Lloyd's Rep. 359 at [97] as reflecting an “increasing recognition in the common law world of the need for good faith in contractual dealings” as it implies “some constraint on the decision-maker's freedom to act purely in its own self-interest”, on appeal the CA (which did not see the *White & Carter* principle as applicable on the facts) did not encourage judges to recognise a “general organising principle” drawn from cases of disparate kinds in this way: [2016] EWCA Civ 789 at [43] and [45] respectively.
- [503.](#)  *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [32] and [152] and see, below, paras 26-178 et seq.
- [504.](#) e.g. Consumer Rights Act 2015 s.23 and see Vol.II, para.38-482.
- [505.](#) See below, paras 4-130 et seq.

- [506.](#) See below, paras 27-034 et seq.
- [507.](#) Misrepresentation Act 1967 s.2(2) (damages in lieu of rescission) on which see below, paras 7-104—7-110.
- [508.](#) Sale of Goods Act 1979 s.15A and see Vol.II, para.44-070.
- [509.](#) Law Reform (Frustrated Contracts) Act 1943 s.1(2) and (3) and see below, para.23-090.

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Introduction

1-057

The Human Rights Act 1998 (“the 1998 Act”) was enacted in order to “bring home” the human rights declared by the European Convention on Human Rights (“the Convention”) into the domestic legal systems of the United Kingdom. ⁵¹⁰ In order to do so, it put in place two main mechanisms. First, there are controls on legislation. So, under s.3 of the 1998 Act it is provided that:

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.” ⁵¹¹

And under s.4 of the 1998 Act, where a court is unable to “read down” primary legislation in this way, and where a court ⁵¹² is satisfied that the legislation is incompatible with Convention rights, it may make a “declaration of incompatibility”. ⁵¹³ As a result, the duty of compatible interpretation and the possibility of a declaration of incompatibility may arise in any proceedings in which the compatibility of primary legislation is challenged, whether or not a “public authority” is party. Secondly, the Act declares it unlawful for “public authorities” to act in a way which is incompatible with a “Convention right”, and for this purpose “public authority” includes a court or tribunal and may include any person certain of whose functions are functions of a public nature. ⁵¹⁴

Temporal impact of the Human Rights Act on contracts

1-058

In determining the impact of these provisions on contracts and, indeed, also upon the *law* of contract itself, a distinction must be drawn between contracts made before and after the coming into force of the operative provisions of the 1998 Act—October 2, 2000. ⁵¹⁵

^{510.} Not all the rights contained in the European Convention and its protocols were included in this process, but only those defined by the Act as “Convention rights”: Human Rights Act 1998 s.1.

^{511.} Human Rights Act 1998 s.3(1).

^{512.} The courts which are so entitled are listed in s.4(5).

^{513.} Human Rights Act 1998 s.4(1) and (2).

^{514.} Human Rights Act 1998 s.6(1) and (3). Section 6(5) further provides that “[i]n relation to a

particular act, a person is not a public authority by virtue only of subs.3(b) if the nature of the act is private” and see below, paras 1-073—1-075.

[515.](#) Human Rights Act 1998 (Commencement No.2) Order 2000 (SI 2000/1851).

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The impact of ss.3 and 4 of the 1998 Act on accrued contractual rights

1-059

In *Wilson v First County Trust Ltd (No.2)*, ⁵¹⁶ the question arose whether provisions in the Consumer Credit Act 1974 which had the effect of denying the enforceability of a creditor's rights under the contract and its accompanying security for lack of fulfilment of some of its requirements as to proper execution ⁵¹⁷ were "incompatible" with the creditor's "Convention rights". The effect of the relevant provisions of the 1974 Act was to deprive the court of any power to enforce a regulated agreement from which a prescribed term has been omitted for the benefit of the creditor, notwithstanding that no prejudice has been caused to anyone by that omission. ⁵¹⁸ The Court of Appeal held that a court, as itself a "public authority", ⁵¹⁹ must not act in a way which is incompatible with Convention rights. ⁵²⁰ In its view, the provisions in the 1974 Act in question which required a court to deny any possibility of enforcement for the benefit of the creditor infringed to a disproportionate and unexplained extent its right to a fair and public hearing under art.6(1) of the Convention. ⁵²¹ The Court of Appeal therefore exercised its discretion in favour of declaring the relevant provision of the 1974 Act incompatible with the Convention. ⁵²² However, this decision was reversed by the House of Lords in a ruling of fundamental importance for the temporal application of the Human Rights Act to private transactions, including contracts. ⁵²³ Unlike the Court of Appeal, whose starting point was the duty of a court under s.6 of the 1998 Act, the House of Lords started by asking whether ss.3 and 4 of the 1998 Act apply retrospectively to the facts before them, the contract of consumer credit having been made and having been due to have been performed before the coming into force of the operative provisions of the 1998 Act on December 2, 2000. The House of Lords held unanimously that in the circumstances of the case ss.3 and 4 should not be held to apply to a contract made and to be performed before the coming into force of the 1998 Act. For a majority of their lordships this position was reached by holding that while ss.2-4 of the 1998 Act may clearly apply to enactments made before its coming into force, ⁵²⁴ they should not be interpreted so as to allow the challenge of primary legislation affecting "transactions that have created rights and obligations which the parties seek to enforce against each other". ⁵²⁵ In the words of Lord Scott of Foscote:

"The legal consequences under the civil law of a transaction or of events ought to be established by reference to the law at the time they take place. They cannot do so if subsequent legislation may add to or diminish those rights or obligations." ⁵²⁶

Given their lordships' view of the lack of impact of ss.3 and 4 on the contract before them, it followed that the Court of Appeal's reliance on s.6 of the 1998 Act was misplaced, since s.6 cannot make unlawful a court's lawful action in giving effect to pre-Act rights and obligations. ⁵²⁷ As a result, the Court of Appeal should not have considered the question of the compatibility with Convention rights of the Consumer Credit Act's provisions which denied the enforceability of the contract for the benefit of the creditor. ⁵²⁸ While Lord Rodger of Earlsferry agreed with this decision on the facts before the

House, he did so explicitly on the narrower ground that ss.3 and 4 of the 1998 Act did not apply to pending proceedings so as to protect the Convention rights enshrined in art.1 of the First Protocol to the Convention protecting a person's right to the peaceful enjoyment of his possessions. ⁵²⁹

1-060

On the other hand, in *PW & Co v Milton Gate Investments Ltd* ⁵³⁰ Neuberger J. was prepared to accept that s.3 of the Human Rights Act could apply to an issue arising from a lease made before its coming into force. There, the learned judge had held that, apart from the operation of s.3, the exercise of a "break clause" in a head-tenancy did not determine the sub-tenancies entered into by the tenant as permitted under the head-lease even though the head-landlord was unable to recover rent under the sub-tenancy covenants. ⁵³¹ Having referred to a number of passages in the speeches of their lordships in *Wilson v First County Trust (No.2)*, ⁵³² Neuberger J. concluded that their reasoning did not preclude the application of ss.3 or 4 of the 1998 Act to issues arising out of contracts made before its coming into force as long as this did not impair "vested rights" or otherwise create unfairness. ⁵³³ In particular, he noted as "very much in point" Lord Scott of Foscote's reference in *Wilson's* case to the example of the impact of legislation intervening between the creation of a lease and its expiry where the legislation could affect the rights and obligations arising under the transaction. ⁵³⁴ On the facts before him, Neuberger J. considered that:

"... the earliest that any 'vested rights' could be said to have arisen under [the break clause in the head-lease], was the date of the service of the Notice under that clause. Unless and until [the break clause] was operated, the rights and obligations of any of the parties as a result of the exercise were merely contingent and not vested." ⁵³⁵

Since this notice had been served after the coming into force of s.3 of the 1998 Act there were no vested rights at the relevant time so as to prevent its operation on the legislative provisions whose application allegedly prejudiced the headlandlord's right to property under art.1 of the First Protocol of the European Convention. Moreover, in the learned judge's view, it was not more generally unfair to apply s.3 in this way even though the notice had been served only four days after its coming into force given, in particular, that the 1998 Act had been on the Statute Book for around two years before it came into force. ⁵³⁶

^{516.} [2003] UKHL 40, [2003] 3 W.L.R. 568, reversing [2001] EWCA Civ 633, [2002] 2 Q.B. 74.

^{517.} Consumer Credit Act 1974 ss.65(1) and 127(3). Section 127(3) of the 1974 Act was repealed by the Consumer Credit Act 2006 s.15: see Vol.II, para.39-094.

^{518.} [2001] EWCA Civ 633 at [9].

^{519.} Human Rights Act 1998 s.6(3)(a).

^{520.} [2001] EWCA Civ 633 at [17]–[18].

^{521.} [2001] EWCA Civ 633 at [28]–[29].

^{522.} Human Rights Act 1998 s.4(2).

^{523.} [2003] UKHL 40, [2003] 3 W.L.R. 568.

^{524.} [2003] 3 W.L.R. 568 at [17], per Lord Nicholls.

^{525.} [2003] 3 W.L.R. 568 at [98] and see at [101]–[102] (Lord Hope of Craighead); [26] (Lord Nicholls of Birkenhead); [145] (Lord Hobhouse of Woodborough); [161]–[162] (Lord Scott of Foscote).

- [526.](#) [2003] 3 W.L.R. 568 at [161].
- [527.](#) [2003] 3 W.L.R. 568 at [157] (Lord Hope of Craighead).
- [528.](#) See below, paras 1-066—1-068 on the substantive issues of compatibility of the then provisions of the Consumer Credit Act 1974 with the Human Rights Act 1998, putting aside the issue of retroactivity.
- [529.](#) [2003] UKHL 40, [2003] 3 W.L.R. 568 at [215]–[220]. For a straightforward application of the HL's approach see *Laws v Society of Lloyd's* [2003] EWCA Civ 1887 at [32]–[33] (Lloyd's enjoyed statutory immunity barring bad faith prior to coming into force of 1998 Act).
- [530.](#) [2003] EWHC 1994 (Ch), [2003] All E.R. (D) 58 (Aug).
- [531.](#) [2003] EWHC 1994 (Ch) at [103]–[104].
- [532.](#) [2003] UKHL 40, [2004] 1 A.C. 816, above, para.1-059.
- [533.](#) [2003] EWHC 1994 (Ch) at [107]–[115].
- [534.](#) [2003] UKHL 40 at [161]; [2003] EWHC 1994 (Ch) at [110] and [114].
- [535.](#) [2003] EWHC 1994 (Ch) at [114].
- [536.](#) [2003] EWHC 1994 (Ch) at [115].

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Section 6 and accrued contractual rights

1-061

The making of a contract by a person or body may sometimes constitute an “act” by a “public authority” within the meaning of s.6 of the 1998 Act. ⁵³⁷ While the decision in *Wilson v First County Trust Ltd (No.2)* ⁵³⁸ was directly concerned with the application of ss.3 and 4 of the 1998 Act to transactions which created rights accruing before its coming into force, it is submitted that a similar approach would be taken so as to deny the application of s.6 of the 1998 Act to contracts made by “public authorities” before its coming into force. As Lord Nicholls observed in setting out the general framework of the 1998 Act:

“On a natural reading [s.6] is directed at post-Act conduct. The context powerfully supports this interpretation. One would not expect a statute promoting human rights values to render unlawful acts which were lawful when done.” ⁵³⁹

Lord Scott of Foscote agreed, observing that:

“It is plain that section 6 is looking to the future. It is not purporting to make unlawful a pre 2 October 2000 act of a public authority.” ⁵⁴⁰

The approach of the majority of the House of Lords in *Wilson v First County Trust Ltd (No.2)* therefore clearly indicates that s.6 of the 1998 Act will not be applied so as to make unlawful the making of contracts by public authorities before its coming into force on December 2, 2000. And while Lord Rodger of Earlsferry took a more nuanced approach to the distinct types of “retroactivity” which he identified according to the different Convention rights protected by the 1998 Act, ⁵⁴¹ he also proceeded on the basis that:

“Parliament must have intended all the operative provisions [which include s.6] of this particular statute to take effect in the same way in respect of any given Convention right.” ⁵⁴²

The later performance of contracts made by “public authorities”

1-062

A further question relating to contracts made before the coming into effect of s.6 of the 1998 Act concerns a public authority's "act" of performance of a contract rather than its "act" in making one. ⁵⁴³ For if a public authority has made a contract before the coming into effect of the 1998 Act, but *after* its coming into effect performs one of its obligations in a way required by the contract but incompatible with a Convention right, such a performance could be thought itself to constitute an "act" made unlawful by s.6 of the 1998 Act. On the other hand, against this line of reasoning it could be contended that s.6 of the 1998 Act should not be interpreted so as to render illegal the performance of existing contractual obligations since this would have the correlative effect of prejudicing the existing rights of the other party under the contract. In resolving these arguments, observations made in *Wilson v First County Trust Ltd (No.2)* concerning the retroactive effect of legislation in general and the 1998 Act in particular may be helpful, even though that decision was concerned with the incompatibility with Convention rights of primary legislation as applied to facts occurring before the 1998 Act's coming into force. ⁵⁴⁴ In this respect, Lord Rodger of Earlsferry noted that:

"Retroactive provisions alter the existing rights and duties of those whom they affect. But not all provisions which alter existing rights and duties are retroactive. The statute book contains many statutes which are not retroactive but alter existing rights and duties—only prospectively, with effect from the date of commencement." ⁵⁴⁵



While Lord Rodger quoted with approval the words of Dickson J. to the effect that "[n]o-one has a vested right to continuance of the law as it stood in the past", ⁵⁴⁶ he observed that:

"... often ... a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect." ⁵⁴⁷

Although he added that "in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive effect". ⁵⁴⁸ What these observations suggest is that s.6 of the 1998 Act should be interpreted so as not to make unlawful the "acts of performance" of public authorities of contractual obligations created before its coming into force even if these acts are incompatible with Convention rights, since such an illegality would prejudice the existing rights of other parties under those contracts. However, a future court could prefer to follow the more nuanced approach adopted by Lord Rodger for this purpose, distinguishing between the various Convention rights ⁵⁴⁹ in assessing the effect of the operative provisions of the 1998 Act. ⁵⁵⁰

Effect of any unlawful performance by a public authority

1-063


 If a court were to hold that a public authority would act unlawfully within the meaning of s.6 of the 1998 Act by performing an obligation arising under a contract made before the coming into force of that Act, then either the performance of the contractual obligation in question would be excused or the contract as a whole would be frustrated by this supervening illegality, this depending on the illegality's significance for the main purpose of the contract as a whole. ⁵⁵¹ 

Unlawful manner of performance by public authority

1-064

Different considerations apply where a public authority's action in performing an obligation arising

under a contract made before the coming into force of the 1998 Act is incompatible with a Convention right, but where this incompatibility is not required by the obligation itself, but rather reflects the chosen manner of its performance by the public authority. In these circumstances, the arguments as to the effect of s.6 of the 1998 Act would differ from those exposed earlier, ⁵⁵² as ex hypothesi the other party to the contract would not have any accrued rights to the action of the public authority in purported performance of the contract. It is submitted, therefore, that in these circumstances a public authority could be held to act unlawfully within the meaning of s.6, even though the contract predated the 1998 Act's coming into force. Where this is the case, then the courts are likely to look to their general approach to illegality in performance to determine the effects of this "unlawful act" on the contractual rights of the parties inter se. ⁵⁵³

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- ^{537.} On the application of the definition of "public authority" under ss.6(3) and (5) of the 1998 Act to the making of contracts, see below, para.1-073—1-075.
- ^{538.} [2003] 3 W.L.R. 568, (2003) 3 W.L.R. 568.
- ^{539.} [2003] 3 W.L.R. 568 at [12].
- ^{540.} [2003] 3 W.L.R. 568 at [156].
- ^{541.} See above, para.1-059.
- ^{542.} [2003] UKHL 40, [2003] 3 W.L.R. 568 at [156].
- ^{543.} For the purposes of the present discussion, it will be assumed that the public authority fulfils the criteria required by the 1998 Act s.6(3) and (4), on which see below, paras 1-073—1-075.
- ^{544.} [2003] UKHL 40, [2003] 3 W.L.R. 568. Lord Rodger of Earlsferry explicitly stated that ss.3–9 of the 1998 Act should be interpreted so as to apply retroactively or only from commencement as a whole: at [204], [206].
- ^{545.} [2003] 3 W.L.R. 568 at [188]. On the restricted basis for Lord Rodger's decision, see above, para.1-059. Lord Rodger drew on the discussion in P.A. Côté, *The Interpretation of Legislation in Canada*, 3rd edn (2000), Ch.2, s.1 and referred to *West v Gwynne* [1911] 2 Ch. 1. Lord Hobhouse adopted Lord Rodger's observations on the various usages of the word "retrospective": [2003] UKHL 40, [2003] 3 W.L.R. 568 at [145]. See also the observations of Lord Scott of Foscote at [161], who noted that: "Where transactions calculated to continue for some considerable period are entered into, intervening legislation may in some respect or other affect the rights or obligations that accrue after the legislation has come into force". He illustrated this by reference to contracts of lease and landlord and tenant legislation.
- ^{546.} [2003] UKHL 40, [2003] 3 W.L.R. 568 at [192]; *Gustavson Drilling (1964) Ltd v Minister of National Revenue* [1977] 1 S.C.R. 271, 282–283.
- ^{547.} [2003] UKHL 40, [2003] 3 W.L.R. 568 at [193].
- ^{548.} [2003] 3 W.L.R. 568 at [195].
- ^{549.} [2003] 3 W.L.R. 568 at [209]–[210]. He distinguished in particular between the procedural rights protected by art.6 of the Convention and other, substantive rights. For Lord Rodger the proper question was therefore whether the 1998 Act gave effect to art.1 of the First Protocol to the Convention so as to affect vested rights or pending proceedings: [2003] 3 W.L.R. 568 at [215].
- ^{550.} i.e. Human Rights Act 1998 ss.3–9.
- ^{551.}  cf. Peel, *Treitel on The Law of Contract*, 14th edn (2015) and see below, paras 23-066—23-069.

[552](#). Above, paras 1-062—1-063.

[553](#). See below, paras 16-151 et seq.

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The construction of contracts

1-065

In *Biggin Hill Airport Ltd v Bromley LBC* ⁵⁵⁴ (which concerned a contract made between a local authority and a private company), it was held that the 1998 Act did not require a court as itself a public authority ⁵⁵⁵ to interpret a contract made *before* the coming into effect of the same Act in such a way as to be compatible with the Convention rights of third parties to the contract, since common law authority established that a court should look to the factual circumstances at the time of a contract's conclusion for the resolution of issues of its construction. ⁵⁵⁶ This decision may be seen as reflecting in the context of the control and application of the common law a similar principle of non-retroactivity as was applied by the House of Lords in its later decision in *Wilson v First County Trust Ltd (No.2)* for the purposes of the control and application of primary legislation. ⁵⁵⁷ On the other hand, in *Biggin Hill Airport* it was accepted that even in respect of a contract made before the coming into force of the 1998 Act, where the contract was *made by* a public authority the protection of people's Convention rights might form an element in its decision-making process, although on the facts the court found that it had not done so. ⁵⁵⁸ If a court were to find such an element to have been the case, then its decision protecting the Convention right would not have any true retroactive impact: it would merely be giving effect to the existing common law principle of interpretation of a contract by reference to the common intentions of the parties as construed in their factual matrix. ⁵⁵⁹

^{554.} *The Times*, January 9, 2001, (2001) 98(3) L.S.G. 42 reversed on other grounds [2001] EWCA Civ 1089, *The Times*, August 13, 2001, (2001) 98(33) L.S.G. 30.

^{555.} Human Rights Act 1998 s.6(3)(a).

^{556.} *Prenn v Simmonds* [1971] 1 W.L.R. 1381; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 and see below, paras 13-041 et seq.

^{557.} Above, para.1-059.

^{558.} *Biggin Hill Airport Ltd v Bromley LBC*, *The Times*, January 9, 2001, (2001) 98(3) L.S.G. 42 at [173], reversed on other grounds [2001] EWCA Civ 1089, *The Times*, August 13, 2001, (2001) 98(33) L.S.G. 30.

^{559.} See below, paras 13-043, 13-121—13-123.

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Sections 3 and 4 of the 1998 Act: primary or secondary legislation governing the contract and Convention rights

1-066

⚠ While it was not necessary for its decision in *Wilson v First County Trust Ltd (No.2)*, ⁵⁶⁰ four members of the House of Lords considered there the substantive questions of compatibility with Convention rights of the then provisions of the Consumer Credit Act 1974 (putting aside the retroactive element found on the facts), and this makes clear their general view that questions of compatibility with Convention rights of legislation governing contracts made *on or after* the date of their coming into force, viz October 2, 2000, would arise for the purposes of ss.3 and 4 of the 1998 Act. The substantive questions raised in *Wilson v First County Trust Ltd (No.2)* itself were whether the denial of any possibility of enforcement of the contract of consumer credit or its attendant security by the creditor against the consumer was incompatible either with the creditor's right to a fair trial under art.6 of the European Convention or with the creditor's right to the peaceful enjoyment of his possessions under art.1 of the First Protocol to the Convention. The issue of compatibility with art.6 was fairly quickly dealt with by the House of Lords as art.6(1) is concerned to ensure a fair civil process and "does not itself guarantee any particular content for civil rights and obligations in the substantive law of the contracting states". ⁵⁶¹ The effect of the Consumer Credit Act was to deny the creditor any substantive legal rights under the contract or in relation to the security and did not

concern its procedural rights. ⁵⁶² ⚠ While their lordships also agreed that (putting aside the question of the temporal application of the 1998 Act) the creditor's right to its possessions was not denied by the relevant provisions of Consumer Credit Act 1974, ⁵⁶³ their reasons for coming to this conclusion differed. Here, there were two issues: (i) did the facts of the case engage the application of art.1 of the First Protocol; (ii) if so, did the provisions of the Consumer Credit Act put in place a legitimate, proportionate and sufficiently certain restriction on the creditor's rights? The following paragraphs will examine the treatment of these issues in *Wilson v First County Trust Ltd (No.2)* itself and in the subsequent case law.

Unenforceable contractual rights and engaging art.1 of the First Protocol

1-067

The four members of the House of Lords who expressed their views were divided in their response to the question whether the facts of *Wilson v First County Trust Ltd (No.2)* ⁵⁶⁴ engaged the application of art.1 of the First Protocol. ⁵⁶⁵ For Lord Nicholls, "possessions" in Article 1 is apt to embrace contractual rights", ⁵⁶⁶ and the provisions of the 1974 Act which denied any rights of enforcement of the contract to the creditor would engage art.1 as they are:

“... more readily and appropriately to be characterised as a statutory deprivation of the lender's rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction.” ⁵⁶⁷

Lord Hobhouse of Woodborough agreed that art.1 could be engaged, but on the narrower ground that the 1974 Act was able to operate so as to deprive the creditor of its special title to possession of the security under a contract of pledge; conversely, if a creditor had not taken possession of any security, art.1 would not be engaged as the creditor would be left merely with “the purported enforcement of a claimed contractual right which the lenders had never in truth validly acquired”. ⁵⁶⁸ By contrast, Lords Hope and Scott agreed that art.1 would not be engaged on the facts before them: art.1 of the First Protocol is directed to interference with existing possessions or property rights, whereas the creditor never had any rights of enforcement or possession against the borrower owing to the application of the provisions of the 1974 Act. ⁵⁶⁹ In the words of Lord Hope, art.1:

“... does not confer a right of property as such nor does it guarantee the content of any rights of property. What it does is to guarantee the peaceful enjoyment of the possessions that a person already owns ... [I]t is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into.” ⁵⁷⁰

According to Lord Scott:

“No authority has been cited ... for the proposition that a statutory provision which prevents a transaction from having the quality of legal enforceability can be regarded an interference for Article 1 purposes with the possessions of the party who would have benefited if the transaction had had that quality.” ⁵⁷¹

Implicit in Lord Nicholls' view is an understanding that even in a context such as consumer credit where statute defines the circumstances in which the parties' rights arise, it is the parties' agreement (possibly as recognised by the common law) which forms the source of their contractual rights, which are then eligible for protection under art.1. For Lords Hope and Scott, it is the statute itself which defines the circumstances when the parties' agreement will or will not give rise to rights in them: the law creates the parties' rights, it does not curtail pre-existing rights. ⁵⁷²

1-068

It is submitted, that whatever the general theoretical validity of either view of the nature and origin of contractual rights in the modern law, the approach of Lord Nicholls is to be preferred for the purposes of art.1 of the First Protocol. ⁵⁷³ For the overall function of art.1 is to prevent states from depriving persons of their possessions illegitimately and for this purpose legislation which denies a right which would otherwise arise (i.e. under the general law) can be seen to have such a depriving effect. This approach may be supported by reference to the case law of the European Court of Human Rights ⁵⁷⁴ and especially its later decision in *Stretch v UK* ⁵⁷⁵ in which it held that art.1 of the First Protocol was engaged where a person's option to renew a lease was subsequently found to be void as ultra vires the lessor public authority's powers, the Court observing that:

“... according to the established case law of the Convention organs, ‘possessions’ can be ‘existing possessions’ or assets, including claims, in respect of which the applicant can argue that he has at least a ‘legitimate expectation’ of obtaining effect enjoyment of a property right.” ⁵⁷⁶

This decision is therefore incompatible with an approach to art.1 which views the existence of a property right as contingent on its recognition by the national law of contract unmitigated by the

influence of Convention rights.

Subsequent cases

1-069

In subsequent English decisions, Lord Nicholls' distinction in *Wilson v First County Trust Ltd (No.2)* between an Act's deprivation of a person's contractual rights and its mere delimitation of them has sometimes been taken up and applied.⁵⁷⁷ So, for example, in *Pennycook v Shaws (EAL) Ltd*,⁵⁷⁸ the Court of Appeal considered whether a tenant's statutory right to renew a business tenancy conferred by Pt II of the Landlord and Tenant Act 1954 is a "possession" for the purposes of art.1. Arden L.J. (with whom Thorpe L.J. and Sir Martin Nourse agreed) found "the most detailed guidance" as to how to approach this question in Lord Nicholls's speech in the *Wilson* case,⁵⁷⁹ with the result that the court needed to look:

"... at the substance of the claimed right to see whether the bar to the exercise of the tenant's right is a delimitation of the right or whether it represents a deprivation of right."⁵⁸⁰

On the facts before her, Arden L.J. held that the 1954 Act deprived the tenant of a right.⁵⁸¹ By the time of *PW & Co Ltd v Milton Gate Investments Ltd*,⁵⁸² however, Neuberger J. was able to take into account the decision of the European Court of Human Rights in *Stretch v UK*⁵⁸³ in deciding whether art.1 was engaged. Neuberger J. there accepted that the Human Rights Act required ss.139 or 141 of the Law of Property Act 1925 to be interpreted so as to prevent a head-landlord from being deprived of rent under the covenants of sub-tenancies which had not determined by the exercise of a "break clause" by the head-tenant. In these circumstances, art.1 of the First Protocol to the European Convention was engaged: if the underleases would survive the determination of the head-lease without the tenant's covenants being enforceable, the head-landlord would be kept out of the premises in question for the remainder of the sub-leases without being able to recover any rent whatever: "[t]hat is scarcely 'peaceful enjoyment of [its] possessions'."⁵⁸⁴ In *Horsham Group Properties Ltd v Clark*⁵⁸⁵ the questions arose whether the exercise of the right by a mortgagee to appoint a receiver under s.101(1)(i) of the Law of Property 1925 and to sell the property under a term of the mortgage deed engaged art.1 of the First Protocol of the Convention by reason of its effect on the mortgagor's interest and, if it did, whether it infringed that article. Briggs J. held that a mortgagor's equity of redemption was a "possession" for the purposes of art.1 First Protocol,⁵⁸⁶ relying on *Pennycook v Shaws (EAL) Ltd*.⁵⁸⁷ However, he further held that the particular mortgagor before him "lost her equity of redemption by virtue of the exercise of powers conferred purely by contract" rather than as a result of the legislative powers, and therefore "without any state intervention at all" so as to engage art.1 First Protocol.⁵⁸⁸ Moreover, he preferred to rest his decision on the broader ground that "section 101 serves to implement rather than override the private bargain between mortgagor and mortgagee", being "in substance a form of conveyancing shorthand designed to implement the ordinary expectations of mortgagors and mortgagees while reducing the costs and delays of conveyancing".⁵⁸⁹ Section 101 was subject to contrary intention and was "as far removed from the concept of state intervention into private rights through overriding legislation, which lies behind article 1, as it is possible for legislation to get".⁵⁹⁰ As a result, the exercise of the statutory power under s.101 did not constitute a deprivation of possessions within the meaning of art.1 First Protocol so as to engage that provision.⁵⁹¹ On the other hand, in *K Ltd v National Westminster Bank Plc*⁵⁹² Longmore L.J. (with whom Ward and Laws L.J.J. agreed) doubted whether the exception creation by ss.328, 333, 335 and 338 of the Proceeds of Crime Act 2002 to a bank's customer's right to have the contract of mandate performed is "the kind of possession which art.1 [of the First Protocol] contemplates will be peaceably enjoyed" as the legislation did not cancel the debt but merely deferred performance of the contract for a number of days during which the bank's suspicion of money-laundering was investigated.⁵⁹³

1-070

By contrast, in *Salat v Barutis*⁵⁹⁴ the Court of Appeal saw the majority opinion in *Wilson v First County*

Trust Ltd (No.2), as being found in the speeches of Lords Hobhouse, Scott and Hope rather than Lords Nicolls and Roger ⁵⁹⁵ and held that *Wilson* is therefore authority for the proposition that there is no violation of a contracting party's rights under art.1 of the First Protocol to the Convention where that party did not acquire any effective rights against the other contracting party as a result of the application of UK statute. ⁵⁹⁶ The Court of Appeal applied this proposition to a case where a contracting party's rights under a contract of credit hire agreement were unenforceable against the consumer hirer by operation of the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008. ⁵⁹⁷ In the Court of Appeal's view, this position was not affected by the decision of the European Court of Human Rights in *Stretch v UK* ⁵⁹⁸ at least in the context before it, as the credit hire company must be taken to have been aware of the effect of the 2008 Regulations at the time it entered into the agreement and so cannot have had a legitimate expectation of being able to enforce the agreement against the consumer hirer if it did not comply with the relevant regulation. ⁵⁹⁹

The legitimacy, certainty, and proportionality of the legislative interference with a person's property


1-071

If a court decides that art.1 of the First Protocol is engaged, it must then address the question whether the law's interference with the right of property is legitimate, sufficiently certain and proportionate. ⁶⁰⁰ In this respect, in *Wilson v First County Trust Ltd (No.2)* ⁶⁰¹ those judges who expressed a view on the matter considered that if the provisions of the Consumer Credit Act 1974 were properly held to interfere with the creditor's right of property, then this interference was both "legitimate" and "proportionate" given the importance of the social policy of protection of borrowers which lay behind them. ⁶⁰² And while Lord Nicholls expressed some hesitation on the issue of certainty, he concluded that he was "not persuaded [that] the degree of uncertainty involved ... [was] unacceptably high". ⁶⁰³ Therefore, there was no incompatibility between the relevant provisions of the Consumer Credit Act 1974 and creditors' Convention rights. Similarly, in *K Ltd v National Westminster Bank Plc* ⁶⁰⁴ the Court of Appeal held that even if the exception created by the Proceeds of Crime Act 2002 to a bank's customer's right to have the contract of mandate performed attracted the application of art.1, any interference with the customer's common law rights under the mandate did not impair its right of access to the courts in anything more than a short suspensory manner and, given the purposes of the 2002 Act, did so in pursuance of a legitimate aim in a proportionate manner. ⁶⁰⁵


Examples of other Convention rights

1-072

⚠ Examples of the application of ss.3 and 4 of the 1998 Act may arise in relation to other Convention rights. ⁶⁰⁶ So, it has been argued that s.11(1)(a) of the Landlord and Tenant Act 1985 imposing an obligation "to keep in repair the structure" of the dwelling house must be construed by operation of s.3(1) of the 1998 Act so as to give effect to the tenant's rights under art.8 of the European Convention and thereby must be read as imposing an obligation "to put and keep [the structure] in good habitable repair". ⁶⁰⁷ However, this argument was rejected by the Court of Appeal on the basis that this was not a possible reading of the relevant provisions of the Landlord and Tenant Act 1985, given the interpretation to them previously established by the Court of Appeal. ⁶⁰⁸ ⚠ It has also been argued that the system of adjudication set up by the Housing Grants Construction and Regeneration Act 1996 s.108(2) is incompatible with art.6 of the European Convention. ⁶⁰⁹ Furthermore, in *Ghaidan v Godin Mendoza* ⁶¹⁰ a majority of the House of Lords relied on s.3 of the Human Rights Act 1998 to "read and give effect" to the provisions of the Rent Act 1977 ⁶¹¹ which grants a statutory tenancy to "[t]he surviving spouse (if any) of the original tenant if residing in the dwelling-house immediately before the death of the original tenant" so as to include homosexual cohabitantes, so as to give effect to their Convention right not to be discriminated against on the ground of sexual orientation in respect of their right to respect for a person's home. ⁶¹²

- [560.](#) [2003] UKHL 40, [2003] 3 W.L.R. 568. These observations were obiter given their decision on the non-retroactive impact of ss.3 and 4 of the 1998 Act: see above, paras 1-059—1-060. Lord Rodger expressed no views on these hypothetical issues: [2003] 3 W.L.R. 568 at [220].
- [561.](#) [2003] UKHL 40, [2003] 3 W.L.R. 568 at [33], per Lord Nicholls.
- [562.](#)  [2003] 3 W.L.R. 568 at [104]–[105] (Lord Hope); [132] (Lord Hobhouse); [165]–[166] (Lord Scott); [215] (Lord Rodger agreeing with Lord Nicholls). This approach was applied in *Winstanley v Sleeman* [2013] EWHC 4792 (QB) at [58]–[59] (rule against scrutiny of academic judgments in claims for breach of contract does not bar access to the courts).
- [563.](#) Consumer Credit Act 1974 ss.65, 106, 113 and especially 127(3). Section 127(3) of the 1974 Act was repealed by the Consumer Credit Act 2006 s.15: see Vol.II, para.39-094.
- [564.](#) [2003] UKHL 40, [2003] 3 W.L.R. 568. These observations were obiter given their decision on the non-retroactive impact of ss.3 and 4 of the 1998 Act: see above, para.1-059.
- [565.](#) As has been noted, Lord Rodger of Earlsferry did not decide the point: [2003] 3 W.L.R. 568 at [220].
- [566.](#) [2003] UKHL 40, [2003] 3 W.L.R. 568 at [39]. This view may be supported from the Strasbourg case law, e.g. *Stran Greek Refineries & Stratis Andreadis v Greece* (1995) E.H.R.R. 293 at [60]–[62] (right under arbitration award); *Stretch v UK* (2004) 38 E.H.R.R. 12 especially at [32] (option to renew lease later considered void as ultra vires the public authority lessor's power).
- [567.](#) [2003] 3 W.L.R. 568 at [44].
- [568.](#) [2003] 3 W.L.R. 568 at [137].
- [569.](#) [2003] 3 W.L.R. 568 at [107] (Lord Hope) and [168] (Lord Scott).
- [570.](#) [2003] 3 W.L.R. 568 at [106].
- [571.](#) [2003] 3 W.L.R. 568 at [168].
- [572.](#) While the context of this discussion was the application of s.4 of the 1998 Act to primary legislation, similar questions would arise in relation to any review or development of the common law undertaken by the courts as “public authorities” under s.6 of the 1998 Act. On this see below, para.1-084.
- [573.](#) See further McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification*, 2nd edn (2011), paras 9.17 et seq.; Allen, *Property and the Human Rights Act 1998* (2005), Ch.8.
- [574.](#) See cases cited at n.504, above.
- [575.](#) (2004) 38 E.H.R.R. 12.
- [576.](#) (2004) 38 E.H.R.R. 12 at [32], and see also [34] and [35].
- [577.](#) [2003] UKHL 40, [2004] 1 A.C. 816 at [137].
- [578.](#) [2004] EWCA Civ 100, [2004] Ch. 296 at [30]–[42]. See also *C A Webber (Transport) Ltd v Railtrack Plc* [2003] EWCA Civ 1167, [2004] 1 W.L.R. 320 at [59]–[61]; *Re T & N Ltd* [2005] EWHC 2870 (Ch), [2006] 1 W.L.R. 1728 at [171]; *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 E.H.R.R. 3 at [52].
- [579.](#) [2004] EWCA Civ 100 at [34].

- [580.](#) [2004] EWCA Civ 100 at [35].
- [581.](#) [2004] EWCA Civ 100 at [38].
- [582.](#) [2003] EWHC 1994 (Ch), [2004] Ch. 142.
- [583.](#) (2004) 38 E.H.R.R. 12 especially at [32].
- [584.](#) [2003] EWHC 1994 (Ch) at [126], per Neuberger J.
- [585.](#) [2008] EWHC 2327 (Ch), [2009] 1 W.L.R. 1255.
- [586.](#) [2008] EWHC 2327 (Ch) at [25].
- [587.](#) [2004] EWCA Civ 100, [2004] Ch. 296 at [30]–[42].
- [588.](#) [2008] EWHC 2327 (Ch) at [33] and [38].
- [589.](#) [2008] EWHC 2327 (Ch) at [35].
- [590.](#) [2008] EWHC 2327 (Ch) at [36].
- [591.](#) [2008] EWHC 2327 (Ch) at [40].
- [592.](#) [2006] EWCA Civ 1039, [2007] 1 W.L.R. 311.
- [593.](#) [2006] EWCA Civ 1039 at [25].
- [594.](#) [2013] EWCA Civ 1499, [2013] C.T.L.C. 250.
- [595.](#) [2003] UKHL 40, [2004] 1 A.C. 816 at [107] (Lord Hope); [137] (Lord Hobhouse); [168] (Lord Scott) and cf. [44] (Lord Nicholls). While Lord Rodger agreed with Lord Nicholls as to the application of the Human Rights Act 1998 to the facts of *Wilson* (i.e. to a contract made before the 1998 Act), he did not express a view on the engagement of art.1, First Protocol ECHR to the Consumer Credit Act): [2003] UKHL 40 at [215] and [220]. See above, paras 1-059 and 1-061.
- [596.](#) [2013] EWCA Civ 1499 at [27] (Moore-Bick L.J. giving judgment for the court).
- [597.](#) SI 2008/1816; [2013] EWCA Civ 1499 at [27]. The 2008 Regulations were revoked and replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) on which see Vol.II, paras 38-056 et seq.
- [598.](#) (2004) 38 E.H.R.R. 12 discussed above, para.1-068 where it is argued that it supports the view of Lord Nicholls in *Wilson v First County Trust Ltd (No.2)*.
- [599.](#) [2013] EWCA Civ 1499 at [27].
- [600.](#) *Sporrong and Lönnroth v Sweden* (1983) 5 E.H.R.R. 35 at [69]–[73].
- [601.](#) [2003] UKHL 40, [2003] 3 W.L.R. 568.
- [602.](#) [2003] UKHL 40, [2003] 3 W.L.R. 568 at [62], [74]–[75] (Lord Nicholls, with whom Lord Hope agreed at [109]); [138] (Lord Hobhouse of Woolborough); [169]–[170] (Lord Scott).
- [603.](#) [2003] UKHL 40 at [77]. See also *Horsham Group Properties Ltd v Clark* [2008] EWHC 2327 (Ch), [2009] 1 W.L.R. 1255 at [44] (on which see above, para.1-069), where it was held that any deprivation of possession constituted by the exercise by a mortgagee of its powers under s.101 of the Law of Property Act after a relevant default by the mortgagor is justified in the public interest, and requires no “case-by-case exercise of a proportionality discretion by the court”.

- [604.](#) [2006] EWCA Civ 1039 [2007] 1 W.L.R. 311.
- [605.](#) [2006] EWCA Civ 1039 at [24].
- [606.](#) On the possible impact of the Human Rights Act on arbitral proceedings see Vol.II, paras 32-015—32-019 referring, inter alia, to *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31 (where it was held that an arbitration clause and any arbitration made under it which was subject to the provisions of the Arbitration Act 1996 did not constitute an infringement of a person's rights under art.6 of the European Convention); *Sumukan Ltd v The Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep. 87 at [53]–[62] (where it was held that an agreement not to appeal an arbitration award under s.69 of the Arbitration Act 1996 did not constitute an infringement of a person's rights under art.6 of the European Convention).
- [607.](#) *Lee v Leeds City Council* [2002] EWCA Civ 6, [2002] 1 W.L.R. 1488 at [56].
- [608.](#)  [2002] 1 W.L.R. 1488 at [56]–[59], referring to *Quick v Taff Ely BC* [1986] Q.B. 809. See also *McDonald v McDonald* [2016] UKSC 28, [2017] A.C. 273 at [61]–[70], noted below, para.1-091.
- [609.](#) *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] B.L.R. 272 at [18]. No determination was made under s.4 of the Act as no notice had been given to the Crown pursuant to s.5 of the Human Rights Act 1998.
- [610.](#) [2004] UKHL 30, [2004] 2 A.C. 557.
- [611.](#) Rent Act 1977 Sch.I paras 2 and 3 (as amended).
- [612.](#) European Convention on Human Rights arts 8 and 14.

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“Public authorities” within the meaning of s.6 of the 1998 Act

1-073


An important preliminary question is whether, when or to what extent contracts made (or not made) ⁶¹³ by public authorities or by other persons attract the application of s.6 of the 1998 Act. According to s.6(1) “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right”. Section 6(3) provides for this purpose that “public authority includes (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature”; s.6(5) then explains that:


“In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private.”

This provision therefore recognises two categories of person: “core public authorities” (sometimes termed “pure public authorities”), that is, those persons or bodies which are public authorities for all purposes, such as government ministers, local authorities, and the police ⁶¹⁴; and “hybrid” bodies which may act either publicly or privately depending on the nature of the act or omission. ⁶¹⁵ As regards “core public authorities”, *all* their “acts” (including apparently their acts in making, performing or breaking their contracts) are subject to the test of illegality found in s.6, however “private” they may appear. ⁶¹⁶ As regards “hybrid” bodies, it is a much more difficult question whether their conclusion of a contract constitutes an act “the nature of [which] is private”, rather than public.

“Hybrid bodies” and “functions of a public nature”

1-074

 The way in which s.6 applies to “hybrid bodies” has arisen in three important decisions. ⁶¹⁷ In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* ⁶¹⁸ the House of Lords considered that there is no single test to determine whether or not a particular function exercised by a “hybrid body” is “public” within the meaning of s.6(3)(b), though factors to be taken into account include:

“... the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.” ⁶¹⁹ 

In this respect, although the domestic case law on judicial review may provide some assistance as to what does and does not constitute a “function of a public nature” within the meaning of s.6(3)(b), this case law must be examined in the light of the jurisprudence of the European Court of Human Rights as to those bodies which engage the responsibility of the state for the purposes of the Convention. ⁶²⁰

Subsequently in *R. (West) v Lloyd's of London* ⁶²¹ the Court of Appeal held that decisions by Lloyd's of London under powers contained in its byelaws to approve minority buy-outs of four syndicates of which the applicant was a member (and which he complained were prejudicial to his rights of due process and of possession of this property under art.6 of the Convention and under art.1 of its First Protocol) were not subject to challenge by way of judicial review, whether by virtue of s.6 of the 1998 Act or more generally. In the view of the Court of Appeal, the relationship between Lloyd's and its members was entirely voluntary and contractual and their rights to participate in a syndicate governed exclusively by the terms of their contracts with their managing agents. ⁶²² Applying the approach of the House of Lords in *Aston Cantlow*, the Court of Appeal held that for the purposes of s.6 of the 1998 Act the objectives of Lloyd's were “wholly commercial” and “not governmental even in the broad sense of that expression”: it was rather the Financial Services Authority acting under the Financial Services and Markets Act 2000 “which is the governmental organisation which will be answerable to the Strasbourg court”. ⁶²³

1-075

Thirdly, in the important and controversial decision in *YL v Birmingham City Council* ⁶²⁴ a majority of the House of Lords held that a commercial company providing residential and nursing care to a person under a contract was not acting as someone “certain of whose functions are functions of a public nature” within the meaning of s.6(3)(b) of the 1998 Act, even though in so doing the company acted under a contract with a local authority which concluded it in furtherance of its statutory duties to make arrangements for providing residential accommodation for persons in need of care and attention not otherwise available to them. The grounds of their lordships' decisions were complex, but of key significance for the majority were the nature of the body providing the care (“a private, profit-earning company” ⁶²⁵); the nature of the obligation which the person in receipt of nursing care was seeking to enforce, namely “a private law contract” ⁶²⁶; and, more widely, a concern for the widespread effect of the opposite decision, which was seen as requiring any commercial company (and its employees) which carried on an operation of a similar nature to an operation carried on by a local authority under statutory powers also to be covered by the 1998 Act. ⁶²⁷ For the minority (Baroness Hale of Richmond, with whom Lord Bingham of Cornhill agreed) the meaning of s.6 had to be seen in the context of the case law of the European Court of Human Rights which has sometimes placed responsibility on a state for the acts of a private body, notably imposing positive obligations on it to prevent violations of an individual's human rights. ⁶²⁸ So, for the purposes of s.6 of the 1998 Act in Baroness Hale's view:

“The contrast is between what is ‘public’ in the sense of being done for or by or on behalf of people as a whole and what is ‘private’ in the sense of being done for one's own purposes.” ⁶²⁹

and:

“... while there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest.” ⁶³⁰

This led the minority to hold that the company undertook functions “of a public nature” in providing residential care to persons in need under a contract with the local authority which discharged thereby its statutory duty to make arrangements for this purpose. ⁶³¹ The minority's position has been cogently supported by Professor Craig on the basis that:

“If it is decided that a core public authority is performing a public function pursuant to a statutory duty or power cast upon it, then that should be decisive” ⁶³²

of the question of its performing a public function and so there should be no assessment of factors (as undertaken by the majority):

“... the nature of the function does not change if the task is contracted out to a body that is nominally private. ⁶³³ It cannot be correct as a matter of principle for the availability of Convention rights to be dependent upon the fortuitous incidence as to how the core public authority chooses to discharge its functions.” ⁶³⁴

However, he acknowledges that legislative intervention may be required to reform the law on the question. ⁶³⁵

A rather more liberal approach to “public act” was taken by the Court of Appeal in *R. (Weaver) v London and Quadrant Housing Trust*. ⁶³⁶ There, the Court of Appeal considered whether the termination of a tenancy by a registered social landlord constituted a “private act” within the meaning of s.6(5) of the Human Rights Act 1998, it having been conceded that some of the landlord’s functions were public functions. A majority of the Court of Appeal (Lord Collins of Mapesbury, Elias L.J.; Rix L.J. dissenting) held that it was necessary to focus on the context in which the act occurs and, for this purpose, both the course and nature of the activities need to be considered when deciding whether an act is a private act or not within s.6(5), as they would in determining whether a function is public or not. In the context, it was held that there were a number of features which brought the act of terminating a social tenancy within the purview of the Human Rights Act as a public act. ⁶³⁷ According to Elias L.J (with whom Lord Collins of Mapesbury agreed)

“... if an act were necessarily a private act because it involved the exercise of rights conferred by private law [including contract], that would significantly undermine the protection which Parliament intended to afford to potential victims of hybrid authorities”. ⁶³⁸

Unlawful refusal to contract by public authority

1-076

Section 6(6) of the 1998 Act provides that “[a]n act’ includes a failure to act”. In *R. (Haggerty) v St. Helen’s BC* ⁶³⁹ Silber J. was prepared to assume that a local authority’s decision not to enter a new contract with a private sector provider for the provision of places in a nursing home in fulfilment of a statutory duty, ⁶⁴⁰ did fall within s.6 so as to require its effects to be assessed as to their compatibility with the Convention rights of the existing residents of the home (who had to move to other accommodation provided by the local authority as a result of its decision not to enter the contract). ⁶⁴¹ However, on the facts the learned judge held that this act of the local authority did not infringe any of their Convention rights.

Unlawful conclusion of contract

1-077

Where a “public authority”, ⁶⁴² concludes a contract after the coming into force of the operative provisions of the 1998 Act, then the “act” of so doing would engage s.6 of the 1998 Act. Where this “act” is itself incompatible with a Convention right (either of the other party or of a third party) then it is

rendered “unlawful”. So, for example, it has been said that a local authority must bear in mind the Convention rights of the residents of accommodation to be provided in performance of its functions under the National Assistance Act 1948 s.21 in making their contracts with private sector providers.⁶⁴³ Similarly, where a “public authority” concludes a contract of employment, it should bear in mind its employees’ Convention rights, notably, to freedom of expression and privacy.⁶⁴⁴

Unlawful manner of performance of contract

1-078

⚠ Section 6 of the 1998 Act may also affect the way in which a “public authority” ought to act in performance of, or in relation to a situation created by, a contract. An example may be found in the actions of a public employer, which must not act inconsistently with the Convention rights of its employees, for instance, as regards the secret monitoring of their telephone conversations.⁶⁴⁵ An important series of examples can be found in the context of public sector housing.⁶⁴⁶ In *Lee v Leeds City Council*,⁶⁴⁷ the Court of Appeal proceeded on the basis that a local authority acted as a “public authority” in relation to the provision of public sector housing and that this therefore imposed on it a statutory duty to take steps to ensure that the condition of the houses which they provided was such that their tenants’ rights to respect of their private and family life under art.8 of the European Convention were not infringed.⁶⁴⁸ However, according to the Court of Appeal:

“The steps which a public authority will be required to take in order to ensure compliance with Article 8 ... must be determined, in each case, by having due regard to the needs and resources of the community and of individuals, [having regard to the fact that] [t]he allocation of resources to meet the needs of social housing is very much a matter for democratically determined priorities”.⁶⁴⁹

In relation to the cases before it, the Court of Appeal held that no breach of the statutory duty which it had identified had been established, in part owing to the proceedings being by way of preliminary issues without any determination of the relevant facts.⁶⁵⁰ In two important decisions, the Supreme Court considered the implications of more recent case law of the European Court of Human Rights on the protection of a person’s right to respect of his home under art.8 of the Convention in relation to claims for possession of a person’s home by a public authority landlord.⁶⁵¹ In *Manchester City Council v Pinnock* the Supreme Court held that this case-law made clear that “where a court is asked to make an order for possession of a person’s home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact”⁶⁵² and that this “unambiguous and consistent approach”⁶⁵³ in the European Court of Human Rights should be followed by the Supreme Court, despite three previous decisions of the House of Lords to the contrary.⁶⁵⁴ Where, therefore, a local authority which had obtained a court order to “demote” a secured tenant on the ground that he or persons living with him were engaged in housing-related anti-social conduct or conduct which used the premises for unlawful purposes, then sought a court order for possession of the premises under s.143D(1) of the Housing Act 1996, the provisions of the Act which required the court to grant the order subject to certain procedural requirements⁶⁵⁵ could and should be interpreted as requiring the court to consider whether the local authority landlord had considered its tenant’s art.8 rights.⁶⁵⁶ The Supreme Court considered that its decision would have implications beyond the special context of claims for possession against “demoted tenants”, although it noted that, as regards public sector “secured tenants”,⁶⁵⁷ ⚠ there would be “no difficulties of principle or practice” since “no order for possession can be made against a secure tenant unless, inter alia, it is reasonable to make the order”⁶⁵⁸: given that

“reasonableness involves the trial judge ‘tak[ing] into account all relevant circumstances ... in a broad common-sense way’ ... [i]t therefore seems highly unlikely, as a practical matter, that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under art.8.”⁶⁵⁹

In *Hounslow LBC v Powell*, *Leeds CC v Hall*, *Birmingham CC v Frisby* the Supreme Court applied its earlier approach to court orders for possession in favour of a public authority landowner and art.8 rights in *Manchester City Council v Pinnock* to the position of residential occupiers of property granted a licence under the homelessness regime in Pt VII of the Housing Act 1985 and to tenants of residential properties under the regime for “introductory tenancies” in Ch.1 of Pt V of the Housing Act 1986.⁶⁶⁰ In the view of the Supreme Court, in all cases where a local authority seeks possession in respect of a property that constitutes a person’s home for the purposes of art.8, the court must have the power to consider whether the order is necessary in a democratic society, meaning that it must be proportionate to a legitimate aim that the local authority is seeking to achieve.⁶⁶¹ However, in those cases where domestic law does not subject the making of a possession order to a requirement of reasonableness, as a general rule the court will have to consider whether the making of such an order is proportionate only if the issue has been raised by the occupier⁶⁶² and if it has crossed the high threshold of being seriously arguable⁶⁶³:

“[i]n seeking an order for possession, the local authority is not required to advance a positive case that this will accord with the requirements of article 8(2). This will be presumed by reason of the authority’s ownership of the property and duties in relation to the management of the housing stock.”⁶⁶⁴

1-079

However, in *Sims v Dacorum BC*⁶⁶⁵ the Supreme Court considered how this law affected the position of a tenant in a public sector *joint* tenancy where the other tenant has served a notice to quit. At common law, in the absence of a contractual term to the contrary, such a tenancy will be validly determined by service on the landlord of a notice to quit by only one of the joint tenants, thereby bringing the tenancy to the end against the wishes or even without the knowledge of his or her co-tenants.⁶⁶⁶ In *Sims* this rule was reflected in an express term of the lease taken, to the effect that the tenancy would be lost if a notice to quit were served by his joint tenant, though the lease also provided that the local authority landlord would consider whether to let him remain or to find other accommodation for him. The claimant tenant argued that the loss of his tenancy by the notice to quit by his joint tenant (his then wife) breached his Convention rights under art.8 or under art.1 of the 1st Protocol, but this was firmly rejected by the Supreme Court. First, as regards his right to property, in the view of the Supreme Court:

“the property which [the claimant] owned and of which he complains to have been wrongly deprived, whether one characterises it as the tenancy or an interest in the tenancy, was acquired by him on terms that (i) it would be lost if a notice to quit was served by [the other joint tenant], and (ii) if that occurred, [his landlord] could decide to permit him to stay in the house or find other accommodation for him.”⁶⁶⁷

The claimant’s property was therefore lost as a result of his joint tenant serving a notice to quit, and by the fact that the landlord considered whether to let him remain and decided not to let him do so. Given that he therefore was deprived of his interest:

“in a way, which was specifically provided for in the agreement which created it, his A1P1 claim is plainly very hard to sustain.”⁶⁶⁸

Moreover, the contract term under which the tenancy was determined was not unreasonable, as it reflected the common law rule (which was not itself challenged) and someone’s interest has to suffer when one of two joint tenants serves a notice to quit; nor was the landlord’s decision against him staying in the property unreasonable or disproportionate.⁶⁶⁹ Secondly, as regards his rights under art.8, while the claimant was entitled to raise the question of the proportionality of the landlord’s pursuit of its claim for possession in the light of its earlier case-law on art.8, this would not help the

claimant as the landlord had considered carefully this decision in a lawful and proportionate manner.⁶⁷⁰ Moreover, the service of the notice to quit did not in itself violate the claimant's art.8 rights as full respect was given to those rights by the fact that his tenancy had been determined in accordance with its contractual terms to which he had agreed, he was to be considered for rehousing, and he could be evicted only by a court order in accordance with domestic law and with an opportunity to argue that the eviction was disproportionate.⁶⁷¹

Effect on the contract

1-080

Where s.6 of the 1998 Act renders the making or performance of a contract unlawful as incompatible with Convention rights it creates a new head of contractual illegality. In the absence of special provision on this issue in the 1998 Act, the contractual and restitutionary consequences for the parties to the contract of this "unlawfulness" fall to be governed by the common law's approach to illegality exposed and analysed in Ch.16. In this respect, difficult questions may arise as to whether the "unlawful act" of the public authority renders the whole contract illegal (and with what effects for its parties) or whether it merely renders a term or terms illegal by application of the doctrine of severance.⁶⁷²

Construction of contracts made by a "public authority"

1-081


In *Biggin Hill Airport Ltd v Bromley LBC*⁶⁷³ it was held that the 1998 Act did not require a court as itself a public authority⁶⁷⁴ to interpret a contract made *before* the coming into effect of the same Act in such a way as to be compatible with the Convention rights of third parties to the contract.⁶⁷⁵ On the other hand, where a contract is made after the coming into force of the 1998 Act by a "public authority"⁶⁷⁶ and another person (whether or not a public authority), it may be argued that there is a presumption that such a public authority intends in making and performing the contract to avoid acting unlawfully under s.6 of the 1998 Act, without any need for reliance on the position of courts as themselves "public authorities". For such a presumption could be supported by reference to the maxim *ut res magis valeat quam pereat*, since a construction of compatibility with Convention rights in these circumstances would avoid the threat of contractual illegality.⁶⁷⁷ Moreover, as regards "terms implied in law" it may be argued that a court should imply terms in a contract so as allow a public authority to perform its duty to act consistently with Convention rights, as "necessary" for the efficacy of the particular type of contract in question (*viz* a contract made by a public authority whose performance would have otherwise potentially prejudicial effect on a person's Convention rights).⁶⁷⁸

^{613.} See below, para.1-076.


^{614.} For the HL in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [6]–[7], [52], [88], [171] the purpose of s.6(1) is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall be subject to a domestic law obligation not to act incompatibly with Convention rights and the phrase "a public authority" for the purpose of s.6(1) is therefore "essentially a reference to a body whose nature is governmental in the broad sense of the expression".

^{615.} *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [8]–[11], [35], [85]. Craig, *Administrative Law*, 7th edn (2012), paras 20–016 et seq. (who notes that this categorisation reflects the parliamentary debates of the Human Rights Act and accords with the approach adopted by the European Court of Human Rights).

^{616.} *YL v Birmingham City Council* [2007] UKHL 27, [2007] 3 W.L.R. 112 at [131] (Lord Neuberger).

- [617.](#) See further HL & HC Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act 2006–2007* (2007) (published before the decision in *YL v Birmingham City Council* [2007] UKHL 27, [2007] 3 W.L.R. 112); Craig, *Administrative Law*, 7th edn (2012) paras 20-016–20-021.
- [618.](#) [2003] UKHL 37, [2004] 1 A.C. 546.
- [619.](#)  [2003] UKHL 37 at [12]. The approach taken by the HL was applied in *TH v Chapter of Worcester Cathedral* [2016] EWHC 1117 (Admin) (decision by the Chapter of a cathedral affecting the claimant's ability to perform his hobby of bell-ringing was held not to be an act of a "hybrid" public authority within s.6(3) of the Human Rights Act 1998).
- [620.](#) [2003] UKHL 37 at [52].
- [621.](#) [2004] EWCA Civ 506, [2004] 3 All E.R. 251.
- [622.](#) [2004] EWCA Civ 506 at [8]–[9].
- [623.](#) [2004] EWCA Civ 506, at [38], per Brooke L.J.
- [624.](#) [2007] UKHL 27, [2007] 3 W.L.R. 112 noted by Landu (2007) P.L. 630.
- [625.](#) [2007] UKHL 27, per Lord Mance at [115] with whom Lord Neuberger of Abbotsbury agreed at [126].
- [626.](#) [2007] UKHL 27, per Lord Scott of Foscote at [34], although cf. Lord Mance at [117]–[118] and Lord Neuberger at [151] who saw the absence of any relevant difference between a resident staying privately under a contract with the company and one staying under an arrangement between the company and a local authority as a reason for treating both as unable to rely on Convention rights against the company.
- [627.](#) [2007] UKHL 27 at [30] and [82] (Lord Mance using the example of private contractors cleaning the windows of premises let to council tenants).
- [628.](#) [2007] UKHL 27 at [56]–[57], per Baroness Hale of Richmond.
- [629.](#) [2007] UKHL 27 at [62], per Baroness Hale of Richmond.
- [630.](#) [2007] UKHL 27 at [66] and see also [7]–[12] (Lord Bingham of Cornhill).
- [631.](#) A private Members' Bill was introduced to Parliament, the Human Rights Act 1998 (Meaning of Public Authority) Bill 2007 cl.1 of which provided that: "[F]or the purposes of section 6(3)(b) of the Human Rights Act 1998 (c.42), a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function." The Bill was not, however, passed into law.
- [632.](#) Craig, *Administrative Law*, 7th edn (2012), para.20-021.
- [633.](#) Craig at para.20-021.
- [634.](#) Craig at para.20-024 (with other arguments to the same effect).
- [635.](#) Craig at para.20-024 noting the Human Rights Act 1998 (Meaning of Public Authority) Bill 2007.
- [636.](#) [2009] EWCA Civ 587, [2010] 1 W.L.R. 363. The decision was applied in *R. (on the application McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin), [2010] 2 P. & C.R. DG6 (where, however, judicial review was refused partly on the basis of the existence of other remedies open to the claimants). The decision in *Weaver* was distinguished by *Southward Housing Cooperative Ltd v Walker* [2015] EWHC 1615 (Ch) at [220]–[225] (fully mutual housing

co-operative not a public authority or acting as such for the purposes of s.6 of the 1998 Act).

- [637.](#) [2009] EWCA Civ 587 at [66]–[82].
- [638.](#) [2009] EWCA Civ 587 at [77], per Elias L.J. with whom Lord Collins of Mapesbury agreed (especially at [100]–[101]).
- [639.](#) [2003] EWHC 803 (Admin), *The Times*, April 30, 2003.
- [640.](#) National Assistance Act 1948 s.21.
- [641.](#) [2003] EWHC 803 (Admin) at [25]–[26].
- [642.](#) Above, paras 1-073—1-075.
- [643.](#) *R. (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] H.R.L.R. 30 at [34]. cf. *YL v Birmingham City Council* [2007] UKHL 27, [2007] 3 W.L.R. 112 in relation to the position of the private sector providers themselves: above, para.1-075.
- [644.](#) See further Morris (1998) I.L.J. 293 and Palmer [2000] C.L.J. 168.
- [645.](#) *Halford v UK* (1997) 24 E.H.R.R. 523; *Copland v UK* (2007) 45 E.H.R.R. 37.
- [646.](#) cf. below, para.1-091 on the position of private sector tenancies.
- [647.](#) [2002] EWCA Civ 6, [2002] 1 W.L.R. 1488 at [26].
- [648.](#) [2002] 1 W.L.R. 1488 at [48].
- [649.](#) [2002] 1 W.L.R. 1488 at [49], per Chadwick L.J.
- [650.](#) [2002] 1 W.L.R. 1488 at [51].
- [651.](#) *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 3 W.L.R. 1441 at [30] et seq. (Lord Neuberger J.S.C., to whose judgment all seven members of the Court contributed). The relevant Strasbourg Court's jurisprudence is: *Connors v UK* [2004] ECHR 66746/01; *Blečić v Croatia* [2004] ECHR 59532/00; *McCann v UK* [2008] ECHR 19009/04; *Posi v Croatia* [2009] ECHR 28261/06; *Zehentner v Austria* [2009] ECHR 20082/02; *Paulić v Croatia* [2009] ECHR 3572/06; *Kay v UK* [2010] ECHR 37341/06.
- [652.](#) [2010] UKSC 45 at [49].
- [653.](#) [2010] UKSC 45 at [46].
- [654.](#) *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 A.C. 983; *Lambeth LBC v Kay*, *Leeds City Council v Price* [2006] UKHL 10, [2006] 2 A.C. 983; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] A.C. 367.
- [655.](#) Housing Act 1996 s.143D(2).
- [656.](#) [2010] UKSC 45 at [79].
- [657.](#)  The Supreme Court explicitly stated that nothing they said was “intended to bear on cases where the person seeking the order for possession is a private landowner”: [2010] UKSC 45 at [50]. On this, see below, para.1-091 and *McDonald v McDonald* [2016] UKSC 28, [2017] A.C. 273.
- [658.](#) [2010] UKSC 45 at [55]; Housing Act 1985 s.84(2)(a).

- [659.](#) [2010] UKSC 45 at [56], quoting Lord Greene M.R. in *Cumming v Danson* [1942] 2 All E.R. 653 at 655.
- [660.](#) [2011] UKSC 8, [2011] 2 A.C. 186.
- [661.](#) [2011] UKSC 8 at [2]–[3] (Lord Hope of Craighead D.P.); [73]–[75] (Lord Phillips P. with whom Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Collins JJ.S.C. agreed).
- [662.](#) *Manchester City Council v Pinnock* [2010] UKSC 45 at [40] citing *Pauli# v Croatia* [2009] ECHR 3572/06 at [43]; [2010] UKSC 45 at [63].
- [663.](#) [2011] UKSC 8 at [33], [34] and [44]–[45] (Lord Hope of Craighead D.P.).
- [664.](#) [2011] UKSC 8 at [88], per Lord Phillips P. *Manchester CC v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8 were applied by the CA in *Thurrock BC v West* [2012] EWCA Civ 1435, [2013] H.L.R. 5 to the context of persons living in a house the subject of a public sector secured tenancy but who were not entitled to become its tenants as survivors of deceased tenants under the Housing Act 1985 ss.87–90. See also *Fareham BC v Millar* [2013] EWCA Civ 159, [2013] H.L.R. 22.
- [665.](#) [2014] UKSC 63, [2014] 3 W.L.R. 1600.
- [666.](#) *Hammersmith and Fulham LBC v Monk* [1992] 1 A.C. 478; [2014] UKSC 63 at [2].
- [667.](#) [2014] UKSC 63 at [15].
- [668.](#) [2014] UKSC 63 at [15].
- [669.](#) [2014] UKSC 63 at [16]–[18].
- [670.](#) [2014] UKSC 63 at [21] referring to *Manchester CC v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8.
- [671.](#) [2014] UKSC 63 at [23].
- [672.](#) See below, Ch.16 and especially paras 16-211 et seq.
- [673.](#) *The Times*, January 9, 2001, (2001) 98(3) L.S.G. 42 at [171]; reversed on other grounds [2001] EWCA Civ 1089, *The Times*, August 13, 2001, (2001) 98(33) L.S.G. 30.
- [674.](#) Human Rights Act 1998 s.6(3)(a) and see below, para.1-082.
- [675.](#) See above, para.1-065.
- [676.](#) See above, paras 1-073—1-075.
- [677.](#) On the maxim see below para.13-084.
- [678.](#) cf. *Lee v Leeds City Council* [2002] EWCA Civ 6, [2002] 1 W.L.R. 1488 at [62]–[63] (no implied term in public sector residential tenancy inconsistent with limited express terms). On the general law as to the implication of terms, see below, Ch.14.

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Consolidated Mainwork Incorporating Second Supplement

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Introduction

1-082

⚠ The way in which the terms of s.6 of the 1998 Act are drafted demonstrate that actions by public authorities are the primary focus of its protection of Convention rights. However, “courts and tribunals” are specifically included as “public authorities” for these purposes ⁶⁷⁹ and as a result a number of questions arise as to how their duty as “public authorities” may affect their functions in relation to disputes concerning contracts where neither party is itself a “public authority” ⁶⁸⁰ ⚠. A very clear application of this duty is found in relation to issues arising from the courts’ supervision and management of the civil process, applicable to proceedings arising from contracts as to other civil proceedings. However, other questions arising from the application of s.6 in this way are less straightforward.

The exercise of judicial discretions

1-083

Where the law in certain circumstances grants a true discretion to a court then its exercise of that discretion can be seen as an “act” so as to engage s.6 of the 1998 Act, with the result that the court must exercise the discretion in a way which is compatible with Convention rights. Both statute and common law confer discretions on courts in a number of situations affecting the relationship between parties to a contract. Examples of such statutory discretions may be found in the power to award damages in lieu of rescission for misrepresentation ⁶⁸¹ or the determination of the “just sum” for the purposes of relief on frustration. ⁶⁸² Rather more likely to involve the consideration of Convention rights, though, are the discretions enjoyed by courts in relation to the equitable remedies of specific performance and injunction. ⁶⁸³

The development of the common law

1-084

The question has arisen whether the courts as “public authorities” have a duty to protect Convention rights in their work in the development of the substantive common law as between two persons neither of whom are themselves “public authorities” within the meaning of the 1998 Act. ⁶⁸⁴ This “highly controversial topic” is often referred to as the possible “indirect horizontal effect” of s.6 of the 1998 Act. ⁶⁸⁵ An important context in which this question has arisen has been the development of the law of breach of confidence so as to reflect the Convention rights to a private life and to freedom of

expression, this having proved possible owing to the relative flexibility of the established law of breach of confidence. ⁶⁸⁶ It remains to be seen how far the courts will be willing to mould existing common law rules or principles or, more radically, to create entirely new legal remedies so as to give effect to Convention rights. ⁶⁸⁷ In the context of the law of contract, the general question is particularly likely to arise in the following contexts. ⁶⁸⁸

The existence of an intention to create legal relations

1-085

In *President of the Methodist Conference v Preston (formerly Moore)*, the Court of Appeal considered that, at common law, ministers of religion are appointed on a basis which does not give rise to a rebuttable presumption that there is no intention to create legal relations and it therefore held that, under the general law, a Methodist minister acted under a contract of employment with the President of the Methodist Conference so as to gain the benefit of the law of unfair dismissal, a decision reversed on appeal to the Supreme Court. ⁶⁸⁹ However, the Court of Appeal then considered how ECHR's art.9 provision on "freedom of thought, conscience and religion" could affect its view on the existence of such a contract. ⁶⁹⁰ The Court concluded that art.9's role here is a modest one, approving a dictum of Arden L.J. in *New Testament Church of God v Stewart* according to whom:

"the fact that in an employment dispute one party to the litigation is a religious body or that the other party is a minister of religion does not itself engage article 9. There must be religious beliefs that are contrary to or inconsistent with the implications of the contract or a contract of employment. It follows that the implication of a contract of employment is not automatically an interference with religious beliefs." ⁶⁹¹

In the view of the Court of Appeal in *Preston*, the dispute between the parties as to whether a Methodist minister worked for the President of the Methodist Conference under a contract of employment did not include a religious doctrinal element so as to engage art.9, nor would the court's finding that such a contract existed interfere with the right of Methodists to manifest their religious belief. ⁶⁹²

Implied contracts

1-086

In *Smith v Carillion* ⁶⁹³ the Employment Appeal Tribunal considered the question whether a court should imply a contract so as to give effect to Convention rights. There the question arose as to whether the relationship between an agency worker and the end-user of his services was based on an implied contract and, in particular, a contract under which he worked as a "worker". The Employment Appeal Tribunal held that, according to "generally applicable contractual principles", the reality of the arrangements before it did not attract the implication of a contract between the agency worker and the enduser. ⁶⁹⁴ It rejected the argument that the Human Rights Act 1998 required it to apply the common law as to the existence of a contract compatibly with Convention rights. In its view:

"HRA and Convention rights do not require or permit the implication of a contract of employment between the agency worker and the end-user in circumstances in which domestic law would not.... [T]he doctrine of necessity in implying contracts applies to all contracts not just to agency contracts. Applying the common law rule that a contract will only be implied between two parties where the relevant facts are capable of interpretation both for and against such a conclusion if such a result is necessary is not demonstrably incompatible with a Convention right. Further to disapply a rule would be likely to lead to uncertainty and inconsistency." ⁶⁹⁵

The Court of Appeal upheld the Employment Appeal Tribunal's decision on the implication of a contract in the circumstances, though it did not do so without consideration of the relevance of the agency worker's Convention rights for this purpose as this had not been argued before it. ⁶⁹⁶

The construction of contracts

1-087

As regards contracts made after the coming into force of the Human Rights Act, ought courts as "public authorities" to interpret contracts (where neither party is a "public authority"), ⁶⁹⁷ so as to be compatible with Convention rights, either of the parties or of third parties? While there is no provision in the 1998 Act requiring courts to construe *contracts* so as not to be incompatible with Conventions rights, ⁶⁹⁸ in contrast to the position as regards legislation which must be so read "in so far as it is possible", ⁶⁹⁹ this silence may not rule out such a duty arising from s.6 and stemming from the courts' functions either in finding of facts or in the development of the common law. As to the former, it is established at common law that the purpose of construction of the contract is to give effect to the parties' intentions as objectively determined, this involving issues both of fact and law, and that, at least where the express terms of the contract are ambiguous, the court should look to the factual matrix of the contract for guidance. ⁷⁰⁰ It may be argued that a court should "interpret" the contract so as to ensure that performance of its obligations is compatible with Convention rights, at least, perhaps, where such an interpretation is possible on the natural meaning of the words used. On the other hand, it may be countered that if it appears either from the terms of the contract on their natural meaning or from the factual matrix of the contract that the parties intended to agree to something which *would* be incompatible with a person's Convention rights, then the courts should hold to this interpretation, rather than impose on the parties something to which they did not agree. Indeed, for the courts to do otherwise in such a situation could be thought to be a misuse of their powers of "fact-finding" in a way itself vulnerable under art.6(1) of the Convention, for the court would be imposing its view of what should have been agreed by the parties and deliberately "mistaking" the facts of a case as generally understood and determined in order to do so. A similar set of arguments would apply to the implication of terms "in fact". ⁷⁰¹ A more robust argument would be that the courts should develop the common law governing the construction of the express terms of contracts so that it builds within it a requirement of interpretation "whenever possible" which makes performance compatible with Convention rights, this being an example of the "horizontal effect" of s.6. However, such a development would fly in the face of existing contractual principles of construction which have been established in the interests of commercial certainty and fairness to the parties: this would not be an example of Convention rights suffusing existing common law principles, but rather of their subverting them. ⁷⁰² Moreover, the decision of the Employment Appeal Tribunal in *Smith v Carillion* ⁷⁰³ which refused to imply a contract so as to give effect to Convention rights suggests that the courts are unlikely to read down the general rules on construction of contracts to do so.

New implied terms

1-088

⚠ Similar lines of argument may be developed for the implication of terms "in law" as have been just exposed in relation to the construction of express terms, so as to contend that a court should imply a term in a contract so as to give protection to the Convention rights of parties or of non-parties. ⁷⁰⁴ However, under the established test for the implication of such terms that they are necessary as well

as reasonable, ⁷⁰⁵ ⚠ and where neither party to the contract is a public authority ⁷⁰⁶ it is difficult to see the genuine necessity of the implication of such a term. And under Lord Hoffmann's reformulation of the law governing the implication of terms which asks whether a particular implied term provision "would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean", such an approach to the implication of terms so as to protect

Convention rights looks even less likely. ⁷⁰⁷ ⚠ Again, though, if the courts as themselves "public authorities" have a duty under the 1998 Act to adapt and develop the common law so as to protect Convention rights, then the proper approach to the implication of terms could itself fall to be interpreted or adapted so as to promote the protection of Convention rights. ⁷⁰⁸ In support of this, it

may be argued that the courts have historically taken a more or a less liberal approach to the implication of terms so as to give effect to their own views of the proper balance of interest between the parties and to create thereby the incidents of particular types of contract. ⁷⁰⁹ At least as regards the protection of the Convention rights of the parties to the contract, use of an implied term to achieve compatibility may not be alien to the spirit of the common law technique. On the other hand, the technique of implication of terms does have its limits, given that they must be fitted around the express terms and legal regulation of the contract in question. So, for example, it has been held that no term to maintain the dwelling in good condition should be implied in a residential tenancy which contains only an express term to keep the *structure* in good repair or which contains no express repairing obligation on the landlord as this would “invite the criticism that the court is seeking to make for the parties a bargain which they have not themselves made”. ⁷¹⁰

Open-textured norms governing the contract

1-089

The courts may also protect or promote Convention rights in the process of the interpretation and application of broad or “open-textured” norms applicable to particular types of contract, whether these norms are expressed as implied terms or as common law rules, ⁷¹¹ even where neither party is a “public authority” so as to be caught directly by s.6 of the 1998 Act. ⁷¹² So, for example, at common law it has been held that contracts of employment contain as their incident an implied term of mutual trust and confidence between the parties. ⁷¹³ Such a term could be used by a court as a vehicle for the protection of an employee’s rights under the Convention, for example, his right to privacy or freedom of expression, by treating a disregard by an employer of his employee’s rights as a breach of his obligation of trust and confidence. ⁷¹⁴ Such a development could be seen as reflecting a positive, indirect impact of the Human Rights Act on contractual relations, positive in that it would increase the practical duties of employer or employee, even if under the cover of an existing general implied term. Moreover, in *Telchadder v Wickland (Holdings) Ltd* ⁷¹⁵ the Court of Appeal accepted that in considering the reasonableness of termination by a private landowner of the licence of a mobile-home owner (as provided for by the Mobile Homes Act 1983), a court should consider, *inter alia*, the competing rights of the parties under art.8 and art.1 of the First Protocol of the Convention, accepting an argument to this effect based on the decision of the Supreme Court in *Manchester City Council v Pinnock*, ⁷¹⁶ even though the latter concerned the impact of the Human Rights Act on a public sector landlord. ⁷¹⁷

Open-textured controls on express contract terms

1-090

Rather differently, and “negatively” as it could lead to the striking down of contract terms, it may be argued that the judicial control of the fairness of terms in consumer contracts under the Unfair Terms in Consumer Contracts Regulations 1999 or, to those contracts to which it applies, the Consumer Rights Act 2015 Pt 2, ⁷¹⁸ may properly take into account in determining whether a term “contrary to the requirement of good faith, ... causes a significant imbalance in the parties rights and obligations arising under the contract, to the detriment of the consumer”, ⁷¹⁹ whether or not that term is incompatible with Convention rights. ⁷²⁰ In this respect, it should be noted that the preamble to the EC Directive which the 1999 Regulations (and the 2015 Act) implement suggests that the function of the “requirement of good faith” is to ensure that a court makes “an overall evaluation of the different interests involved”, and it then refers to matters which appear to relate to the public interest. ⁷²¹ So, for example, where rules governing the legal relationship between a university and its students find their basis in terms of the contract between them, the question of the fairness of these rules within the meaning of the 1999 Regulations, or 2015 Act Pt 2, could take into account their impact on the student’s Convention rights (for example, their rights to privacy or freedom of expression). ⁷²²

Private sector possession orders and article 8 of the Convention

1-091

❗ The question has been raised whether a tenant, former tenant or other possessor of land may rely on art.8's right to respect of a person's home against a claim for possession by a *private* land-owner. The Supreme Court has held that a possessor of a dwelling may so rely in relation to claims made by a public authority, and while it explicitly took no view of the position as regards claims by private persons, it recognised that "[c]onflicting views have been expressed both domestically and in Strasbourg" on the latter situation. ⁷²³ ❗ So, although comments in the House of Lords in its earlier decision in *Qazi* suggest that a distinction should be drawn between claims by a private landowner and by a public landowner, ⁷²⁴ in *Belchikova v Russia*, ⁷²⁵ the European Court of Human Rights:

"seems to have considered that article 8 was relevant, even when the person seeking possession was a private sector landlord ...[p]resumably ... on the basis that the court making the order was itself a public authority." ⁷²⁶

❗ However, in *McDonald v McDonald* ⁷²⁷ ❗ the Supreme Court held that, although it may well be that art.8 of the Convention is engaged when a court makes an order for possession of a tenant's home at the suit of a private sector landlord under s.21(4) of the Housing Act 1988, art.8 cannot:

"justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interest of private sector landlords and residential tenants." ⁷²⁸ ❗

A court considering whether to make such an order is therefore not required to assess the proportionality of evicting the occupier in the light of s.6 of the Human Rights Act 1998 and art.8 of the Convention. ⁷²⁹ ❗ In the view of the Supreme Court,

"[t]o hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is ... to protect citizens from having their rights infringed by the State. To hold otherwise would also mean that the Convention could be invoked to interfere with the A1P1 [art.1, 1st Protocol] rights of the landlord, and in a way which was unpredictable." ⁷³⁰ ❗



The Supreme Court contrasted this situation where there are "legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants" ⁷³¹ ❗ with situations where the relationship between two private parties is "tortious or quasi-tortious" rather than contractual and where the legislature has "expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise", for example, where a person is seeking to rely on her art.8 rights to restrain a newspaper from publishing an article in breach of her privacy and where the newspaper relies on art.10 of the Convention. ⁷³² ❗






⁶⁷⁹. Human Rights Act 1998 s.6(3)(a).

⁶⁸⁰. ❗ See, however, *McDonald v McDonald* [2016] UKSC 28, [2017] A.C. 273 (below para.1-091) where the SC observed that, while a court is a public authority for the purposes of the 1998 Act,

when it makes an order for possession against a private sector tenant it does so “merely as the forum for determination of the civil right in dispute between the parties” and that “once it concludes that the landlord is entitled to possession, there is nothing further to investigate”: at [44], quoting Lord Millett in *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 A.C. 983 at [108].

- 681. Misrepresentation Act 1967 s.2(2) and see below, paras 7-104, 7-110.
- 682. Law Reform (Frustrated Contracts) Act 1943 s.1(3) and see below, para.23-090.
- 683. See below, paras 27-034 et seq. and 27-065 et seq.
- 684. For discussion of these other “public authorities”, see above, paras 1-073—1-075.
- 685. *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40, [2003] 3 W.L.R. 568 at [25], per Lord Nicholls and see similarly at [174] (Lord Rodger). See for an introduction to this question: Craig, *Administrative Law*, 7th edn (2012) at paras 18-027–18-028 and see further Hunt [1998] P.L. 423; Markesinis (1998) 114 L.Q.R. 47; Bamforth [1999] C.L.J. 159; Buxton (2000) 116 L.Q.R. 48; Wade (2000) 116 L.Q.R. 217; Morgan (2002) L.S. 259; Phillipson (2003) 66 M.L.R. 726; Phillipson & Williams (2011) 74 M.L.R. 878.
- 686. *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967; *A v B Plc* [2002] EWCA Civ 337, [2003] Q.B. 195; *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] E.M.L.R. 4; *Douglas v Hello! Ltd (No.6)* [2003] EWHC 786, (2003) 153 N.L.J. 595; *Lady Archer v Williams* [2003] EWHC 1670, [2003] E.M.L.R. 38; *Douglas v Hello! Ltd (No.3)* [2005] EWCA Civ 595, [2006] Q.B. 125; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457; *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 W.L.R. 194 and see below, para.1-094.
- 687. cf. the observations on the creation of an independent tort of privacy in *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967, 997 et seq. (Sedley L.J.) and the denial of any general tort of invasion of privacy at common law by the House of Lords in *Wainwright v Home Office* [2003] UKHL 53, [2003] 3 W.L.R. 1137 (though on facts preceding the coming into effect of the 1998 Act and involving a claim against a public authority).
- 688. cf. *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch), [2009] Ch. 173 at [47]–[48], where Lewison J. declined to follow the earlier dictum of Walton J. in *Re Bucks Constabulary Widows’ and Orphans’ Fund Friendly Society (No.2)* [1979] 1 W.L.R. 936, 943 to the effect that a sole surviving member of an unincorporated association (whose members hold the assets of the association according to the terms of the contract between them while the association exists), cannot claim the association’s assets and that they vest in the Crown as bona vacantia: “for one of an unincorporated association to be deprived of his share of the association by reason of the death of the other of them, and without any compensation, appears to be a breach” of ECHR art.1 First Protocol.
- 689. [2011] EWCA Civ 1581, [2012] 2 W.L.R. 1119 at [21]–[28]; [2013] UKSC 29, [2013] 2 A.C. 163 on which (and on further case-law) see below, paras 2-190—2-191.
- 690. [2011] EWCA Civ 1581, [2012] 2 W.L.R. 1119 at [29]–[34]. The Supreme Court held that, in the context of the constitution of the Methodist Church, the requirement of contractual intention was not satisfied; no reference was made for this purpose to the possible relevance of the minister’s Convention rights.
- 691. [2008] I.C.R. 282 at [62] and see also, per Lawrence Collins L.J. at [66].
- 692. [2011] EWCA Civ 1581 at [33]–[34], per Maurice Kay L.J. with whom Longmore L.J. and Sir David Keene agreed.
- 693. [2014] I.R.L.R. 344.
- 694. [2014] I.R.L.R. 344 at [57]–[63], applying *James v London Borough of Greenwich* [2008] I.C.R. 302 and *Tilson v Alstrom Transport* [2011] I.R.L.R. 169 at [8].

- [695.](#) [2014] I.R.L.R. 344 at [64] per Slade J. relying on *The Aramis* [1989] 1 Lloyd's Rep. 213.
- [696.](#) [2015] EWCA Civ 209, [2015] I.R.L.R. 467. The CA rejected the relevance of s.3 of the Human Rights Act 1998 to the interpretation of the legislation conferring the rights claimed by the agency-worker on the basis that the end-user's actions took place before the coming into force of that Act: [2015] EWCA Civ 209 at [49].
- [697.](#) For discussion of how the 1998 Act may affect construction of contracts made by a "public authority", see above, para.1-081.
- [698.](#) *Biggin Hill Airport Ltd v Bromley LBC* (2001) 98(3) L.S.G. 42, *The Times*, January 9, 2001 [171], reversed on other grounds [2001] EWCA Civ 1089, *The Times*, August 13, 2001, (2001) 98(33) L.S.G. 30.
- [699.](#) Human Rights Act 1998 s.3(1).
- [700.](#) See below, paras 13-051, 13-120 et seq.
- [701.](#) See below, paras 14-004—14-007 and 14-010 ("obvious inference from agreement").
- [702.](#) cf. below, para.1-094 concerning the law of confidentiality.
- [703.](#) [2014] I.R.L.R. 344, above, para.1-086.
- [704.](#) On implied terms generally, see below, Ch.14.
- [705.](#)  *Liverpool City Council v Irwin* [1977] A.C. 239; *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 W.L.R. 1843 at [14]–[21] and [77].
- [706.](#) For the position where one of the parties is a public authority, see above, para.1-081.
- [707.](#)  *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 especially at [21]. In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 W.L.R. 1843 a majority of the SC considered that Lord Hoffmann's guidance on implied terms in the *Belize* case should not be seen as "authoritative guidance on the law of implied terms": [2015] 3 W.L.R. 1843 at [31]; and see below, para.14-006.
- [708.](#) On this wider question, see above, para.1-084.
- [709.](#) See above, para.1-034 and below, para.14-003.
- [710.](#) *Lee v Leeds City Council* [2002] EWCA Civ 6, [2002] 1 W.L.R. 1488 at [62], per Chadwick L.J. The context of this decision was a claim that the existing interpretation of a "public authority" landlord's obligations to his residential tenants was incompatible with their Convention rights, on which see above, para.1-078.
- [711.](#) Where an open-textured rule which governs a contract is legislative, then courts are under a duty to interpret the legislation itself "so far as it is possible to do so" in a way which is compatible with Convention rights: Human Rights Act 1998 s.3(1) and see above, para.1-066.
- [712.](#) On which see above, paras 1-073—1-075.
- [713.](#) See Vol.II, paras 40-062—40-066; 40-150—40-153 and *Johnson v Unisys Ltd* [2001] 2 W.L.R. 1076.
- [714.](#) Hepple, *Amicus Curiae* (June 8, 1998), pp.19–23; Palmer [2000] C.L.J. 168, 181. cf. the moulding of the existing law of breach of confidence rather than the direct creation of a law of privacy so as to give effect to Convention rights of privacy noted, below, paras 1-092—1-094.

- [715.](#) [2012] EWCA Civ 635, [2012] H.L.R. 35.
- [716.](#) [2010] UKSC 45, [2010] 3 W.L.R. 1441, on which see above, para.1-078.
- [717.](#) [2012] EWCA Civ 635 at [42], [56], [58]–[59]. cf. below, para.1-091. The decision of the CA upholding the landlord's termination was reversed on other grounds by the Supreme Court: [2014] UKSC 57, [2014] 1 W.L.R. 4004.
- [718.](#) On which see Vol.II, paras 38-201 et seq.
- [719.](#) Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) reg.5(1).
- [720.](#) A similar argument could be run as regards the application of the “reasonableness test” under the Unfair Contract Terms Act 1977 s.11(1), though this test does not explicitly draw attention to the relevance of issues of public interest for its assessment.
- [721.](#) Directive 93/13 on unfair terms in consumer contracts, preamble, recital 16 and see Vol.II, paras 38-244—38-245 and 38-359.
- [722.](#) Whittaker (2001) 21 O.J.L.S. 193, 210–213.
- [723.](#)  *Manchester City Council v Pinnock* [2010] UKSC 45 at [50]. And see Main Work, Vol.I, para.1-078.
- [724.](#) *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 A.C. 983 at [23] (Lord Bingham); [26] (Lord Steyn) (both expressing no view on the question) and [52]–[53] (Lord Hope who contrasts the position as regards art.6 and art.1 of the First Protocol and art.8, on the basis that the Strasbourg jurisprudence on the latter is to the effect that “the object of article 8 is to protect the individual against arbitrary interference by the public authorities with his right to privacy and that it is not concerned, as such, with the protection of his right to own or to occupy property”).
- [725.](#) App. No.2408/06 (*Unreported March 25, 2010*).
- [726.](#) [2010] UKSC 45 at [50].
- [727.](#)  [2016] UKSC 28, [2017] A.C. 273.
- [728.](#)  [2016] UKSC 28 at [40]. The SC expressed these views conditionally on there being no Strasbourg jurisprudence to the contrary, which it later held was the case: see [2016] UKSC 28 at [48]–[59].
- [729.](#)  [2016] UKSC 28 at [40]–[46], [59] and [76]. The SC also held, obiter, that if a proportionality assessment were required, it would not be possible to read this into s.21(4) of the 1988 Act by way of application of s.3(1) of the 1998 Act, the only remedy therefore being a declaration of incompatibility under s.4 of the 1998 Act: [2016] UKSC 28 at [69]–[70]; and that, even were a proportionality assessment required, the claimant tenant's circumstances were not such as to justify refusing an order for possession and thereby postponing indefinitely the right of the landlord's mortgagee/lender (acting through appointed receivers): [2016] UKSC 28 at [71], [74]–[75].
- [730.](#)  [2016] UKSC 28 at [41] per Lord Neuberger of Abbotsbury P.S.C. and Baroness Hale of Richmond D.P.S.C. (with whom Lord Kerr of Tonaghmore, Lord Reed and Lord Carnwath J.J.S.C. agreed). See further at [42]–[47]. The SC held that there was no support in the case law of the European Court of Human Rights for the proposition that a court must consider the proportionality of the order in the context of claims for possession by private sector landlords: see at [48]–[59] (where the relevant case-law was reviewed).

[731.](#)

! [2016] UKSC 28 at [40] per Lord Neuberger of Abbotsbury P.S.C. and Baroness Hale of Richmond D.P.S.C.

[732.](#)

! [2016] UKSC 28 at [46] per Lord Neuberger of Abbotsbury P.S.C. and Baroness Hale of Richmond D.P.S.C. See further Main Work, Vol.I, para.1-092.

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Section 12 and “horizontal effect”

1-092

Section 12 of the 1998 Act makes special provision for the protection of freedom of expression after the general coming into effect of the Act, on the basis that otherwise this right (which is itself found in art.10 of the Convention) may be unduly curtailed as the result of developments giving effect to the right to a private life contained in art.8 of the Convention. Section 12 therefore constrains in certain ways the granting by a court of relief which, if granted, might affect the exercise of the Convention right to freedom of expression. In this respect, s.12(4) provides that:

“The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a)
 - the extent to which
 - (i)
 - the material has, or is about to, become available to the public; or
 - (ii)
 - it is, or would be, in the public interest for the material to be published;
- (b)
 - any relevant privacy code.”

According to Sedley L.J., this provision:

“... puts beyond question the direct applicability of at least one Article of the Convention as between one private party to litigation and another—in the jargon, its horizontal effect.”⁷³³

1-093

In *Ashworth v The Royal National Theatre*,⁷³⁴ the claimants had been employed as musicians for a particular production by the defendant theatre, which had purported to terminate their contracts of employment on alleged grounds of redundancy as it had decided to produce the play without live music. They applied to the High Court for an interim injunction, or alternatively specific performance, to continue to engage them in the production until trial of their claim. In assessing the balance of convenience in relation to the award of specific relief, Cranston J. held that art.10 of the European Convention on Human Rights:

“has a significant role in the application of the *American Cyanamid* test,[⁷³⁵] not only in considering the claimants’ prospect at trial but also in deciding where the balance of convenience lies.”⁷³⁶

In the learned judge’s view, there was a serious issue to be tried on the question whether the defendant was contractually entitled to terminate the claimants’ contracts and that the claimants’ prospects in claiming that it did so in breach of contract were strong.⁷³⁷ However, he noted that s.12(1) and (4) of the Human Rights Act 1998

“provides that, in considering whether to grant any relief which may affect the right of freedom of expression in Article 10 of the European Convention on Human Rights, the court must have particular regard to the importance of that right. Section 12(4) refers to artistic and related material and the Strasbourg jurisprudence is clear that Article 10 protects artistic expression ... The decisions of producers and artistic teams in staging plays are protected by Article 10. Here the effect of the order sought would be to interfere with the National Theatre’s right of artistic freedom.”⁷³⁸

This would be a clear interference with the defendant’s right under art.10 and would not be necessary or proportionate to the *claimants’* rights under art.10(2), which were not interfered with by the dismissal (as they can play their instruments elsewhere) and their contractual rights could be adequately protected by an award of damages.⁷³⁹ Overall, therefore, Cranston J. refused the interim relief sought.⁷⁴⁰

The impact of s.12 on duties of confidentiality

1-094

Before the coming into force of the Human Rights Act, English law recognised the existence of duties of confidentiality arising from express or implied contractual agreement or from the nature of a non-contractual relationship between the parties and saw the basis of these duties in very broad concepts of good faith, loyalty and fair dealing.⁷⁴¹ The application of s.12 of the 1998 Act has arisen in the context of both contractual and non-contractual duties of confidentiality in a number of cases since its coming into force.⁷⁴² It has been observed that:

“these cases ... represent a fusion between the pre-existing law of confidence and rights and duties arising under the Human Rights Act.”⁷⁴³

In the result, “the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence”.⁷⁴⁴ In applying s.12, the court evaluates and weighs up duties of confidentiality, competing rights of privacy and of free expression and more general considerations of the public interest.⁷⁴⁵ In this respect, it has been observed that:

“... it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression, than a duty of confidentiality not buttressed by express agreement.”⁷⁴⁶

^{733.} *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967 at [133].

^{734.} [2014] EWHC 1176 (QB), [2014] 4 All E.R. 238.

^{735.} *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396.

^{736.} [2014] EWHC 1176 (QB) at [3].

^{737.} [2014] EWHC 1176 (QB) at [15].

^{738.} [2014] EWHC 1176 (QB) at [27].

^{739.} [2014] EWHC 1176 (QB) at [27] and [30]–[31].

^{740.} [2014] EWHC 1176 (QB) at [31]–[33].

^{741.} *Fraser v Evans* [1969] 1 Q.B. 349, 361; *A.G. v Guardian Newspaper (No.2)* [1990] 1 A.C. 109, 269; *Douglas v Hello! Ltd (No.6)* [2003] EWHC 786, (2003) 153 N.L.J. 595 at [181].

^{742.} *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967; *A v B Plc* [2002] EWCA Civ 337, [2003] Q.B. 195; *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] E.M.L.R. 4; *Douglas v Hello! Ltd (No.6)* [2003] EWHC 786, (2003) 153 N.L.J. 595; *Lady Archer v Williams* [2003] EWHC 1670, [2003] E.M.L.R. 38; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457; *Douglas v Hello! Ltd (No.3)* [2005] EWCA Civ 595, [2006] Q.B. 125; *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 W.L.R. 194; *Ntuli v Donald* [2010] EWCA Civ 1276, [2011] 1 W.L.R. 294.

^{743.} *Douglas v Hello! Ltd (No.6)* above at [186], per Lindsay J.

^{744.} *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 at [17], per Lord Nicholls of Birkenhead.

^{745.} *A v B Plc* [2002] EWCA Civ 337, [2003] Q.B. 195 at [6]; *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967 at [135]; *Lady Archer v Williams* [2003] E.M.L.R. 38 at [59] and note s.12(4)(a)(ii)’s reference to the significance of the public interest.

^{746.} *Campbell v Frisbee* [2002] EWCA Civ 1374, [2003] I.C.R. 141 at [22], per Lord Phillips M.R. (who noted, however, conflicting dicta on this point in *London Regional Transport v The Mayor of London* [2003] E.M.L.R. 4 at [46]; *A.G. v Barker* [1990] 3 All E.R. 257, 260–261) (no comment was made by members of the HL on appeal in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457). cf. *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 W.L.R. 194 at [43], where in the circumstances Buxton L.J. considered that: “the provision of the written contract did not add much to the obligations that the first defendant owed in equity by reason of the closeness of her personal relationship with the first claimant.”

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The different types of classification

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Contracts may be classified in a variety of ways: according to their subject matter ⁷⁴⁷; according to their parties ⁷⁴⁸; according to their form (whether contained in deeds ⁷⁴⁹ or in writing, ⁷⁵⁰ whether express or implied ⁷⁵¹); or according to their effect (whether bilateral or unilateral, ⁷⁵² whether valid, void, voidable or unenforceable ⁷⁵³).

⁷⁴⁷. See below, paras 1-096—1-100.

⁷⁴⁸. See below, para.1-101.

⁷⁴⁹. See below, paras 1-103, 1-113—1-144.

⁷⁵⁰. See below, Ch.5.

⁷⁵¹. See below, para.1-104.

⁷⁵². See below, para.1-107.

⁷⁵³. See below, paras 1-108—1-112.

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(a) - Classification of Contracts According to their Subject Matter

General

1-096

⚠ Despite the generality of approach of English contract law, ⁷⁵⁴ ⚠ the most prominent classification of contracts in the modern law divides them according to their subject matter: thus, there are contracts of sale of goods and of land, insurance, suretyship, employment, hire, etc., and some of the more prominent of these special contracts are discussed in the second volume of this work.

Classification for legislative purposes

1-097

Some types of contract are statutorily defined, for example, contracts of sale of goods, ⁷⁵⁵ contracts to supply digital content, ⁷⁵⁶ contracts for the carriage of goods by sea, ⁷⁵⁷ contracts of marine insurance, ⁷⁵⁸ and contracts of consumer credit, ⁷⁵⁹ and the purpose of these definitions is made clear by the statute in which they are contained. However, in other cases, even where important statutory regulation applies to a particular type of contract, its definition is left to the common law, examples of this being the contracts of employment, ⁷⁶⁰ contracts for services, ⁷⁶¹ contracts of tenancy ⁷⁶² or contracts of insurance. ⁷⁶³ Further, in the case of the classification of a contract for the purposes of EU legislation, the European Court of Justice has held that “it is not for [itself] to classify specifically the transactions at issue” in the main proceedings from which a reference has been made, this being:

“... within the jurisdiction of the national court alone. The [European] Court’s role is confined to providing the national court with an interpretation of Community law which will be useful for the decision which it has to take in the dispute before it.” ⁷⁶⁴

For this purpose, the European Court explained, for example, the distinction between “public service contracts” and “service concession” contracts found in the European law of public procurement. ⁷⁶⁵

Classification for common law purposes

1-098

Classification of the parties’ agreement as a particular type of contract may also need to be undertaken for the purposes of the common law. First, the courts have over the years found many implied terms in contracts which are not special to the particular agreement of the parties, ⁷⁶⁶ but are considered incidental to the type of agreement in question. ⁷⁶⁷ By attaching an implied term to a

particular set of facts in this way, a court thereby either recognises an existing category of contract or creates a new one. In this respect, there is a certain tendency for the broader categories of contracts to be subdivided into smaller ones. For example, the contract of employment attracts many implied terms which are of general application,⁷⁶⁸ but in *Sim v Rotherham MBC*,⁷⁶⁹ the court implied a term into a contract of employment between a local authority and a school teacher that the latter would cover for her fellow teachers in their absence if reasonably requested to do so, a term which would apply to similar contracts but not necessarily to contracts of employment beyond that context.⁷⁷⁰ In *Scally v Southern Health and Social Services Board*,⁷⁷¹ Lord Bridge felt able to imply a term in the contracts of employment between a hospital board and its employees to take reasonable steps to inform the latter of their valuable right to opt to make payments into their pension schemes. His Lordship rejected the argument that the formulation of an implied term must necessarily be too wide, holding that “this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision”.⁷⁷² Similarly, while some terms are implied into leases in general,⁷⁷³ others apply only to particular types of lease. Thus, in *Liverpool City Council v Irwin*⁷⁷⁴ the House of Lords implied a term into a contract of lease, but their Lordships’ speeches suggest that this term was considered incidental to a much more specific contract, namely one made by a local authority for the lease of a flat in a high-rise block.⁷⁷⁵

Exceptional rules

1-099

Secondly, the courts sometimes make a formal exception to a rule of common law which applies only to a particular type of contract. For example, although in general a breach of contract, however fundamental, does not terminate it so as to prevent the application of any exemption clause which it may contain,⁷⁷⁶ in a contract of carriage of goods by sea, any unnecessary deviation from the agreed or customary route constitutes a breach of the contract which gives rise in the owner to a right to treat himself as discharged and this right, if exercised, does have the effect of disapplying any exemption clause from the deviating journey.⁷⁷⁷ Similarly, although in general a person is not bound by an exemption clause in a contract to which he is not party, if for example, A sends goods for repair to B with permission to send the work out to a sub-contractor, C, A may be bound by any exemption clause in this contract of sub-bailment.⁷⁷⁸ A final example may be found in relation to restrictive covenants concerning land. These started life as a particular type of contract, or rather a particular type of contractual obligation, as they were stipulated as part of the sale of land,⁷⁷⁹ but after *Tulk v Moxhay*⁷⁸⁰ in 1848, they were held capable of binding a successor in title of the purchaser of the land, despite the principle of privity of contract. While technically this is justified by saying that the making of the covenant creates an equitable (proprietary) interest in land,⁷⁸¹ it can equally be seen as an example of the law creating an exception to the rules of privity of contract for a particular type of term in a particular type of contract.

Commercial practice

1-100

Other types of contract arise from commercial practice rather than from the regulation of either statute or common law, though the practical homogeneity on which they are based easily attracts particular treatment by the courts. Very clear examples of this can be found in an area like the building industry, in which the industry offers standard forms for the conclusion of the many contracts which modern construction requires.⁷⁸² Moreover, new types of contracts in this sense are constantly arising, for example, for the supply and maintenance of information technology.⁷⁸³

⁷⁵⁴.

❗ Nicholas (1974) 48 Tulane L.R. 946, 948–949. This approach in English law is to be contrasted with, for example, French law. In that legal system, while the Civil Code contains provisions describing the conditions for and effects of contracts in general, it also contains much more extensive sections relating to particular *types* of contract, e.g. sale, hire, mandate,

etc. Thus, some of the “nominate contracts” of Roman law survived into the, Civil Code, though as particular examples of a general principle of contract based on agreement: art.1101, C. civ. (as promulgated); art.1101 C.civ. (as inserted by Ordonnance No.2016/131 of February 10, 2016).

- [755.](#) Sale of Goods Act 1979 s.2(1) and see below, Vol.II, para.44-020. In the case of consumer contracts, the Consumer Rights Act 2015 places “sales contracts” within a wider framework of “goods contracts”: 2015 Act s. 3(2)(a) and 5. “Goods contracts” also includes contracts of the hire of goods, hire-purchase agreements and contracts for transfer of goods: 2015 Act s.3(2). On this new law see Vol.II, paras 38-431—38-500.
- [756.](#) Consumer Rights Act 2015 s.33 (definition for purposes of Ch.3 of Pt 1 of the Act) which applies only to contracts for a trader to supply digital content to a consumer: see Vol.II, paras 38-501—38-526.
- [757.](#) Carriage of Goods by Sea Act 1971 s.1 and Sch. to the Act art.I(b).
- [758.](#) Marine Insurance Act 1906 s.1.
- [759.](#) Consumer Credit Act 1974 s.8 and see below, Vol.II, para.39-017.
- [760.](#) See Vol.II, paras 40-010 et seq., where it is noted that there is no comprehensive definition of the contract, the cases instead relying on a number of factors relevant to finding whether a particular contract is of service.
- [761.](#) See, in particular, the Supply of Goods and Services Act 1982 ss.2–16 (on which see below, para.14-037) and the Consumer Rights Act 2015 ss.48–57 (on which see Vol.II, paras 38-527—38-547).
- [762.](#) There has been particular difficulty in distinguishing between leases and contractual licences: see *Street v Mountford* [1985] A.C. 809; *A.G. Securities v Vaughan* [1990] 1 A.C. 417.
- [763.](#) See Vol.II, para.42-001. See, in particular, the Consumer Insurance (Disclosure and Representations) Act 2012 and Insurance Act 2015 and see Vol.II, paras 42-031 et seq.
- [764.](#) *Parking Brixen GmbH v Gemeinde Brixen (C-458/03)* [2006] 1 C.M.L.R. 3 at [32].
- [765.](#) [2006] 1 C.M.L.R. 3 at [38]–[43].
- [766.](#) cf. *Ashmore v Corp of Lloyd's* [1992] 2 Lloyd's Rep. 620, 630–631.
- [767.](#) See above, para.1-052 and below, para.14-003.
- [768.](#) For example, it is an implied term in every contract of employment that the employee will not disclose any confidential information which he learns by reason of his employment: see Vol.II, para.40-066.
- [769.](#) [1987] Ch. 216.
- [770.](#) cf. [1987] Ch. 216 at [248].
- [771.](#) [1992] 1 A.C. 294.
- [772.](#) [1992] 1 A.C. 294 at [307]. Lord Bridge defined the category by reference to three special circumstances.
- [773.](#) e.g. a landlord's implied covenant for quiet enjoyment: see Woodfall on Landlord and Tenant (2015) paras 11.226 et seq.
- [774.](#) [1977] A.C. 239.

- [775.](#) See [1977] A.C. 239 at 254, 258, 261. This subdivision of large categories for the purposes of the implication of terms can be seen in *Jones v Just* (1868) L.R. 3 Q.B. 197, 202–203 in relation to sale before the Sale of Goods Act 1893.
- [776.](#) *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827.
- [777.](#) See below, para.15-032.
- [778.](#) *Morris v C. W. Martin & Sons Ltd* [1966] 1 Q.B. 716; *The Pioneer Container* [1994] 2 A.C. 324 and see below, paras 15-057, 33-026.
- [779.](#) Lawson and Rudden, *The Law of Property*, 3rd edn (2002), p.157.
- [780.](#) (1848) 2 Ph. 774.
- [781.](#) Gray and Gray, *Elements of Land and Law*, 5th edn (2009), paras 3.4.16–3.4.18.
- [782.](#) These are known as “RIBA/JCT standard forms”: see Vol.II, paras 37-021 et seq.
- [783.](#) See Morgan and Burden, *Morgan and Burden on IT Contracts*, 9th edn (2013).

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(b) - Classification of Contracts According to their Parties

General

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Contracts are sometimes classified according to their parties and this type of classification sometimes cuts across those other types which have already been mentioned. Perhaps the most important of this type of division is between commercial and non-commercial contracts. Commercial contracts can be described as those which are made between two or more parties who are in business for the purposes of trade. "Non-commercial contracts" is a residual category and would include transactions as disparate as contracts on the dissolution of marriage, contracts under which legal claims are settled, sales between private individuals other than in the course of business as well as "consumer contracts". The latter is in the modern law an important category and may be defined as those contracts which are made between one party who is in business and one who is contracting other than for business purposes.⁷⁸⁴ However, the common law of contract does not recognise the categories of commercial⁷⁸⁵ or consumer contracts and the latter category has only become prominent as a result of modern legislation passed for the protection of consumers, in particular concerning credit agreements,⁷⁸⁶ the effectiveness of exemption clauses and other unfair contract terms,⁷⁸⁷ and governing some aspects of particular categories of contract.⁷⁸⁸

Another important distinction in the modern law is between contracts made between private persons and those where one or both parties are public bodies. This distinction has been discussed for the purposes of the Human Rights Act 1998⁷⁸⁹ and will be discussed generally later.⁷⁹⁰

^{784.} cf. Unfair Contract Terms Act 1977 s.12 "dealing as consumer" (on which see below, para.15-073) and more generally Vol.II, Ch.38.

^{785.} cf. McKendrick, *Goode on Commercial Law*, 4th edn (2009), p.155. Some legal systems possess a commercial law code to govern at least in part the relationships of traders and which is distinct from the civil code which is of more general application: see Zekoll and Reimann, *Introduction to German Law*, 2nd edn (2005), Ch.4; Bell in Bell, Boyron and Whittaker, *Principles of French Law*, 2nd edn (2008), Ch.11.

^{786.} Consumer Credit Act 1974 and see Vol.II, Ch.39.

^{787.} Unfair Contract Terms Act 1977 (on which see below, paras 15-062 et seq.); Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (on which see Vol.II, paras 38-201 et seq.). For the contracts to which it applies, the Consumer Rights Act 2015 amends the 1977 Act and revokes and replaces the 1999 Regulations as explained below, paras 15-064 et seq. and Vol.II, paras 38-334 et seq.

- [788.](#) This is particularly clear under the Consumer Rights Act Pt 1 which governs certain aspects of “goods contracts”, “digital contents contracts” and “services contracts”, on which see Vol.II, paras 38-431 et seq.
- [789.](#) See above, paras 1-061—1-063, 1-073—1-081.
- [790.](#) See below, Ch.11.

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(c) - Classification of Contracts According to their Form or Means of Formation

Introduction

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Contracts can also be classified according to their form or means of formation and for this purpose, distinctions can be drawn between formal and informal contracts, and express and implied contracts, contracts which are and which are not made at a distance or which are made "offpremises".


Formal and informal contracts


1-103

Contracts may be either formal or informal. Apart from the so-called contracts of record, comprising judgments and recognisances, which are not properly speaking contracts at all, the only formal contract in English law is the contract contained in a deed or specialty contract. All others are informal contracts, or simple contracts as they are more often termed. Such contracts may in principle be oral or in writing, ⁷⁹¹ though particular contracts possess different requirements as to writing. ⁷⁹² The requirements of a valid contract contained in a deed are discussed in the next section of this chapter. The chief respect in which they differ from simple contracts is that, for historical reasons, they are valid without the necessity for consideration.


Express and implied contracts

1-104

 Contracts may be either express or implied. ⁷⁹³ The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination. ⁷⁹⁴ There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term or the court may infer an implied contract drawing on some of the terms of the earlier contract, but omitting others. ⁷⁹⁵ Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, ⁷⁹⁶ agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts has little importance. However:

“One distinction exists ... in relation to the ease with which an express or implied contract may be established. Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed. It is otherwise when the case is that a contract should be implied from the parties’ conduct. It is then for the party asserting a contract to show the necessity for implying it.” ⁷⁹⁷ 

The recognition of implied contracts in the sense explained in the present paragraph does not mean that a court should imply terms in an oral agreement so as to enable it to be sufficiently complete to amount to a binding contract. As Lewison L.J. has recently observed,

“[i]t is of course the case that the court may imply terms into a concluded contract. But that assumes that there is a concluded contract into which terms can be implied. It is not legitimate, under the guise of implying terms, to make a contract for the parties”. ⁷⁹⁸ 

“Distance contracts”, “off-premises contracts” and other contracts

1-105

Under legislation implementing EU directives, distinctions are drawn within the broad category of consumer contracts between “distance contracts”, “off-premises contracts” and consumer contracts concluded in other circumstances (termed “on-premises contracts”). This law is now principally contained in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, ⁷⁹⁹ which define a “distance contract” as:

“a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”. ⁸⁰⁰

The definition of “off-premises contract” is more elaborate, but it includes



“a contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader.” ⁸⁰¹

The 2013 Regulations impose differing information requirements in the trader according to this triple distinction as to the circumstances in which the contracts are concluded, and, as regards distance contracts and off-premises contracts for the purposes of rights of cancellation in the consumer. ⁸⁰²

^{791.} *Rann v Hughes* (1778) 7 T.R. 350n.

^{792.} See below, Ch.5.

^{793.} cf. above, para.1-086 (no contract of employment implied so as to give effect to person’s rights under the ECHR).

- [794.](#) *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [100].
- [795.](#) *Hamsard 3147 Ltd (trading as “Mini Mode Childrenswear”) v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [71], [84]–[88] (where a contract of joint venture between a supplier and a retailer expired in circumstances where the retailer was concerned with the reliability of its future supply, the contract to be implied by reason of the necessity of circumstances dealt only with the parties’ current operational arrangements, and did not include an implied term requiring good faith in the parties in relation to the operation of the contract as had been expressed in the earlier joint venture contract).
- [796.](#) Above, para.1-017.
- [797.](#)  *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [102], per Mance L.J.; *Heis v MF (Global) Services Ltd* [2016] EWCA Civ 569 at [36]–[47] and see below, paras 2-169–2-170.
- [798.](#)  *Devani v Wells* [2016] EWCA Civ 1106, [2017] 2 W.L.R. 1391 at [19] (with whom McCombe L.J. agreed at [79]), referring to *Scancarriers A/S v Aotearoa International Ltd* [1985] 2 Lloyd’s Rep. 419, 422 per Lord Roskill.
- [799.](#) SI 2013/3134 (“2013 Regulations”), implementing Directive 2011/83/EU on consumer rights [2011] O.J. L304/64. The 2013 Regulations revoked and replaced the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc Regulations 2008 (SI 2008/1816) and the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334): see generally Vol.II, paras 38-056 et seq. Financial services contracts concluded at a distance are governed by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095): see Vol.II, para.38-131.
- [800.](#) 2013 Regulations reg.5 “distance contract” and see Vol.II, paras 38-081 et seq.
- [801.](#) 2013 Regulations reg.5 “off-premises contract” (a) and see Vol.II, paras 38-076 et seq.
- [802.](#) 2013 Regulations regs 7–18, 27–38 on which see Vol.II, paras 38-086 et seq.

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(d) - Classification of Contracts According to their Effect

Introduction

1-106

Contracts are sometimes classified according to their effect and so distinctions can be drawn between unilateral and bilateral contracts and valid, void, voidable and unenforceable contracts. The last three terms denote varying degrees of imperfection and are in constant use in the law of contract.

Unilateral and bilateral contracts

1-107

⚠ Contracts may be either unilateral or bilateral. ⁸⁰³ By a unilateral contract is meant a contract under which only one party undertakes an obligation. ⁸⁰⁴ Bilateral (or synallagmatic) contracts, on the other hand, are those under which both parties undertake obligations. It is to be noted, though, that the unilateral nature of the contract does not (in the ordinary case) mean that there is only one party, nor that there is no need for an acceptance or the provision of consideration by the other party. ⁸⁰⁵ An example of a unilateral contract may be found in the case of an offer for a reward for the return of lost property: here, a contract is formed (at the latest) on the return of the property, this constituting the offeree's acceptance of the offer and the furnishing of consideration for the creation of the contract. ⁸⁰⁶

⚠ Bilateral contracts comprise the exchange of a promise for a promise, e.g. if you promise to pay me £1,000, I promise to sell you my car.

Void contracts

1-108

A void contract is strictly a contradiction in terms, because if an agreement is truly void it is not a contract; but the term is a useful one and well understood by lawyers. Properly speaking, a void contract should produce no legal effects whatsoever. Neither party should be able to sue the other on the contract. If goods have been delivered, they or their value should be recoverable by an action in tort, because the property will not pass. If money has been paid, it should be recoverable by an action in restitution, because the money was not due. In one situation, i.e. where a contract is void for mistake, these consequences would appear to follow from the fact that the contract is void. ⁸⁰⁷ But it is by no means true that all contracts termed "void" by the law necessarily produce this effect.

"Void" contract may have effects

1-109

For example, a contract may be void for illegality. But, although in many cases, neither party can sue on it, in other cases a party who is innocent of any illegal design may have a right of action.⁸⁰⁸ Property may pass under an illegal contract⁸⁰⁹ and money paid in pursuance of it is often irrecoverable.⁸¹⁰ Moreover, where A and B have paid money to C under an agreement under which C is empowered to pay some of the money to B, the court will not at A's request restrain C from so doing, even though the agreement is illegal and void as an unreasonable restraint of trade.⁸¹¹ Other difficult questions arise in relation to the relative positions of the parties to a contract for the sale or other disposition of an interest in land which is a nullity as a result of not having been made in writing as is required by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989.⁸¹²

Voidable contracts

1-110

A voidable contract is one where one or more of its parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by affirmation of the contract to extinguish the power of avoidance.⁸¹³ In English law, contracts may be voidable, e.g. for misrepresentation,⁸¹⁴ duress,⁸¹⁵ undue influence,⁸¹⁶ minority,⁸¹⁷ lack of mental capacity,⁸¹⁸ drunkenness⁸¹⁹ or under statute.⁸²⁰ If the contract is wholly executory, the party entitled to avoid the contract can plead its voidability in an action against him. If it has been wholly or partly executed, he can claim to have set it aside and to be restored to his original position. But until the right of avoidance is exercised, the contract is valid. Thus if a contract for the sale of goods is voidable for fraud (but has not been avoided), the fraudulent party acquires a good title to the goods which he can transfer to an innocent purchaser for value.⁸²¹ The right of avoidance must also be exercised promptly in most cases. It is theoretically possible for a contract to be avoidable by both parties thereto, e.g. if each defrauds the other, or both are drunk; but naturally instances of this are rare.

Power to set aside on terms


1-111

In the case of contracts said to be voidable for common mistake in equity, this description refers not to a power in one or other of the parties to avoid the contract, but to a power in the court to set aside the contract on terms.⁸²² However, the existence of such a distinct equitable jurisdiction has been denied on the ground of its being irreconcilable with the leading, higher common law authority.⁸²³

Unenforceable contracts

1-112

Unenforceable contracts are valid in all respects except that one or both parties cannot be sued on the contract. Instances of unenforceable contracts in English law are afforded by certain contracts which are not evidenced by a signed writing as required by statute⁸²⁴; contracts in respect of which the right of action is barred by the Limitation Act 1980⁸²⁵; and certain contracts with a foreign sovereign⁸²⁶ or in breach of foreign exchange control regulations.⁸²⁷ In some cases the defect of unenforceability is curable. Thus, if written evidence of a contract of guarantee comes into existence, the contract becomes enforceable, though it was made orally⁸²⁸; a current period of limitation may be repeatedly extended if the defendant makes a written acknowledgment of his indebtedness, or a part payment⁸²⁹; a foreign sovereign may waive his immunity.⁸³⁰ An unenforceable contract may be indirectly enforceable by means other than bringing an action. Thus a statute-barred debt may be recoverable indirectly if the creditor has a lien on goods of the debtor which are in his possession.⁸³¹ Although in principle a term in a consumer contract found to be unfair will not bind a consumer, "the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term".⁸³² If, therefore, a contract is not capable of continuing in existence without the unfair term, then apparently the consumer contract is unenforceable by either party.⁸³³

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- [803.](#) Restatement of Contracts (1932), para.12. The Restatement of Contracts, 2nd edn (1981), para.45 abandons this distinction and substitutes for unilateral contracts “option contracts”.
- [804.](#) See *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd* [1975] A.C. 154, 167–168, 171, 177. Quaere whether the engagement of an estate agent is a unilateral contract: *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 124; Murdoch (1975) 91 L.Q.R. 357; McConnell (1983) 265 E.G. 547.
- [805.](#) See *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256. In certain situations, a contract under which only one party undertakes an obligation may be truly one-sided, in that the other party may be dispensed from the need to provide consideration. Thus, an agreement contained in a deed under which A covenants to pay B a sum of money may be considered a unilateral contract as only A undertakes an obligation (see below, para.1-136).
- [806.](#)  For an unusual example of a unilateral contract see *Roller team Ltd v Riley* [2016] EWCA Civ 1291, [2017] Ch. 109 esp. at [45], where the description in the text of unilateral contracts was cited with approval. On this case see below, para.5-017. On the issue of when such a contract is formed see below, paras 2-082 et seq.
- [807.](#) See below, paras 3-036 et seq. and 6-008 but cf. paras 3-029 et seq.
- [808.](#) See below, para.16-020.
- [809.](#) See below, para.16-195.
- [810.](#) See below, para.16-194.
- [811.](#) *Boddington v Lawton* [1994] I.C.R. 478.
- [812.](#) See below, paras 5-039 et seq.
- [813.](#) See Restatement of Contracts, 2nd edn, para.7.
- [814.](#) See below, Ch.7. See also the consumer’s “right to unwind” a contract made with a trader if the trader engages in a “misleading action”: the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870): see Vol.II, paras 38-160 et seq. especially at 38-167, 38-180—38-181.
- [815.](#) See below, paras 8-001—8-056. See also the consumer’s “right to unwind” a contract made with a trader if the trader engages in an “aggressive commercial practice”: the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870): see Vol.II, paras 38-160 et seq. especially at 38-167, 38-180—38-181.
- [816.](#) See below, paras 8-057—8-129.
- [817.](#) See below, paras 9-005—9-074.
- [818.](#) See below, paras 9-075 et seq.
- [819.](#) See below, paras 9-105—9-106.
- [820.](#) e.g. Auctions (Bidding Agreements) Act 1969 s.3(1) replacing Auctions (Bidding Agreements) Act 1927 s.2 (as amended). Consumer Credit Act 1974 ss.67–73 (cancellation of consumer credit agreements) and see Vol.II, paras 39-095 et seq.; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) regs 27–38 and see

Vol.II, paras 38-107 et seq. (cancellation of off-premises or distance contracts).

- [821.](#) See *Phillips v Brooks Ltd* [1919] 2 K.B. 243; *Lewis v Averay* [1972] 1 Q.B. 198; Sale of Goods Act 1979 s.23. Contrast *Cundy v Lindsay* (1878) 3 App. Cas. 459 and *Ingram v Little* [1961] 1 Q.B. 31, where the contract was void for mistake (though see *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919). See below, Vol.II, para.44-208.
- [822.](#) See *Solle v Butcher* [1950] 1 K.B. 671, 696–697.
- [823.](#) *Great Peace Shipping Ltd v Tsavlis Salvage Ltd* [2002] EWCA Civ 1407, [2003] Q.B. 679; *Bell v Lever Bros* [1932] A.C. 161 and see below, paras 6-055—6-060.
- [824.](#) e.g. contracts of guarantee: Statute of Frauds 1677 s.4 (see Vol.II, paras 45-042—45-060). cf. consumer credit agreements whose failure to satisfy certain requirements of form render them in principle enforceable only on order of the court: Consumer Credit Act 1974 ss.60, 61, 65 and see Vol.II, paras 39-080, 39-093—39-094.
- [825.](#) See below, Ch.28.
- [826.](#) See below, Ch.12.
- [827.](#) *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 A.C. 168, 189–190.
- [828.](#) See below, Vol.II, para.45-053.
- [829.](#) Limitation Act 1980 s.29 and see below, paras 28-093 et seq.
- [830.](#) See below, paras 12-020 et seq.
- [831.](#) See below, para.28-134.
- [832.](#) Unfair Terms in Consumer Contracts 1999 (SI 1999/2083) reg.8; Consumer Rights Act 2015 ss.62(2)–(3) and 67 on which see Vol.II, paras 38-311—38-312 and 38-369 respectively.
- [833.](#) See Vol.II, para.38-312.

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Preliminary

1-113

At common law, contracts under seal, or specialties, were an important example of deeds and at common law a deed was an instrument which was not merely in writing, but which was sealed by the party bound thereby, and delivered by him to or for the benefit of the person to whom the liability was incurred. ⁸³⁴ In no other way than by the use of this form could validity be given to executory contracts at common law in early times. At common law, all deeds were documents under seal, but not all documents under seal were and are deeds. A deed must:

- (a)
effect the transference of an interest, right or property;
- (b)
create an obligation binding on some person or persons; or
- (c)
confirm some act whereby an interest, right or property has already passed.

Some documents under seal are not deeds, for instance a certificate of admission to a learned society or probate of a will. ⁸³⁵

General abolition of the requirement of sealing

1-114

⚠ In 1989, legislation was enacted which abolished the ancient requirement of sealing for the execution of the deeds in many situations. ⁸³⁶ ⚠ As regards deeds executed by an individual, s.1 of the Law of Property (Miscellaneous Provisions) Act 1989 (the “1989 Act”) replaced the requirement of sealing with requirements that the intention of the party making a deed should make this intention clear on its face, of signature by that party ⁸³⁷ and of attestation. ⁸³⁸ As regards companies incorporated under the Companies Acts (“companies”), the requirement of sealing for the execution of documents ⁸³⁹ was supplemented by an alternative method of execution of a document which required signature by a director and the secretary of the company or by two directors and the

expression “in whatever form of words” that it was executed by the company; and it was further provided that where a document made clear on its face that it was intended to be a *deed*, it should take effect on delivery as a deed, delivery being rebuttably presumed where it was so executed. ⁸⁴⁰ Similar provisions were enacted in 1993 to govern the position of charities incorporated under the Charities Act 1993, later replaced by the Charities Act 2011. ⁸⁴¹ In the case of deeds executed by other persons (including other corporations aggregate ⁸⁴² and corporations sole ⁸⁴³), the common law requirement of sealing was left unaffected.

Further amendment of the law governing the execution of instruments

1-115


In 2005 further amendments were made to the law governing the execution of deeds and some other instruments by an order (“the 2005 Order”) made under the Regulatory Reform Act 2001, ⁸⁴⁴ so as to give effect to the principal recommendations of a report of the Law Commission. ⁸⁴⁵ The main changes introduced in 2005 concern the creation of standard requirements for companies incorporated under the Companies Act 1985 and corporations aggregate (but not corporations sole) for the due execution of instruments in general and of deeds in particular; the making of specific provision for the execution of documents by persons (including companies and corporations aggregate) by or on behalf of another person (whether the latter is an individual, a company within the meaning of the Companies Act or a corporation); and the clarification that the mere sealing of a document by a person (whether an individual or another corporate body) does not in itself satisfy the so-called “face-value requirement” that:

“an instrument shall not be a deed unless ... it makes clear on its face that it is intended to be a deed by the person making it.” ⁸⁴⁶



The changes introduced by the 2005 Order came into force as regards “instruments executed” on or after September 15, 2005, but leave unaffected any instrument executed before this date. ⁸⁴⁷

Electronic documents and deeds ⁸⁴⁸

1-116

 Following the recommendations of the Law Commission, ⁸⁴⁹ the Land Registration Act 2002 made provision for the creation of a framework in which it will be possible to transfer and create interests in registered land by electronic means through a network controlled by the Land Registry. In order to permit this, Pt 8 of the Act makes provision for the fulfilment of formality requirements by the transactions in question. Accordingly, by s.91(4) and (5) of the 2002 Act:

“... a document to which this section applies is to be regarded as: (a) in writing; and (b) signed by each individual, and sealed by each corporation, whose electronic signature it has. [And such a document] is to be regarded for the purposes of any enactment as a deed.” ⁸⁵⁰

Section 91 applies to “documents in electronic form” of certain types dealing with registered interests in land ⁸⁵¹  as long as: (a) the document makes provision for the time and date when it takes effect; (b) the document has the electronic signature of each person by whom it purports to be authenticated; (c) each electronic signature is certified; and (d) such other conditions as rules may provide are met. This provision does not, therefore, create a new type of deed capable of being made electronically; rather it assimilates certain qualifying electronic documents to deeds for the purposes of any enactment requiring the dispositions to which those documents relate to use a deed. ⁸⁵² At the time of writing, this new system has not yet been brought into operation. ⁸⁵³ 

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- [834.](#) Compare above, para.1-016 on the question of agreement in relation to deeds.
- [835.](#) *R. v Morton (1873) L.R. 2 C.C.R. 22, 27.*
- [836.](#) **!**On the ancient requirement see Sheppard, *Touchstone of Common Assurances*, 7th edn (1820), p.56. The recognition of “electronic seals” by Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] O.J. L257/73 (the “eIDAS Regulation”), see esp. arts 2(25), 35–40, does not affect the law described here, as art.2(3) provides that the Regulation does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form: see further below, para.5-008.
- [837.](#) This requirement had been imposed by the Law of Property Act 1925 s.73.
- [838.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.1.
- [839.](#) Companies Act 1985 s.36A(2) (as inserted by s.36A of the Companies Act 1989 (c.40) ss.130(2), 213(2)). This provision has been superseded as explained at para.1-128 below.
- [840.](#) Companies Act 1985 s.36A(4) and (5) (as inserted by s.36A of the Companies Act 1989 (c.40) ss.130(2), 213(2)). This provision has been superseded as explained at para.1-128 below.
- [841.](#) Charities Act 1993 ss.50 and 60; Charities Act 2011 ss.252 and 260–261.
- [842.](#) A corporation aggregate may be defined as consisting of: “[A] body of persons which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder of the office in question for the time being”: Law Com. No.253 para.4.1, n.1 referring to Halsbury’s Laws of England, 4th edn (reissue, 1998), Vol.9(2), para.1005.
- [843.](#) A corporation sole may be defined as consisting of: “[O]ne person and his or her successors in some particular office or status, who are incorporated in law in order to give them certain legal capacities and advantages which they would not have in their natural person”: Law Com. No.253 para.4.23 referring to Halsbury’s Laws of England, 4th edn, Vol.9(2), para.1007 and giving as examples a government minister or Church of England bishop.
- [844.](#) Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005/1906).
- [845.](#) The Execution of Deeds and Documents by or on behalf of Bodies Corporate, Law Com. No.253 (1998).
- [846.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.1(2)(a) and see below.
- [847.](#) 2005 Order art.1 (this being 12 weeks from June 23, 2005, the day on which the Order was made).
- [848.](#) “Electronic documents and deeds” for the purposes of the Land Registration Act 2002 (which are the subject of the present paragraph) are to be distinguished from “electronic seals” recognised by Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] O.J. L257/73 (the “eIDAS Regulation”), see below, para.5-008.
- [849.](#) Law Commission, Land Registration for the Twenty-First Century (2001) Law Com. No.271.
- [850.](#) Land Registration Act 2002 (Commencement No.4) Order 2003 (SI 2003/1725) brought this provision into force on October 13, 2003.

851.

! The relevant dispositions are specified by the Land Registration Act 2002 s.91(2).

852.

Land Registration Act 2002 s.91(3).

853.

! See Smith, *Property Law*, 8th edn (2014), pp.113–115 discussing the Land Registration Act 2002 and noting that in 2011 the Land Registry halted the e-conveyancing project: Land Registry Annual Report and Accounts 2010–2011, p.26; Megarry and Wade, *The Law of Real Property* 8th edn (2012) by Harpum, Bridge and Dixon, paras 7-157–7-163. See further Law Commission, Updating the Land Registration Act 2002, A Consultation Paper (Consultation Paper No.227, 2016), Pt 8, which notes (at para.20.6) that the electronic system provided for by Pt 8 of the 2002 Act which would have implemented the model which it had earlier recommended has not been developed, and instead makes recommendations for a “new vision for electronic conveyancing” (at para.20.11).

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Introduction

1-117

The following paragraphs will explain first the law as amended by the legislation in 1989 and then explain how this position was affected by the 2005 Order, though it is to be noted that the position of charitable corporations differs again. ⁸⁵⁴ There will then follow a discussion of certain aspects of the requirements of form and of delivery which apply to deeds whenever executed.

⁸⁵⁴. Below, para.1-120. It is also to be noted that the relevant provisions of the Companies Act 1989 which were amended in 2005 were then replaced by the Companies Act 2006, though without substantive changes. The notes to the following paragraphs explain these sets of legislative changes.

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(i) - Deeds executed on or after July 31, 1989 and before or on September 14, 2005

Deeds executed by an individual

1-118

 The law introduced by the Law of Property (Miscellaneous Provisions) Act 1989 s.1 requires that for an instrument made by an individual to be a deed, it must make:


“... clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise).” [855](#)

It has been observed that:

“... the Act provides that documents can be deeds without using the word ‘deed’; but ... that a document is only to be held to be a deed if it is clear from the wording of the document itself (‘on its face’) that it was intended to be a deed.” [856](#)

As a result, words which indicate an intention by the parties that a document should be legally binding are not enough: “what is needed is something showing that the parties intended the document to have the extra status of being a deed”. [857](#) The 1989 Act also introduced other requirements for the execution of a deed by an individual and preserved an existing one. For an instrument to be validly executed as a deed, it must be:

“... signed (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature.” [858](#)

“Signature” is defined later in the section to include making one’s mark. [859](#)  The Act specifically preserved the common law requirement that for an instrument to be validly executed as a deed it must be “delivered” as a deed by him or a person authorised to do so on his behalf. [860](#)

Deeds executed by companies incorporated under the Companies Acts

1-119

In 1989, the law governing the execution of documents and deeds by companies incorporated under the Companies Acts was amended so as to create a “dual system”.⁸⁶¹ So, while it preserved the possibility for a company to execute a document (including a deed) by the affixing of its common seal,⁸⁶² it also provided that a document signed by a director and secretary, or by two directors, of a company incorporated under the Act and expressed to be executed by the company has the same effect as if executed under the common seal of the company and notwithstanding that the company has no common seal.⁸⁶³ In either case, it is provided that a:

“... document executed by a company which makes clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed.”⁸⁶⁴

The deeds of a company must be executed in accordance with its articles of association but, in favour of a purchaser, s.74(1) of the Law of Property Act 1925 provides that a deed is deemed to have been duly executed if its seal is affixed thereto in the presence of and attested by its secretary and a member of the board of directors⁸⁶⁵ and a similar deeming provision applies to documents not made under the company seal, but where the document makes clear on its face that it is intended by the person or persons making it to be a deed.⁸⁶⁶ There is no statutory requirement that the name used in the body of a deed should be the company’s registered name rather than its trading name and the common law rule therefore applies so that extraneous evidence is admissible to identify a contracting party when its identity is not clear from the face of the deed.⁸⁶⁷

Deeds executed by other persons

1-120

Where a deed is executed by a person other than a private individual, a company incorporated under the Companies Acts, or a charity incorporated under the Charities Act 1993,⁸⁶⁸ the common law requirement of sealing still applies. This would apply to corporations aggregate and to corporations sole.⁸⁶⁹ However, the requirement of sealing has been interpreted by the courts very liberally: “to constitute a sealing neither wax nor wafer nor a piece of paper nor even an impression is necessary”.⁸⁷⁰ Pieces of green ribbon⁸⁷¹ or a circle printed on the document containing the letters “L.S.” (locus sigilli)⁸⁷² or even a document bearing no indication of a seal at all⁸⁷³ will suffice, if there is evidence (e.g. attestation) that the document was intended to be executed as a deed.⁸⁷⁴ In the absence of such evidence, a signatory of a document expressed to have been “signed, sealed and delivered” by him may be estopped from denying that it was sealed.⁸⁷⁵

Delivery

1-121

It remains the case after the 1989 legislation that “[w]here a contract is to be by deed, there must be a delivery to perfect it”.⁸⁷⁶ “Delivered”, however, in this connection does not mean “handed over” to the other party. It means delivered in the old legal sense,⁸⁷⁷ namely, an act done so as to evince an intention to be bound.⁸⁷⁸ Any act of the party which shows that he intended to deliver the deed as an instrument binding on him is enough. He must make it his deed⁸⁷⁹ and recognise it as presently binding on him.⁸⁸⁰

“The critical thing is that the person who has signed the deed must have separately indicated that he intends to be bound by the deed. Mere signature is not enough. Nor is it enough that what looks like a deed has been given to the person who appears to be the beneficiary of it—the issue is not whether the document has been physically handed over to the beneficiary, but whether the person whose deed it is supposed to be intended to be

bound by it.” ⁸⁸¹

Delivery is effective even though the grantor retains the deed in his own possession. There need be no actual transfer of possession to the other party:

“... the efficacy of a deed depends on its being sealed ⁸⁸² and delivered by the maker of it, not on his ceasing to retain possession of it.” ⁸⁸³

Where a solicitor or licensed conveyancer in the course of a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument. ⁸⁸⁴

Delivery and corporate bodies

1-122

In *Bolton Metropolitan BC v Torkington* ⁸⁸⁵ the Court of Appeal held that while s.74(1) of the Law of Property Act 1925 deemed a deed “duly executed” where a corporation’s seal is affixed in the presence of and attested by its designated officers, it created no presumption as to its delivery. ⁸⁸⁶ Moreover, while strictly obiter, Peter Gibson L.J. expressed the view that at common law:

“... to describe the sealing by a corporation as giving rise to a rebuttable presumption may go too far, implying, as that does, that the burden is on the corporation affixing the seal.” ⁸⁸⁷

As a result, where, as on the facts before the court, negotiations were undertaken towards a lease expressly subject to contract, a court should not infer an intention to be bound from the mere sealing of a deed of execution of a lease. ⁸⁸⁸ On the other hand, in the case of a company incorporated under the Companies Act 1985, where a document makes it clear on its face that:

“[I]t is intended by the person or persons making it to be a deed ... it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.” ⁸⁸⁹

^{855.} s.1(2)(a). Section 1(11) of the 1989 Act provided that “nothing in this section applies in relation to instruments *delivered* as deeds before this section comes into force” i.e. July 31, 1989. This appears to mean that an *instrument* made before this date but delivered after it remains governed by the earlier law.

^{856.} *HSBC Trust Co v Quinn* [2007] EWHC 1543 (Ch), [2007] All E.R. (D) 125 (Jul) at [50], per Christopher Nugee Q.C. cf. *Johnsey Estates (1900) Ltd v Newport Marketworld Ltd Unreported May 10, 1996* (noted and criticised by Law Com. No.253, paras 2.17–2.18) where it was held that the mere fact that a document was made under seal is sufficient to make it clear that it was executed as a deed.

^{857.} [2007] EWHC 1543 (Ch) at [51].

^{858.} Law of Property (Miscellaneous Provisions) Act 1989 s.1(3) (as enacted). The signature and

attestation must form part of the same physical document which constitutes the deed: *R. (on the application of Mercury Tax Group Ltd) v Revenue and Customs Commissioners* [2008] EWHC 2721 (Admin), [2009] S.T.C. 743 at [40].

859.

⚠ Law of Property (Miscellaneous Provisions) Act 1989 s.1(4). The question whether the requirement of signature may be satisfied other than by a party writing his or her name or mark with his or her own hand remains unclear. There is authority for the purposes of s.2 of the 1989 Act that requires such writing (*Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, on which see Vol.I, para.5-037), but a more liberal position has been taken for the purposes of the (less demanding) formalities of s.4 of the Statute of Frauds: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All E.R. 881 at [31]; *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542 at [32] (on which see Vol.II, para.45-057). In *Ramsay v Love* [2015] EWHC 65 (Ch) at [7], Morgan J. observed (in the context of s.1(3) of the 1989 Act, obiter) that the position in *Firstpost Homes Ltd v Johnson* (which requires signature by an executing party with a pen in his own hand) was not designed to distinguish between signing in such a way and by use of a signature writing machine. For further discussion of the significance of "signature" see Emmet & Farrand on Title (looseleaf and electronic version updated to June 2016) paras 2–041—2–041.06. For the possibility that an "electronic signature" may satisfy this requirement by way of s.7 of the Electronic Communications Act 2000 see below, para.5-008.

860.

1989 Act s.1(3)(b).

861.

Law Commission, *The Execution of Deeds and Documents by or on behalf of Bodies Corporate*, Law Com. No.253 (1998), para.3.3.

862.

Companies Act 1985 s.36A(4) as inserted by Companies Act 1989 s.130(2).

863.

Companies Act 1985 s.36A(3) as inserted by Companies Act 1989 s.130(2).

864.

Companies Act 1985 s.36A(5) as inserted by Companies Act 1989 s.130(2).

865.

This provision was amended by the 2005 Order for instruments executed on or after September 14, 2005, below, para.1-128.

866.

Companies Act 1985 s.36A(6) and cf. s.36C, also inserted by Companies Act 1989 s.130(1) (pre-incorporation contracts, deeds and obligations).

867.

OTV Birwelco Ltd v Technical & General Guarantee Company Ltd [2002] 4 All E.R. 668.

868.

Charities Act 1993 ss.50, 60 remain applicable to instruments executed between August 1, 1993 and March 13, 2012, being the day preceding the coming into force of the Charities Act 2011 ss.260–261: see below, n.827.

869.

Law of Property (Miscellaneous Provisions) Act 1989 s.1(10). On "corporations aggregate" and "corporations sole" see above, nn.775 and 776. Note also s.1(9) which specifically reserves the requirement of sealing at common law in relation to deeds required or authorised to be made under the seals of the County Palatine of Lancaster, the Duchy of Lancaster or the Duchy of Cornwall.

870.

Ex p. Sandilands (1871) L.R. 6 C.P. 411, 413.

871.

Ex p. Sandilands (1871) L.R. 6 C.P. 411; See also *Stromdale & Ball Ltd v Burden* [1952] Ch. 233, 230.

872.

First National Securities Ltd v Jones [1978] Ch. 109; *Hoath* (1980) 43 M.L.R. 415.

873.

First National Securities Ltd v Jones [1978] Ch. 109; *Commercial Credit Services v Knowles* [1978] 6 C.L. 64.

- [874.](#) cf. *National Provincial Bank v Jackson* (1886) 33 Ch. D. 1; *Re Balkis Consolidated Ltd* (1888) 58 L.T. 300; *Re Smith* (1892) 67 L.T. 64 (these cases were explained in *First National Securities Ltd v Jones* [1978] Ch. 109); cf. *TCB v Gray* [1986] 1 Ch. 621, 633.
- [875.](#) *TCB v Gray* [1986] 1 Ch. 621. cf. *Rushingdale Ltd v Byblos Bank* (1985) P.C.C. 342, 346–347.
- [876.](#) *Xenos v Wickham* (1863) 14 C.B.(N.S.) 435, 473; *Termes de la Ley*, s.v. *Fait*; *Co Litt.* 171b; Law of Property (Miscellaneous Provisions) Act 1989 s.1(3)(b).
- [877.](#) But see *Yale* [1970] C.L.J. 52.
- [878.](#) *Vincent v Premo Enterprises Ltd* [1969] 2 Q.B. 609, 619. See further *Longman v Viscount Chelsea* [1989] 58 P. & C.R. 189 at 195; *Queen Maritime Ltd v Persia Petroleum Services Ltd* [2010] EWHC 2867 (QB) [107]–[114].
- [879.](#) *Tupper v Foulkes* (1861) 9 C.B.(N.S.) 797; *Xenos v Wickham* (1867) L.R. 2 H.L. 296, 312; *Re Seymour* [1913] 1 Ch. 475.
- [880.](#) *Xenos v Wickham* (1867) L.R. 2 H.L. 296.
- [881.](#) *Bibby Financial Services Ltd v Magson* [2011] EWHC 2495 (QB) at [335], per Judge Richard Seymour Q.C.
- [882.](#) But see above, para.1-113.
- [883.](#) *Xenos v Wickham* (1867) L.R. 2 H.L. 296, per Lord Cranworth at 323; cf. per Pigott B. at 309; *Doe d. Garnons v Knight* (1826) 5 B. & C. 671; *Macedo v Stroud* [1922] 2 A.C. 330; *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, affirmed [1961] Ch. 105; *Vincent v Premo Enterprises Ltd* [1969] 2 Q.B. 609.
- [884.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.1(5). In *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [66] it was held that s.1(5) does not apply where a solicitor or licensed conveyancer transfers a deed in escrow as they would not have “purport[ed] to deliver an instrument as a deed on behalf of a party to the instrument”. For deeds in escrow see below, para.1-133. The definition of the persons to whom this provision applies changed on the bringing into force on January 1, 2010 of the Legal Services Act 2007 s.208(1), Sch.21 para.81(a) to “a relevant lawyer, or an agent or employee of a relevant lawyer”, s.1(6) of the 1989 Act (as amended) providing that “‘relevant lawyer’ means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes a reserved instrument activity (within the meaning of that Act)”.
- [885.](#) [2003] EWCA Civ 1634, [2004] Ch. 66. The decision concerned the effect of s.74(1) as in force before its amendment by the 2005 Order, on which see below, para.1-128.
- [886.](#) [2003] EWCA Civ 1634 at [22], [45].
- [887.](#) [2003] EWCA Civ 1634 at [46].
- [888.](#) [2003] EWCA Civ 1634 at [53].
- [889.](#) Companies Act 1985 s.36A(5) as inserted by the Companies Act 1989 s.130(2). On the new law, see below, para.1-128.

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“Instruments executed”

1-123

The 2005 Order ⁸⁹⁰ refers to “instruments executed” and this raises the question as to how the changes it introduced apply in relation to the making of deeds. ⁸⁹¹ It could be thought that a deed (the “instrument”) is “executed” only after its delivery, and not merely after the making of the document, as only on delivery is the deed a valid instrument. However, the 2005 Order (following the Law Commission’s recommendation ⁸⁹²) distinguishes clearly between the formal requirements required for the execution of an instrument (or document) and the further requirement of delivery for the execution of an instrument *as a deed* ⁸⁹³ and this argues that the changes introduced by the Order apply only to *documents executed* on or after September 15, 2005, and not also to documents executed as deeds on or before September 14, 2005, but delivered as deeds only after this date. This interpretation also has the practical advantage of not applying the changes contained in the Order retrospectively.

The new general requirements for deeds after the 2005 Order

1-124

Under s.1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 (as amended by the 2005 Order ⁸⁹⁴), an instrument shall not be a deed unless:

“(a)

it makes clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed to be signed as a deed or otherwise); and

(b)

it is validly executed as a deed—

(i)

by that person or a person authorised to execute it in the name or on behalf of that person; or

(ii)

by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties.”

These requirements apply to instruments executed by an individual, by a company incorporated under the Companies Act 1985, by a corporation aggregate or by a corporate sole.⁸⁹⁵ However, even after the reforms of 2005, the significance and impact of these provisions differ somewhat according to these different categories of person. In this respect, a distinction is to be drawn between the condition contained in s.1(2)(a) of the 1989 Act as amended (the so-called “facevalue requirement”) and the condition in s.1(2)(b) of the 1989 Act as amended (the condition of “valid execution”).

The “face-value requirement” for deeds

1-125

The reforms of 1989 introduced the idea that an instrument should qualify as a deed by reference to the intention of the party or parties to it as made clear on its face,⁸⁹⁶ this reflecting earlier developments in judicial attitudes to the common law requirement of sealing.⁸⁹⁷ Following the Law Commission’s recommendations,⁸⁹⁸ this face-value requirement was retained in 2005, though its formulation was clarified and standardised for instruments executed by individuals and companies.⁸⁹⁹ In particular, it is expressly provided that:

“... an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal.”⁹⁰⁰

Execution on behalf of one or more of the parties to the instrument

1-126

Following the Law Commission’s recommendations,⁹⁰¹ the 2005 Order introduced new clarifying provisions so as to provide expressly for execution in the name or on behalf of another person. So, it is provided that as regards individuals, a document may be executed by a person on behalf of another, and that it is the person who executes the document (whether or not on behalf of the other) who must comply with the formalities⁹⁰²; as regards companies, the legislative provisions which state how a company may execute a document and provide for deemed execution in favour of a purchaser apply where a company executes a document on behalf of another person⁹⁰³; and as regards corporations aggregate, the Law of Property Act 1925 was amended so as to provide that deemed execution in favour of a purchaser applies where the corporation executes an instrument on behalf of another person.⁹⁰⁴

“Valid execution”: individuals

1-127

After amendment by the 2005 Order, the 1989 Act provides that for an instrument to be validly executed as a deed by an individual, it must be:

“... signed

(i)

by him in the presence of a witness who attests the signature; or

(ii)

at his direction and in his presence and the presence of two witnesses who each attest the signature.” ⁹⁰⁵

“Signature” is defined later in the section to include making one’s mark. ⁹⁰⁶ The 2005 Order preserved the further common law requirement that for an instrument to be validly executed as a deed it must be “delivered” as a deed. ⁹⁰⁷

“Valid execution”: companies and corporations aggregate

1-128

❗ One of the purposes of the 2005 Order was to harmonise the law governing the execution of instruments as deeds by corporate bodies. ⁹⁰⁸ So, it is now provided that a document is validly executed as a *deed* by both companies and corporations aggregate so as to satisfy the general requirements imposed by the 1989 Act ⁹⁰⁹ “if and only if” it is “duly executed” by the corporate body *and* if it is delivered as a deed. ⁹¹⁰ As regards delivery, it is provided for both types of corporate body that an instrument shall be presumed to be delivered for these purposes “upon its being executed, unless a contrary intention is proved”. ⁹¹¹ ❗ As regards companies, this provision marked a change from the previous law where the presumption of delivery was irrebuttable in these circumstances ⁹¹², as regards corporations aggregate, it clarified the position given that the existence of a rebuttable presumption at common law had been recently judicially questioned. ⁹¹³ However, the conditions for the “due execution” of a document still differ somewhat as between companies and corporations aggregate. In the case of companies, there are alternative requirements: a document may be executed either by the affixing of its common seal or by being signed “by two authorised signatories, or by a director of the company in the presence of a witness who attests the signature”, ⁹¹⁴ provided that such a signed document is “expressed, in whatever words, to be executed by the company”. ⁹¹⁵ Where a document is to be signed by a person as a director or the secretary of more than one company, it shall not be taken to be duly signed by that person for these purposes unless the person signs it separately in each capacity. ⁹¹⁶ In the case of corporations aggregate, the common law requirement of affixing the corporation’s seal still applies in principle, ⁹¹⁷ but it is provided that:


“... in favour of a purchaser an instrument shall be deemed to have been duly executed ... if a seal purporting to be the corporation’s seal purports to be affixed to the instrument in the presence of and attested by (a) two members of the board of directors, council or other governing body of the corporation, or (b) one such member and the clerk, secretary or other permanent officer of the corporation or his deputy.” ⁹¹⁸

“Valid execution”: corporations sole

1-129

Where a deed is executed by a corporation sole, the common law requirement of sealing which has already been explained still applies.⁹¹⁹

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- ^{890.} Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005/1906).
- ^{891.} cf. the discussion in Law Com. No.253, paras 3.6-3.12 as to the confusion over whether the term “executed” in the Companies Act 1985 s.36A (as amended in 1989), the Law of Property Act 1925 s.74 and the Law of Property (Miscellaneous Provisions) Act 1989 s.1 included “delivery”.
- ^{892.} Law Com. No.253, para.3.12.
- ^{893.} See notably, the 2005 Order arts 4, 6 and below, paras 1-127—1-128.
- ^{894.} 2005 Order art.7(3).
- ^{895.} In the case of instruments executed by charities incorporated under statute, the formal requirements contained in the Charities Act 1993 s.60 remain applicable to instruments executed between August 1, 1993 and March 13, 2012, whereas those contained in the Charities Act 2011 ss.260-261 apply to instruments made on or after March 14, 2012 (the date of their coming into force).
- ^{896.} Above, para.1-115.
- ^{897.} *First National Securities v Jones* [1978] Ch. 109 and Chitty on Contracts, 26th edn (1989), para.23.
- ^{898.} Law Com. No.253, paras 2.29-2.34.
- ^{899.} 2005 Order art.7(3) (individuals); Sch.2, repealing Companies Act 1985 s.36A(5) (companies); Law Com. No.253, paras 2.50, 2.54. cf. above, paras 1-118—1-119.
- ^{900.} Law of Property (Miscellaneous Provisions) Act 1989 s.1(2A) as inserted by the 2005 Order art.8. cf. *Startwell Ltd v Energie Global Management Ltd* [2015] EWHC 421 (QB) at [48] where it was noted that the fact that there is a witness to a contract contained in a document is not of itself enough to satisfy the “face value requirement” of s.1.
- ^{901.} Law Com. No.253, Pt 7.
- ^{902.} Law of Property (Miscellaneous Provisions) Act 1989 s.1(2)(b) and (4A), as amended and inserted by the 2005 Order art.7(3) and 7(4) respectively.
- ^{903.} Companies Act 1985 s.36A(7) as inserted by the 2005 Order art.7(2) and replaced by Companies Act 2006 s.44(8).
- ^{904.} Law of Property Act 1925 s.74(1A) as inserted by the 2005 Order art.7(1).
- ^{905.} Law of Property (Miscellaneous Provisions) Act 1989 s.1(3) (as amended by 2005 Order art.7(3)). The signature and attestation must form part of the same physical document which constitutes the deed: *R. (on the application of Mercury Tax Group Ltd) v Revenue and Customs Commissioners* at [2008] EWHC 2721 (Admin), [2009] S.T.C. 743 at [40]. A signature of an unidentified individual added later cannot constitute attestation for these purposes: *Darjan Estate Co Plc v Hurley* [2012] EWHC 189 (Ch), [2012] 1 W.L.R. 1782 at [11]–[12].
- ^{906.} Law of Property (Miscellaneous Provisions) Act 1989 s.1(4)(b) as amended by the 2005 Order Sch.1 para.14.

- [907.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.1(3)(b).
- [908.](#) Law Com. No.153, Pt 4.
- [909.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.1(2)(b) (as amended); see above, para.1-124.
- [910.](#) Law of Property Act 1925 s.74A(1) as inserted by the 2005 Order art.4 (corporations aggregate); Companies Act 1985 s.36AA(1) as inserted by the 2005 Order art.6 replaced by Companies Act 2006 s.46(1).
- [911.](#)  Law of Property Act 1925 s.74A(2) as inserted by the 2005 Order art.4 (corporations aggregate); Companies Act 1985 s.36AA(2) (companies) as inserted by 2005 Order art.6 and replaced by Companies Act 2006 s.46(2). For these purposes an objective approach must be taken to the establishment of contrary intention: *Silver Queen Maritime Ltd v Persia Petroleum Services Ltd* [2010] EWHC 2867 (QB) at [117]–[118]. It has been held that a requirement of the “execution” of a deed in a consent order must equally be understood as requiring delivery as well as signature of a document: *Arrowgame Ltd v Wildsmith* [2016] EWHC 3608 (Ch).
- [912.](#) As a result, the 2005 Order art.5 amended the Companies Act 1985 s.36A(6) and see Law Com. No.253 paras 6.37-6.43.
- [913.](#) *Bolton Metropolitan BC v Torkington* [2003] EWCA Civ 1634, [2004] Ch. 66 at [46], above, para.1-122.
- [914.](#) Companies Act 2006 s.44(2) replacing Companies Act 1985 s.36A(1), (4) as inserted by the Companies Act 1989 s.130(2).
- [915.](#) Companies Act 2006 s.44(4). This proviso has been held not to require that, in addition to the signature of the individuals who are authorised signatories, there must be words spelling out that those signatures are “by or on behalf of” the company, as long as the capacity in which they sign is demonstrated from the terms of the document: *Williams v Redcard Ltd* [2011] EWCA Civ 466, [2011] All E.R. (D) 214 (Apr) at [25]–[27].
- [916.](#) Companies Act 2006 s.44(6) replacing Companies Act 1985 s.36A(4A) as inserted by 2005 Order art.10(1), Sch.1 para.10
- [917.](#) Law Com. No.253 para.4.5.
- [918.](#) Law of Property Act 1925 s.74(1) as substituted by the 2005 Order art.3. Section 74(1B) of the 1925 Act as inserted by the 2005 Order art.10(1), Sch.1 para.2 provides that for these purposes: “a seal purports to be affixed in the presence of and attested by an officer of the corporation, in the case of an officer which is not an individual, if it is affixed in the presence of and attested by an individual authorised by the officer to attest on its behalf.” And see Law Com. No.253 paras 4.6-4.9 and *Lovett v Carson County Homes Ltd* [2009] EWHC 1143 (Ch), [2009] 2 B.C.L.C. 196 at [70]–[80].
- [919.](#) See above, n.776, for a definition of corporations sole and see also Law. Com. No.253 para.4.23. On the common law requirements see above, para.1-120.

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Introduction

1-130

There remain certain aspects of the law governing deeds which apply irrespective of the nature of the person making them or the date on which they are executed.

Date

1-131

A date is not essential to the validity of a deed. ⁹²⁰ A deed takes effect on the date of its delivery. ⁹²¹

Estoppel preventing reliance on formal invalidity

1-132

❗ In *Shah v Shah* ⁹²² the Court of Appeal held in relation to an instrument governed by the 1989 Act as enacted ⁹²³ that where an individual has signed an instrument which on its face purports to be a deed and has delivered it apparently attested by the signature of a witness, he may be estopped from denying the validity of this “deed” on the ground that the apparently attesting signatory was not present at the time of that individual’s signature. ⁹²⁴ The Court of Appeal expressed its approval in this respect for Beldam L.J.’s earlier statement in *Yaxley v Gotts* to the effect that the:

“... general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it.” ⁹²⁵

While it was accepted before the Court of Appeal in *Shah v Shah* that no estoppel could operate in the case of the absence of a signature by the person allegedly executing a deed, there was no social policy requiring a person attesting such a signature to be present so as to prevent an estoppel from arising in respect of a defect in attestation. ⁹²⁶ On the other hand, in *Briggs v Gleeds* it was held that estoppel cannot be invoked where a document does not even appear to comply with the 1989 Act in that it did not bear any signature (or even place for a signature) of a witness, distinguishing the position in *Shah v Shah*. ⁹²⁷ ❗ Moreover, as the House of Lords made clear in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* (which concerned s.4 of the Statute of Frauds ⁹²⁸), an

estoppel cannot arise to prevent a person relying on formal invalidity unless there is an unambiguous representation that the transaction in question was enforceable.⁹²⁹ This was the case in *Shah v Shah* where “the delivery of an apparently valid deed constituted an unambiguous representation of its nature”.⁹³⁰

Delivery of deed as an escrow

1-133

⚠ A party may deliver a deed as an escrow, that is, so that it shall take effect or be his deed on certain conditions. It is in other words a limited or conditional delivery.⁹³¹ ⚠ Such delivery need not be accompanied by express words; if from all the facts attending the transaction it can reasonably be inferred that the writing was delivered so as not to take effect as a deed until a certain condition should be satisfied, it will operate as an escrow.⁹³² To constitute a delivery as an escrow, however, it was at one time necessary that the deed should not have been handed over to the grantee or covenantor.⁹³³ But nowadays a deed may be delivered as an escrow by handing it to a solicitor who is acting for all the parties to it⁹³⁴; or even to the solicitor of the grantee or covenantor himself, provided it is clear upon the whole transaction that such handing over was not intended to be a delivery at that time to such grantee or covenantor.⁹³⁵ In other words, evidence is admissible to show the character in which and the terms upon which the deed was delivered.⁹³⁶ It is a question of fact, and depends on what the parties intended. Their intention may be ascertained either from their statements or from the surrounding circumstances prior to or simultaneous with (but not subsequent to) the delivery of the instrument.⁹³⁷

Conveyance as an escrow

1-134

Where a conveyance is executed by the vendor and entrusted to his solicitor with a view to its being handed over to the purchaser on completion, then, in the absence of special circumstances, it is to be inferred that the conveyance is executed as an escrow conditional upon payment of the purchase price and (where appropriate) execution by the purchaser.⁹³⁸ In such a case, there must be a time limit within which the implied condition of the escrow is to be performed.⁹³⁹ So if the vendor by notice makes time of the essence of the contract, and the purchaser does not within the time specified in the notice perform the condition, it is no longer possible for the condition of the escrow to be performed.⁹⁴⁰ However, the inference as to delivery as an escrow arising from non payment of the price can be rebutted by other circumstances attending the delivery.⁹⁴¹

Retrospective effect



1-135

A deed delivered as an escrow takes effect as between grantor and grantee retrospectively from the date of its delivery, and not on the date on which the relevant conditions are satisfied.⁹⁴²

^{920.} Bacon, *Abridgment Obligation* (C); Comyns Digest Fait (B3); *Goddard's Case* (1584) 2 Co Rep. 4b.

^{921.} This paragraph was cited with approval in *Silver Queen Maritime Ltd v Persia Petroleum Services Ltd* [2010] EWHC 2867 (QB) at [124]. See also below, para.1-133 (escrow).

^{922.} [2001] EWCA Civ 527, [2002] Q.B. 35.

- [923.](#) Above, para.1-118.
- [924.](#) The 1989 Act s.1(3) requires that the instrument is signed in the presence of the attending witness or witnesses.
- [925.](#) [2001] EWCA Civ 527, [2002] Q.B. 35 at 44 (Pill L.J. with whom Tuckley L.J. and Sir Christopher Slade agreed): *Yaxley v Gotts* [2000] Ch. 162, 191.
- [926.](#) [2001] EWCA Civ 527, [2002] Q.B. 35 at 47.
- [927.](#)  [2014] EWHC 1178 (Ch), [2015] Ch. 212 at [43]–[44]; *Bank of Scotland Plc v Waugh* [2014] EWHC 2117 (Ch), [2015] 1 P. & C.R. DG3 at [68]–[79].
- [928.](#) See Vol.II, para.45-060.
- [929.](#) [2003] UKHL 17, [2003] 2 All E.R. 615 at [51].
- [930.](#) [2003] UKHL 17 at [51], per Lord Walker of Gestingthorpe; [2001] EWCA Civ 527, [2002] Q.B. 35 at 47.
- [931.](#)  It may be difficult to distinguish between a deed which has not been delivered at all and one which has been delivered as an escrow: Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.3–173; *Vincent v Primo Enterprises (Voucher Sales) Ltd* [1969] 2 Q.B. 609, 620; *Kingston v American Investments Ltd* [1975] 1 W.L.R. 161; *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch. 88 at 102 (reversed on other grounds [1961] Ch. 375); *Silver Queen Maritime Ltd v Persia Petroleum Services Ltd* [2010] EWHC 2867 (QB).
- [932.](#) *Murray v Earl of Stair* (1823) 2 B. & C. 82; *Xenos v Wickham* (1867) L.R. 2 H.L. 296 at [323]; *Macedo v Stroud* [1922] 2 A.C. 330 at [337]; *Beesly v Hallwood Estates Ltd* [1961] Ch. 105; *Vincent v Primo Enterprises Ltd* [1969] 2 Q.B. 609; *D'Silva v Lister House Development Ltd* [1971] Ch. 17; *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161; *Glessing v Green* [1975] 1 W.L.R. 863; *Terrapin International Ltd v IRC* [1976] 1 W.L.R. 665; *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [63].
- [933.](#) Co.Litt. 36a; Sheppard, *Touchstone of Common Assurances*, 7th edn (1820), p.59.
- [934.](#) *Millership v Brookes* (1860) 5 H. & N. 797; *Kidner v Keith* (1863) 15 C.B.(N.S.) 35; 42. *Glessing v Green* [1975] 1 W.L.R. 863.
- [935.](#) *Watkins v Nash* (1875) L.R. 20 Eq. 262, 266; *Nash v Flyn* (1844) 1 Jo. & La.T. 162, 177.
- [936.](#) *London Freehold and Leasehold Property Co v Suffield* [1897] 2 Ch. 608, 621–622. See below, para.13-109.
- [937.](#) *Bowker v Burdekin* (1843) 11 M.W. 128, 147; *Davis v Jones* (1856) 17 C.B. 625, 634; *Governors, etc., of Foundling Hospital v Crane* [1911] 2 K.B. 367, 374. *Thompson v McCullough* [1947] K.B. 447.
- [938.](#) *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161; *Glessing v Green* [1975] 1 W.L.R. 863.
- [939.](#) *Glessing v Green* [1975] 1 W.L.R. 863. cf. *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161 at [168]–[169].
- [940.](#) *Glessing v Green* [1975] 1 W.L.R. 863. cf. *Beesly v Hallwood Estates Ltd* [1961] Ch. 105, 118, 120; *Kingston v Ambrian Investment Co Ltd* [1975] 1 W.L.R. 161 at 166.
- [941.](#) *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [51].

[942.](#) *Alan Estates Ltd v W.G. Stores Ltd* [1982] Ch. 511, not following *Terrapin International Ltd v IRC* [1976] 1 W.L.R. 665; *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [51]; Kenny (1982) Conv. 409.

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(c) - Consideration

No consideration required

1-136

⚠ Generally speaking, as will be seen later in detail, ⁹⁴³ the law does not enforce gratuitous promises but instead requires a certain reciprocity for the creation of a “simple” contract, this requirement being expressed through the rules gathered under the heading of the doctrine of consideration. However, in contracts contained in a deed no such reciprocity is ordinarily required, the rule being that a contract contained in a deed is good even against a party standing to derive no advantage from it. ⁹⁴⁴ This means that the common law actions of debt (for a promised sum of money) or damages (for failure to perform promises more generally) are available to the person for whose benefit they are expressed. On the other hand equity never favoured voluntary transactions even if they were contained in a deed, and refused to grant its special remedies in cases where these were without consideration. So it has been laid down that specific performance will not be decreed of a contract contained in a deed which is entirely without consideration. ⁹⁴⁵ Knight-Bruce L.J. in *Kekewich v Manning* ⁹⁴⁶ said:

“In equity, where at least the covenantor is living, or where specific performance of such a (voluntary) covenant is sought, it stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed.” ⁹⁴⁷

And an imperfect conveyance, if voluntary, is not binding, and equity will not execute it in favour of volunteers if anything remains to be done. ⁹⁴⁸ A contract contained in a deed, if made without consideration, may be impeached by third parties on similar grounds to those on which voluntary settlements can be impeached as being fraudulent as against creditors or purchasers. ⁹⁴⁹ Where a promise or agreement unsupported by consideration is enforceable by reason of its being contained in a deed, it may be avoided on the ground of special equitable rules of mistake which are distinct from the rules of mistake applicable to contracts. ⁹⁵⁰ ⚠

^{943.} See below, Ch.4.

^{944.} See Plowd. 308; *Morley v Boothby* (1825) 3 Bing. 107, 111–112.


^{945.} *Wycherley v Wycherley* (1763) 2 Eden 175, 177; *Groves v Groves* (1829) 3 Y. & J. 163; *Jefferys v Jefferys* (1841) Cr. & Ph. 138. See Fry on Specific Performance, 6th edn (1921), p.53; Jones and Goodhart, *Specific Performance*, 2nd edn (1996), p.24. Contrast *Mountford v Scott* [1975] Ch. 258 (token payment for grant of option). See also below, paras 4-021, 27-039.

^{946.} (1851) 1 De G.M. & G. 176, 188.

[947.](#) But see above, para.1-113.

[948.](#) As in *Milroy v Lord* (1862) 4 De G.F. & J. 264; *Richards v Delbridge* (1874) L.R. 18 Eq. 11; *Re Kay's Settlement* [1939] Ch. 329; *Re Fry* [1946] Ch. 312. See also Law of Property Act 1925 s.173, replacing Voluntary Conveyances Act 1893.

[949.](#) See Law of Property Act 1925 s.173; Insolvency Act 1986 ss.423–425, 436 (replacing Law of Property Act 1925 s.172).

[950.](#)  *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 esp. at [115]; applied in *Van der Merwe v Goldman* [2016] EWHC 790 (Ch), [2016] 4 W.L.R. 71 at [26]–[32]. On the common law rules applicable to mistakes in contracts, see Vol.I, Chs 3 and 6.

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(d) - Other Aspects

Benefit of person not a party

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According to an ancient rule of the common law, no one could take an immediate interest as grantee nor the benefit of a covenant as covenantee under an indenture inter partes (as opposed to a deed poll) unless he was named as a party thereto. ⁹⁵¹ This was altered by s.5 of the Real Property Act 1845, which provided that under an indenture, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, might be taken, although the taker was not named a party to the same indenture. ⁹⁵² This section was re-enacted with modifications by s.56(1) of the Law of Property Act 1925, which provides that a person may take the benefit of any covenant *or agreement* over or respecting land *or other property*, although he may not be named as a party to the conveyance or other instrument. ⁹⁵³ The determination of the exact scope of this provision is a matter of considerable difficulty ⁹⁵⁴, but it is clear that it does not effect any general abrogation of the doctrine of privity of contract. ⁹⁵⁵ In *Beswick v Beswick*, ⁹⁵⁶ a majority of the House of Lords was of the opinion that a limited meaning should be given to the word "property". Lord Guest thought it meant real property. Lord Upjohn, however, was not prepared to accept this limitation, although he considered that the application of the section was restricted to covenants contained in documents strictly inter partes and under seal. ⁹⁵⁷

Contract (Rights of Third Parties) Act 1999

1-138

It is not entirely clear how the position described in the preceding paragraph is affected by the coming into force of the Contract (Rights of Third Parties) Act 1999, which creates a new exception to privity of contract where the contract expressly provides that a third party may in his own right enforce a term of the contract, or where a term purports to confer a benefit on him unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party. ⁹⁵⁸ Where a contract in the ordinary sense of an agreement supported by consideration is contained in a deed, there is nothing in the 1999 Act which suggests that its provisions should not apply to contracts owing to the use of this formality: indeed the 1999 Act itself assumes that some actions upon a speciality can be brought under it as it provides that "an action upon a speciality" in s.8 of the Limitation Act 1980 shall include references to ... an action brought in reliance on [s.1] relating to a speciality". ⁹⁵⁹ More difficult, however, is the question whether an agreement contained in a deed is itself "a contract" for the purposes of the 1999 Act even in the absence of any supporting consideration. As has been noted, ⁹⁶⁰ there is no agreement as to whether in general a promise or an agreement contained in a deed takes effect as a "contract". In the case of the 1999 Act, though, its own provisions do make clear that the contracts with which it is concerned must consist of an agreement between two or more persons for the benefit (as defined) of a third party. ⁹⁶¹ Moreover, the Law Commission's report on whose recommendations the 1999 Act was based took the view that its proposed reform would restrict the ambit of the doctrine of consideration so as to prevent the rule that



“consideration must move from a promisee” from denying a right in a third party to a contract otherwise fulfilling the requisite conditions.⁹⁶² In the course of exposing its views of the future position, however, the Law Commission observed that:

“... provided there is a contract supported by consideration (*or made by deed*), it may then be enforceable by a third party beneficiary who has not provided consideration.”⁹⁶³

Given that the courts refer to Law Commission reports for guidance in the interpretation of resulting legislation,⁹⁶⁴ this suggests that an agreement contained in a deed should count as a “contract” for the purposes of the 1999 Act, even if it is unsupported by consideration.⁹⁶⁵

Non est factum and mistake

1-139

 There was an ancient common law defence to actions on specialties known as non est factum: if an illiterate man, to whom the provisions of a deed had been wrongly read, executed it under a mistake as to its contents, he could say that it was not his deed.⁹⁶⁶ In modern times this doctrine has undergone modification⁹⁶⁷ and has been extended to cases other than those of illiteracy and to simple contracts in writing,⁹⁶⁸ so that there is now no difference between specialty and other written contracts in this respect. This position is to be contrasted with mistakes made in making gifts or other voluntary dispositions (including those made by deed), where equitable rules apply which differ from the common law rules applicable to mistake in contracts (whether or not contained in deeds).⁹⁶⁹ 

Estoppel and facts stated in the deed

1-140

“A party who executes a deed is estopped in a Court of Law from saying that the facts stated in the deed are not truly stated.”⁹⁷⁰

The principle has been extended to statements in recitals in a deed.⁹⁷¹ It is a question of the construction of the deed as a whole as to which parties are estopped by a recital. When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party: and the intention is to be gathered by construing the instrument.⁹⁷² The scope of the doctrine is extremely limited in modern law. First, it only applies between the parties to the deed and those claiming through them.⁹⁷³ Secondly, it only applies when an action is brought to enforce rights arising out of the deed and not collateral to it.⁹⁷⁴ Thirdly, it only applies if the statement is clear and unambiguous.⁹⁷⁵ Fourthly, it does not prevent a party from relying on defences such as non est factum, fraud, illegality or incapacity. In such cases the facts may be pleaded in order to defeat the deed, even though they may contradict statements made on the face of the deed.⁹⁷⁶ And so, although a party to a deed may be estopped from denying facts which are stated in it, he is not estopped from saying that, on the facts so stated, the deed is void in law.⁹⁷⁷ Fifthly, where a deed is rectifiable (that is to say, ought to be rectified), the doctrine of estoppel by deed will not bind the parties to it.⁹⁷⁸ However, it may be going too far to say that there is, given these restrictions, little point in preserving a separate category of estoppel by deed on the basis that it appears to be covered by estoppel representation or by convention. As Lord Toulson has observed:

“For one thing, convention may be contractual or non-contractual. Consideration is still ordinarily a requirement of a contract. In *Johnson v Gore Wood* [979] Lord Goff expressed

reservation about attempting to encapsulate the many circumstances capable of giving rise to an estoppel within a single formula, in part because consideration remains a fundamental principle of the law of contract and is not to be reduced out of existence by the law of estoppel. A particular characteristic of a deed is that consideration is not ordinarily required for it to be effective as between the parties.... However, where there is a contractual convention, it makes no difference in principle whether or not the contract is embodied in a deed.” ⁹⁸⁰

Merger

1-141

A deed is an instrument of a higher nature than a simple contract. A security created by simple contract will be merged in and extinguished by a specialty security if it secures the same obligation. ⁹⁸¹ A simple contract may also be merged in a deed, e.g. a conveyance, if so intended by the parties. ⁹⁸²

Alteration of deeds

1-142

Where a deed is altered in a material way either by a party in whose custody it is kept or by a stranger to the transaction, it becomes void, but where the alteration is not material it does not become void. ⁹⁸³ This rule applicable to deeds was extended in 1791 to contracts in written instruments generally ⁹⁸⁴ and is discussed further in Ch.25. ⁹⁸⁵

Variation or discharge

1-143


⚠ At common law, an attribute of a contract contained in a deed was that it could only be varied or discharged by another contract contained in a deed, and not by a contract under hand or by word of mouth ⁹⁸⁶; but in equity such contracts could be varied or discharged by parol, ⁹⁸⁷ and the rule of equity now prevails. ⁹⁸⁸ ⚠


Period of limitation

1-144

The period of limitation for an action for a breach of contract is 12 years if the contract is contained in a deed, whereas it is only six years in the case of a simple contract. ⁹⁸⁹

^{951.} *Scudamore v Vandennstene* (1587) 2 Co.Inst. 673; *Berkeley v Hardy* (1826) 5 B. & C. 355; *Forster v Elvet Colliery Co Ltd* [1908] 1 K.B. 629, 639, affirmed sub nom. *Dyson v Forster* [1909] A.C. 98. (An “indenture” is a deed executed by more than one party, whereas a “deed poll” is one executed by only one party.) cf. *Moody v Condor Insurance Ltd* [2006] EWHC 100, [2006] 1 W.L.R. 1847, where it was held that the mere fact that a deed was executed by a guarantor and a principal debtor and expressed as being made “between” them did not conclude the issue whether the document was a deed poll or a deed inter partes, as it was “necessary to examine what the parties ... set out to do by it”: at [18], per Park J.

- [952.](#) *Kelsey v Dodd* (1881) 52 L.J.Ch. 34, 39; *Forster v Elvet Colliery Co Ltd* [1908] 1 K.B. 629.
- [953.](#) “Property” is defined in s.205(1)(xx). See also Law of Property Act s.78, re-enacting with modifications Conveyancing Act 1881 s.58.
- [954.](#) *Beswick v Beswick* [1968] A.C. 58; Elliott (1956) 20 Conv.(N.S.) 43, 114; Andrews (1959) 23 Conv.(N.S.) 179; Ellinger (1963) 26 M.L.R. 396; below, para.18-022.
- [955.](#) *Beswick v Beswick* [1968] A.C. 58.
- [956.](#) [1968] A.C. 58, 77, 81, 87.
- [957.](#) [1968] A.C. 58 at [105]–[107]. See also Lord Pearce at [94]. The reference to sealing must be read in the light of the effect of the Law of Property (Miscellaneous Provisions) Act 1989 s.1, above, para.1-113.
- [958.](#) Contract (Rights of Third Parties) Act 1999 s.1 and see generally, below, paras 18-090 et seq.
- [959.](#) Contracts (Rights of Third Parties) Act 1999 s.7(3).
- [960.](#) See above, para.1-016.
- [961.](#) Contract (Rights of Third Parties) Act 1999 s.1(2) which refers to the intention of the *parties*.
- [962.](#) Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties, Law Com. No.242 (1996) Pt VI.
- [963.](#) Privity of Contract, Law Com. No.242, para.6.4 (emphasis added).
- [964.](#) *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40, [2003] 3 W.L.R. 568 at [56].
- [965.](#) In *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52, [2008] L. & T.R. 30 at [33]–[42] it was assumed that a third party could take a right under a deed under the Contracts (Rights of Third Parties) Act 1999, although on the facts the Court of Appeal held that as a matter of construction the parties did not intend to do so (landlord’s undertaking by deed that liability for rent owed by partnership assignees of a lease should not extend to their personal assets held not intended to create a right in the former tenant, guarantor of that rental liability). On the facts, however, there was consideration moving to the promisors (the landlords) under the deed, which was expressed as supplemental to the lease.
- [966.](#) *Thoroughgood’s Case* (1584) 2 Co. Rep. 9a. But the doctrine was much older than that case: see Holdsworth, *History of English Law*, Vol.8, p.50.
- [967.](#) See below, paras 3-049 et seq.
- [968.](#) See below, para.3-049.
- [969.](#)  *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 esp. at [115]; applied in *Van der Merwe v Goldman* [2016] EWHC 790 (Ch), [2016] 4 W.L.R. 71 at [26]–[32]. On the common law rules applicable to mistakes in contracts, see Vol.I, Chs 3 and 6.
- [970.](#) *Baker v Dewey* (1823) 1 B. & C. 704, 707. See also *Hayne v Maltby* (1789) 3 Term Rep. 438, 441; *Potts v Nixon* (1870) 1 R. 5 C.L. 45.
- [971.](#) *Lainson v Tremere* (1834) 1 Ad. & El. 792; *Bowman v Taylor* (1834) 2 Ad. & El. 278; *Young v Raincock* (1849) 7 C.B. 310, 338.
- [972.](#) *Stroughill v Buck* (1850) 14 Q.B. 781, 787; cf. *Greer v Kettle* [1938] A.C. 156, 168–171.

- [973.](#) *Carpenter v Buller* (1841) 8 M. & W. 209, 212.
- [974.](#) *Carpenter v Buller* (1841) 8 M. & W. 209 at [213]; *Wiles v Woodward* (1850) 5 Exch. 557, 563; *Ex p. Morgan* (1875) 2 Ch. D. 72.
- [975.](#) *Bensley v Burdon* (1830) 8 L.J.(O.S.) Ch. 85, 87; *Right v Bucknell* (1831) 2 B. & Ad. 278, 282; *Heath v Crealock* (1874) L.R. 10 Ch. App. 22; *General Finance, etc., Co v Liberator, etc., Building Society* (1879) 10 Ch. D. 15; *Onward Building Society v Smithson* [1893] 1 Ch. 1; *Poulton v Moore* [1915] 1 K.B. 400; cf. *Trinidad Asphalte Co v Coryat* [1896] A.C. 587.
- [976.](#) *Collins v Blantern* (1767) 2 Wils. K.B. 341; *Hayne v Maltby* (1789) 3 Term Rep. 438; *Hill v Manchester and Salford Waterworks Co* (1831) 2 B. & Ad. 544.
- [977.](#) *Doe d. Preece v Howells* (1831) 2 B. & Ad. 744, and see *Re A Bankruptcy Notice* [1924] 2 Ch. 76.
- [978.](#) *Greer v Kettle* [1938] A.C. 156, 171; *Wilson v Wilson* [1969] 1 W.L.R. 1470; *OTV Birwelco Ltd v Technical & General Guarantee Co Ltd* [2002] 4 All E.R. 668.
- [979.](#) [2002] 2 AC 1, 39–40.
- [980.](#) *Prime Sight Ltd v Lavarello (Official Trustee)* [2013] UKPC 22, [2014] A.C. 436 at [30] (on behalf of the Privy Council).
- [981.](#) See below, paras 25-001 et seq.
- [982.](#) See below, para.25-003.
- [983.](#) *Pigot's Case* (1614) 11 Co. Rep. 26B, 27A; *Aldous's Case* (1868) L.R. 3 Q.B. 753; *Northern Bank Ltd v Laverty* [2001] N.I. 315.
- [984.](#) *Master v Millar* (1791) 14 T.R. 320.
- [985.](#) See below, paras 25-020 et seq.
- [986.](#) *Kaye v Waghorn* (1809) 1 Taunt. 428; cf. *Ex p. Morgan* (1875) 2 Ch. D. 72 at 89 and see the rule recognised but infringed in *Nash v Armstrong* (1861) 10 C.B.(N.S.) 259.
- [987.](#) *Webb v Hewitt* (1857) 3 K. & J. 438.
- [988.](#)  Senior Courts Act 1981 s.49; *Steeds v Steeds* (1889) 22 Q.B.D. 537; *Berry v Berry* [1929] 2 K.B. 316; *Mitas v Hyams* [1951] 2 T.L.R. 1215; *Plymouth Corp v Harvey* [1971] 1 W.L.R. 549. The parties to a contract contained in a deed (as in the case of a simple contract) may vary or discharge that contract by simple contract despite its containing an “anti-oral variation clause” by which, for example, any variation may be effected only by deed or only in signed writing: *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] Q.B. 604 at [19]–[34], following dicta in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All E.R. (Comm) 601 esp. at [100] and [119], and reviewing earlier conflicting authorities.
- [989.](#) Limitation Act 1980 s.8(1) (but subject to s.8(2)). See, e.g. *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 W.L.R. 1281, 1292. See below, paras 28-002, 28-003.

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Introduction

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The proper relationship between contract and tort has caused considerable difficulty and justifies some discussion of its history as well as an examination of the modern law. ⁹⁹⁰ As a matter of history, the first problem for the common law was to decide whether a particular form of action which it granted ought to be considered as founded on tort or on contract, a problem of the classification of actions. ⁹⁹¹ Secondly, it is clear that there are considerable differences between the typical cases of liability in tort and contract: contractual obligations are voluntary and particular to the parties, whereas liability in tort is imposed by law as a matter of policy and affects persons generally. ⁹⁹² Moreover, the distinction between the two liabilities is reflected in differences of rule which govern not merely their existence but also their incidents. ⁹⁹³ Thirdly, given these differences of regime between contract and tort, the question arises whether a party to a contract may choose to sue the other party in tort where the constituent elements of a tort can be made out and, if so, with what effects. ⁹⁹⁴ Again, where the existence of liability in tort is doubtful, the question arises whether the existence of a contract between the parties is a reason in favour of the recognition of such a tortious duty or a reason against it, a question which has arisen in particular in the context of recovery of pure economic loss in the tort of negligence. ⁹⁹⁵ Finally, the question is posed whether or to what extent the existence of a contractual obligation owed by A to B under a contract affects any liability in A to C, who is not party to that contract or, conversely, liability in C to A: do contracts affect torts beyond privity? ⁹⁹⁶

⁹⁹⁰. See Prosser, *Selected Topics on the Law of Torts* (1953), p.380; Guest (1961) 3 Univ. Malaya L.R. 191; Poulton (1966) 82 L.Q.R. 346; Fridman (1977) 93 L.Q.R. 422; Duncan Wallace (1978) L.Q.R. 60; Burrows (1983) 99 L.Q.R. 217; Smith (1984) U.B.C.L. Rev. 95; Jaffey (1985) 5 L.S. 77; Reynolds (1985) 11 N.Z. Univ. Law Rev. 215; Atiyah, *Law & Contemporary Problems* 287; Cane, *The Law of Torts* (1986), Ch.6; Cane, *Tort Law and Economic Interests*, 2nd edn (1996), pp.129–149, 307–343; McLaren (1989) 68 Can. Bar Rev. 30; Adams and Brownsword (1991) 55 Sask. L. Rev. 441; Burrows (1995) C.L.P. 103; Cane, *Consensus ad Idem* (1996), p.96; Whittaker (1996) 16 O.J.L.S. 191; Whittaker (1997) 17 Legal Studies 169. For an economic analysis see Bishop (1983) 12 L.S. 241. For comparative studies see Weir, *International Encyclopedia of Comparative Law* (1976), Vol.XI, “Torts” Ch.12; Markesinis (1987) 103 L.Q.R. 354.

⁹⁹¹. See below, para.1-146.

⁹⁹². See below, paras 1-147—1-149.

⁹⁹³. See below, paras 1-150—1-153.

⁹⁹⁴. See below, paras 1-154 et seq.

⁹⁹⁵. See below, paras 1-165 et seq.

[996](#). See below, paras 1-201 et seq.

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Forms of action

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For a long time, the common law did not require formally to distinguish between actions in contract and in tort. ⁹⁹⁷ Until the late seventeenth century, only Bracton used a Roman legal framework for the treating of common law material, including the distinction between actions ex delicto and ex contractu, and even he did not make this distinction central to his exposition. ⁹⁹⁸ Moreover, while some early decisions appear to turn on such a distinction, care should be taken not to read into these cases, which turned on differences of individual writs, disputes as to a classification unfamiliar and irrelevant to contemporary legal thought ⁹⁹⁹: indeed, the action which became the main sanction of breach of contract (*assumpsit*) and the modern torts both grew out of the action of trespass. ¹⁰⁰⁰ However, from the late seventeenth century, the courts did distinguish between actions in contract (*assumpsit*, covenant and account) and actions in tort (which included trespass, trover and nuisance). They did so for the purposes of rules governing transmissibility of actions on death ¹⁰⁰¹ and capacity, ¹⁰⁰² but the principal purposes were procedural and in particular the rules as to joinder of actions in the same declaration and joinder of parties to proceedings were said to turn on whether the action was in a form ex contractu or a form ex delicto. ¹⁰⁰³ Even so, it was not until the nineteenth century that this distinction was used as a general basis of exposition of the common law material, ¹⁰⁰⁴ though it had been mentioned in earlier works. ¹⁰⁰⁵ However, since the abolition in the mid-nineteenth century of many of the procedural differences between the two types of action, ¹⁰⁰⁶ these disputes could be seen as “useless, and worse than useless learning”. ¹⁰⁰⁷ Where, therefore, after these reforms a court has had to classify a particular *type* of claim by a claimant as contractual or tortious, for example for the purposes of the jurisdiction of a court of limited jurisdiction, it has done so on the basis of what it considered was the substance rather than the form of action. ¹⁰⁰⁸

⁹⁹⁷. Maitland, Appendix A to Pollock, *The Law of Torts*, 1st edn (1887), p.467, p.468.

⁹⁹⁸. Maitland, Appendix A to Pollock, *The Law of Torts*, p.468.

⁹⁹⁹. Prosser above, n.920, at pp.380–381.

¹⁰⁰⁰. Simpson, *A History of the Common Law of Contracts* (1975), p.199; Milsom, *Historical Foundations of the Common Law*, 2nd edn (1981), Ch.12; Fridman (1977) 93 L.Q.R. 422.

¹⁰⁰¹. *Pinchon's Case* (1608) 9 Col. Rep. 86b; *Hambly v Trott* (1776) 1 Cowp. 371.

¹⁰⁰². *Johnson v Pye* (1666) 1 Sid. 258, 1 Keb. 913; *Bristow v Eastman* (1794) 1 especially 172.

¹⁰⁰³. *Denison v Ralphson* (1682) 1 Vent. 365; *Bosun v Sandford* (1691) 2 Salk. 440. In this respect, there was something of a dispute as to the form in which the action of detinue was properly to

be classified: see Chitty, *A Practical Treatise on Pleading* (1809), Vol.II, p.399; *Cooper v Chitty* (1756) 1 Burr. 20, 31; *Gledstane v Hewitt* (1831) 1 C. & J. 566; Manning, note to *Walker v Needham* (1841) 3 Man. & Gr. 561. This dispute appears particularly strange given the clearly proprietary function of the action.

[1004.](#) Chitty, above, n.933 Vol.I, Chs 1 and 2.

[1005.](#) Bracton, Fol. 102; Bacon, *A New Abridgement of the Law* (1736) "Actions in General (A) Of the different Kinds of Actions"; Comyns, *A Digest of the Laws of England*, 1st edn (1762–67), Vol.1, p.120; Blackstone, *Commentaries*, III, Ch.VIII.

[1006.](#) Common Law Procedure Act 1852 ss.34, 35, 41, 74.

[1007.](#) *Bryant v Herbert* (1878) 3 C.P.D. 389, 392, per Bramwell L.J., referring to the problem of the classification of detinue, on which see above n.933.

[1008.](#) *Bryant v Herbert* (1878) 3 C.P.D. 389; *Legge v Tucker* (1856) 1 H. & N. 500. In theory, this issue of the classification of a particular type of claim is distinct from the issue whether in cases of concurrence of actions the claimant may choose the basis of his claim. Thus, in *Att-Gen v Canter* [1939] 1 K.B. 318 the question arose whether a claim by the Crown for a penalty imposed on a taxpayer for fraud transmitted against the latter's estate under s.1 of the Law Reform (Miscellaneous Provisions) Act 1934, and if so, whether it ought to be considered a "cause of action in tort" for the purposes of s.1(3) of the same Act which imposed time restrictions as to the accrual of such a transmitted claim. At first instance, Lawrence J. held that the claim was "one for a debt created by the statute" under which the penalty was imposed and did transmit against the estate, but was not a "cause of action in tort": at 321. The Court of Appeal confirmed this decision, though only the principle of transmissibility was addressed. However, the courts have also looked to the substance of a plaintiff's claim as being contract rather than tort in cases of concurrence, to prevent the plaintiff's choice of form of action from governing the procedural rule applicable: see *Legge v Tucker*, above, though the court denied the "independence" of the tort from the contractual duty: at 502; *Kelly v Metropolitan Ry Co* [1895] 1 Q.B. 944; *Edwards v Mallen* [1908] 1 K.B. 1002.

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(b) - Differences of Substance between Contract and Tort

General

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Publication in the mid-nineteenth century of the great systematising textbooks of Addison, ¹⁰⁰⁹ Underhill ¹⁰¹⁰ and Pollock ¹⁰¹¹ saw a change in understanding of the distinction between contract and tort from one of form to one of substance. This change resulted, not only from the sweeping away of the old procedural differences between the two types of action, but also from the acceptance by English lawyers of the “will theory” of contractual obligation, ¹⁰¹² a theory which pointed to the special voluntary nature of contractual obligations, in contrast to duties in tort which were not. ¹⁰¹³ This contrast lies behind part of the generally accepted modern distinction between contract and tort. Thus, according to Winfield, ¹⁰¹⁴ liability for breach of contract is distinguished from liability in tort in that:

- “(i)
the duties in tort are primarily fixed by the law while in contract they are fixed by the parties themselves; and
- (ii)
in tort the duty is towards persons generally while in contract it is towards a specific person or persons.”

Both propositions still hold good, at least as a starting point. So, Jackson L.J has observed that:

“Contractual obligations are negotiated by the parties and then enforced by law because the performance of contracts is vital to the functioning of society. Tortious duties are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct.” ¹⁰¹⁵

Moreover, there is a further real, general distinction: for torts can be said to make the claimant's (existing) position worse, whereas a breach of contract often consists of failing to make the claimant's position better, better, that is, from the claimant's pre-contractual position and as defined by the other party's obligations under the contract. ¹⁰¹⁶ However, developments in the modern law have blurred

these contrasts. First, as has already been remarked, many of the incidents of modern contracts are not fixed by the parties: the courts ¹⁰¹⁷ and the legislature have regulated the relationships of many contractors. Moreover, even where this regulation is effected by the implication of a term, some terms are not susceptible to express exclusion or alteration by the parties. ¹⁰¹⁸ Indeed, in some types of contracts legislative regulation has reached a level where the “voluntary element” is reduced to a simple choice whether or not to enter the relationship. ¹⁰¹⁹ Furthermore, in general common law or statute, rather than the parties, specify what legal consequences arise on the failure to perform a contract, whether this is considered a matter of breach ¹⁰²⁰ or frustration. ¹⁰²¹ It is the law itself which provides and delineates the remedies of damages, termination for major breach of contract or specific performance, and the role of the parties’ agreement here is not to create but at most to modify the rules already provided by the law. ¹⁰²² Conversely, “voluntariness” can be relevant to the imposition of liability in tort: positively, where “voluntariness” or consent on the part of the *defendant* is a factor in the imposition of liability, for example, in relation to occupier’s liability, ¹⁰²³ liability for omissions ¹⁰²⁴ or under the principle established by *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. ¹⁰²⁵ Negatively, however, the consent of a *claimant* may prevent liability from arising in tort: thus, consent to medical treatment ¹⁰²⁶ or to a risk of injury in sport ¹⁰²⁷ may exclude liability in tort by operation of the maxim *volenti non fit injuria*, as may a contractual agreement by the parties excluding liability, whether in tort or in contract. ¹⁰²⁸

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⚠ Some writers have stressed the special protection of expectations created by a contract, reflected in the nature of the damages awarded on its breach and the lack of protection of expectations by the law of torts. ¹⁰²⁹ Others have disagreed, ¹⁰³⁰ arguing that this obscures the importance of awards of damages in contract based on the claimant’s “reliance interest”, which is similar to that protected generally in tort. ¹⁰³¹ Conversely, damages in tort can compensate the injured party’s disappointed expectations, for example, his expectation to be able to earn a living, ¹⁰³² although it has been pointed out that this expectation is general, unlike contractual expectations which are induced by making the contract. ¹⁰³³ ⚠ On the other hand, while traditionally it could be said that recovery for non-intentional pure economic loss was generally irrecoverable in tort, while being recoverable in contract, this position has been significantly qualified by the House of Lords’ application of the principle of “assumption of responsibility” of *Hedley Byrne & Co Ltd v Heller & Partners* ¹⁰³⁴ to cases of the negligent performance of services. ¹⁰³⁵

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More radical criticism of the division between contract and tort argues that it, together with other broad conceptual distinctions in the law, at times helps to obscure similarities of factual situation which cut across it and at others to group together situations which have practically nothing in common. ¹⁰³⁶ Instead, it has been suggested, private law should be reclassified according to the nature of the interest of the claimant to be protected. ¹⁰³⁷ However, this type of suggestion has not been generally accepted and the distinction between contract and tort remains fundamental.

Differences of regime between contract and tort: damages

1-150

⚠ Some legal incidents of liability differ according to whether the claimant’s claim is based on a breach of contract or a tort. Thus, there are important differences between the damages recoverable in contract and in tort. ¹⁰³⁸ As has been noted, the most basic difference remains that the function of damages in contract is primarily to put the injured party as far as possible in the position in which he would have been had the contract been performed, ¹⁰³⁹ whereas the function of damages in tort is to put the injured party in the position in which he would have been if the tort had not been committed. ¹⁰⁴⁰ Thus, damages for breach of warranty may give the claimant his lost bargain, ¹⁰⁴¹ whereas damages in the tort of deceit, ¹⁰⁴² ⚠ negligent misstatement, ¹⁰⁴³ under s.2 of the Misrepresentation Act 1967 ¹⁰⁴⁴ and in respect of “misleading actions” or “aggressive commercial practices” ¹⁰⁴⁵ may not, being instead restricted to what has been termed compensation of his “status quo interest”. ¹⁰⁴⁶ The

tests of remoteness of damage in contract and in tort are apparently different ¹⁰⁴⁷ and in general the defence of contributory negligence does not apply to claims in contract, though it is now established that the court may reduce a claimant's damages for breach of contract on this ground if his claim is based on breach of a contractual duty to take reasonable care, concurrent with liability in the tort of negligence. ¹⁰⁴⁸

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Other differences in the heads of damages available in contract and in tort are often to be based on circumstances other than the mere classification of the liability in issue. Thus, whereas nominal damages are always possible in an award in contract, it would appear that they are only available in tort if it is actionable per se. ¹⁰⁴⁹ Punitive or exemplary damages are sometimes said to be possible in tort, but not in contract, ¹⁰⁵⁰ though the exceptional circumstances in which they are permitted in tort are usually inapplicable to the contractual context. ¹⁰⁵¹ Similarly, damages for injured feelings or mental distress not consequential on the claimant's own physical injury are very closely, if differently, circumscribed both in tort ¹⁰⁵² and in contract, ¹⁰⁵³ though there remains some authority which excludes them entirely from liability in contract. ¹⁰⁵⁴ Traditionally, it was sometimes said that damages for loss of reputation are not available in contract in contrast to tort, ¹⁰⁵⁵ but there were conflicting decisions on this point, ¹⁰⁵⁶ and some cases clearly recognised such a recovery in contract in appropriate cases, such as injury to a trader whose business reputation is affected by the breach ¹⁰⁵⁷ and where the contract can be said to be for the maintenance or promotion of the claimant's reputation. ¹⁰⁵⁸ Moreover, in *Mahmud v Bank of Credit and Commerce International SA (In Liquidation)*, ¹⁰⁵⁹ the House of Lords allowed recovery by two former employees for damage to their employment prospects by breach of their employer's obligation not to damage the relationship of trust between employer and employee, seeing this as an example of the general rule allowing recovery for financial harm caused by breach of contract (as opposed to caused by the manner in which the contract was breached). ¹⁰⁶⁰

Limitation of actions

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Although the Limitation Act 1980 ¹⁰⁶¹ provides an identical period of six years ¹⁰⁶² for actions founded on simple contract or on tort, the period begins to run "from the date on which the cause of action accrued". ¹⁰⁶³ This may vary according to whether the action is framed in tort, contract or restitution. ¹⁰⁶⁴ For example, in contract the cause of action accrues when the breach of contract takes place, not when the damage occurs or is discovered. ¹⁰⁶⁵ But, in the tort of negligence, the cause of action accrues when damage occurs, and not at the time of the act or default giving rise to the claim. ¹⁰⁶⁶ However, the practical effect of this rule was reduced by the provision of the Latent Damage Act 1986, which provides ¹⁰⁶⁷ that:

"... actions for damages for negligence in respect of latent damage not involving personal injuries may be brought for a period of three years after the discovery of the damage by the plaintiff even if this is after six years after accrual of the cause of action."

This provision has created its own distinction between claims in contract and in tort, as it has been held that the term "*negligence actions*" for this purpose does not include actions for breach of a contractual obligation to take reasonable care, even where this is concurrent with an action for tortious negligence. ¹⁰⁶⁸


Other differences

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A contractual right, for example, to a certain sum due under a contract, can generally be assigned, but a right of action in tort generally cannot. ¹⁰⁶⁹ The rules of the conflict of laws governing both

jurisdiction ¹⁰⁷⁰ and applicable law are different in matters relating to tort and to contract. ¹⁰⁷¹ The law governing the capacity of parties may be different: so, for example, a minor is in principle liable for his torts, but only to a limited extent on his contracts. ¹⁰⁷² Statutory provisions sometimes distinguish according to rights arising out of a contract, and other rights (which would include tort) though this appears to be a diminishing practice. ¹⁰⁷³

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- ¹⁰⁰⁹. Addison, *Contracts*, 1st edn (1845).
- ¹⁰¹⁰. Underhill, *A Summary of the Law of Torts or Wrongs Independent of Contract*, 1st edn (1873).
- ¹⁰¹¹. Pollock, *Principles of Contract at Law and in Equity*, 1st edn (1876); *The Law of Torts*, 1st edn (1887).
- ¹⁰¹². See Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), Ch.6.
- ¹⁰¹³. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p.408.
- ¹⁰¹⁴. Winfield, *Province of the Law of Tort* (1931), p.380.
- ¹⁰¹⁵. *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [79] (with whom Stanley Burnton and Maurice Kay L.JJ. agreed).
- ¹⁰¹⁶. cf. Weir, *International Encyclopedia of Comparative Law* (1976), Vol.XI, "Torts", Ch.12, p.5; Whittaker (1996) 16 O.J.L.S. 191, 207 et seq. cf. below, para.1-150.
- ¹⁰¹⁷. See above, para.1-034; below, Ch.14.
- ¹⁰¹⁸. See, e.g. Sale of Goods Act 1979 s.14; Unfair Contract Terms Act 1977 s.6; and (on its coming into force) Consumer Rights Act 2015 ss.9–10; 31. On these provisions see below, para.15-093 and Vol.II, para.38-492.
- ¹⁰¹⁹. Hepple (1986–1987) 36 King's Counsel 11 and see above, para.1-034.
- ¹⁰²⁰. See below, Chs 24, 26, 27.
- ¹⁰²¹. See below, Ch.23.
- ¹⁰²². For example, the law specifies what losses may be compensated by an action for damages for breach of contract. In principle, the parties may specify the circumstances in which a right to terminate a contract on the ground of breach will arise (below, paras 13-019, 24-039) or can exclude or limit a party's liability in damages, but they cannot resort to the use of "penalties": below, paras 26-178 et seq.
- ¹⁰²³. The liability of an occupier to someone on the premises for injury depends, inter alia on whether that person had permission to be there: see Occupiers' Liability Act 1957 s.1(2) (visitors) and Occupiers' Liability Act 1984 s.1(1) (trespassers).
- ¹⁰²⁴. Thus, liability in the tort of negligence will be imposed for a negligent "pure omission" where the defendant has voluntarily accepted a duty: Clerk & Lindsell on Torts, 21st edn (2014), paras 8-53—8-61.
- ¹⁰²⁵. [1964] A.C. 465. See *Spring v Guardian Assurance Co Ltd* [1995] 2 A.C. 296; *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *Williams v Natural Life Health Foods Ltd* and *Mistlin* [1998] 1 W.L.R. 830. cf. *Smith v Eric S Bush* [1990] 1 A.C. 831; *Harris v Wyre Forest District Council* [1990] 1 A.C. 831 at 862 and see below, paras 1-166 et seq. See also Barker (1993) 109 L.Q.R. 461; Whittaker (1997) 17 Legal Studies 169.

- [1026.](#) *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 2 W.L.R. 768.
- [1027.](#) *Condon v Basi* [1985] 1 W.L.R. 866.
- [1028.](#) See below, para.1-181.
- [1029.](#) Burrows (1983) 99 L.Q.R. 217; Taylor (1982) 45 M.L.R. 139; Friedmann (1995) 111 L.Q.R. 628; Whittaker (1996) 16 O.J.L.S. 191, 207 et seq. cf. Stapleton (1997) 113 L.Q.R. 257.
- [1030.](#) Atiyah, *Essays on Contract* (1986), Essay 2; Hedley (1988) 9 L.S. 137.
- [1031.](#) Fuller & Purdue (1936–1937) 46 Yale L.J. 52 and 373.
- [1032.](#) Atiyah, *The Rise and Fall of Freedom of Contract* (1979), pp.762–763.
- [1033.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–021.
- [1034.](#) [1964] A.C. 465.
- [1035.](#) See *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *Williams v Natural Life Health Foods Ltd and Mistlin* [1998] 1 W.L.R. 830 and below, paras 1-166—1-173.
- [1036.](#) Atiyah, *Essays on Contract* (1986), pp.53–55. cf. Burrows (1983) 99 L.Q.R. 217.
- [1037.](#) Atiyah at Essay 2; Hedley (1988) 8 L.S. 137.
- [1038.](#) McGregor on Damages, 19th edn (2014), paras 22-001 et seq.; Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (2004), Ch.2.
- [1039.](#) *Robinson v Harman* (1848) 1 Exch. 850, 855; Burrows (1983) 99 L.Q.R. 217. cf. Atiyah (1978) 94 L.Q.R. 193 and *Essays on Contract* (1986), Ch.2; Owen (1984) 4 O.J.L.S. 393; Waddams (1983–84) 8 Can. Bus. L.J. 2; Friedmann (1995) 111 L.Q.R. 628.
- [1040.](#) *Livingstone v Raywards Coal Co* (1880) 5 App. Cas. 25, 39; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] A.C. 174, 186 et seq.; *Gates v City Mutual Life Assurance Society Ltd* (1986) C.L.R. 1, 11–12.
- [1041.](#) e.g. Sale of Goods Act 1979 s.53(3).
- [1042.](#)  Peek v Derry (1887) 37 Ch. D. 541, 578; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158, 167 and see *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254; cf. *Davidson v Tullock* (1860) 3 Macq. 783; *East v Maurer* [1991] 1 W.L.R. 461; *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778, [2017] 3 All E.R. 157 and see below, paras 7-055, 7-058—7-059.
- [1043.](#) *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801, 820–821; *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep. 391.
- [1044.](#) *André & Cie SA v Ets Michel Blanc et Fils* [1977] 2 Lloyd's Rep. 166, 181; *McNally v Welltrade International Ltd* [1978] I.R.L.R. 497, 499; Taylor (1982) 45 M.L.R. 139; Cartwright (1987) 51 Conv. 423; *Sharneyford Supplies Ltd v Edge Barrington & Black* [1986] Ch. 128, [1987] Ch. 305, not following *Watts v Spence* [1976] Ch. 16; *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297 and see below, para.7-078.
- [1045.](#) The right in a consumer to claim damages in respect of the “misleading action” or “aggressive practice” of a trader is contained in the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) regs 5 and 7, 27A–27D, 27J (as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)). The measure of damages is set by reg.27J(1); reg.27J(3) specifically excludes recovery of damages for financial loss in respect of the

difference between the market price of a product (as specially defined) and the amount payable for it under the contract: see generally Vol.II, paras 38-160 et seq. and, on the right to damages, paras 38-185—38-186.

- [1046.](#) Burrows (1983) 99 L.Q.R. 217, 219–221. Damages in tort may include compensation for wasted expenditure and lost opportunities: *East v Maurer* [1991] 1 W.L.R. 461 and see below, para.7-058.
- [1047.](#) *Koufos v Czarnikow Ltd* [1969] 1 A.C. 350; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 at [119]–[122] and see below, paras 26-116—26-118. The principles of causation, e.g. in relation to the effect of supervening causes, are said sometimes to be the same in contract as in tort: *Beoco Ltd v Alfa Laval Co Ltd* [1995] Q.B. 137; cf. *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360.
- [1048.](#) Law Reform (Contributory Negligence) Act 1945; *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852; *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 21; *Barclays Bank Plc v Fairclough Building Ltd (No.2)* [1995] I.R.L.R. 605 and see below, para.26-077.
- [1049.](#) Ogus, *The Law of Damages* (1973), pp.22 et seq. cf. *Marzetti v Williams* (1830) 1 B. & Ad. 415.
- [1050.](#) *Addis v Gramophone Co Ltd* [1909] A.C. 488; *Perera v Vandiyar* [1953] 1 W.L.R. 672, see below, paras 26-044—26-045.
- [1051.](#) *Rookes v Barnard* [1964] A.C. 1129; *Cassell & Co Ltd v Broome* [1972] A.C. 1027. cf. below, para.7-070 (fraud). The exception to this is where “the defendant’s conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff”: *Rookes v Barnard* [1964] A.C. 1129, 1126–1127. The traditional and general rule is that a party injured by a breach of contract cannot on this ground alone recover against the party in breach for profits made as a consequence of that breach as distinct from losses caused by that breach: *Teacher v Calder* [1899] A.C. 451; *Surrey CC v Bredero Homes Ltd* [1993] 3 W.L.R. 1361. However, in *Att-Gen v Blake* [2001] 1 A.C. 268, the House of Lords held that exceptionally the courts possess a discretion to award an account of profits against a party in breach of contract, even where the injured party has suffered no loss and see below, paras 26-001, 26-046 et seq.
- [1052.](#) McGregor on Damages, 19th edn (2014), paras 5-012 et seq. cf. *McLoughlin v O’Brien* [1983] 1 A.C. 785; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310; *Page v Smith* [1995] 2 W.L.R. 644; *White v Chief Constable of South Yorkshire* [1998] 3 W.L.R. 1509; *Rothwell v Chemical Insulating Co Ltd* [2008] 1 A.C. 281.
- [1053.](#) Below, paras 26-139—26-147 and see McGregor on Damages, 19th edn (2014) paras 5-023 et seq. *Cook v Swinfen* [1967] 1 W.L.R. 457; *Jarvis v Swann Tours Ltd* [1973] 1 Q.B. 233; *Bliss v S.E. Thames Regional Health Authority* [1985] I.R.L.R. 308; *Hayes v James & Charles Dodd (A Firm)* [1990] 2 All E.R. 815, 824; *McLeish v Amoo-Gottfried & Co, The Times*, October 13, 1993; *Watts v Morrow* [1991] 1 W.L.R. 1421; *Knott v Bolton* [1995] E.G.C.S. 59; *Mahmud v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20; *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 W.L.R. 1076; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 W.L.R. 55. cf. *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 at [119].
- [1054.](#) *Addis v Gramophone Co Ltd* [1909] A.C. 488.
- [1055.](#) *Addis v Gramophone Co Ltd* [1909] A.C. 488; *Withers v General Theatre Corp Ltd* [1933] 2 K.B. 536.
- [1056.](#) cf. *Withers v General Theatre Corp Ltd* [1933] 2 K.B. 536 with *Marbe v George Edwardes (Daly’s Theatre) Ltd* [1928] 1 K.B. 269.
- [1057.](#) *Wilson v United Counties Bank Ltd* [1920] A.C. 102.

- [1058.](#) *Rolin v Steward* (1854) 14 C.B. 595; *Aerial Advertising Co v Batchelors Peas (Manchester) Ltd* [1938] 2 All E.R. 788.
- [1059.](#) [1998] A.C. 20 and see McGregor on Damages, 19th edn (2014), para.5-035.
- [1060.](#) [1998] A.C. 20, 51. But see *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518; *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 A.C. 503; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 W.L.R. 55; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 and below, paras 26-148—26-149.
- [1061.](#) Ss.2, 5.
- [1062.](#) But see s.11 (three years for actions in respect of personal injuries): below, paras 28-006 et seq. This provision specifically applies to actions in contract as well as in tort.
- [1063.](#) A similar phrase is used in the Senior Courts Act 1981 s.35A (interest on debt and damages) which by the Administration of Justice Act 1982 s.15(1), Sch.1 Pt 1 replaced s.3 of the Law Reform (Miscellaneous Provisions) Act 1934.
- [1064.](#) *Battley v Faulkner* (1820) 3 B. & Ald. 288; *Beaman v A.R.T.S. Ltd* [1948] 2 All E.R. 89, 92 (reversed on other grounds [1949] 1 K.B. 550); *Bagot v Stevens, Scanlan & Co Ltd* [1966] 1 Q.B. 197; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384. See below, paras 28-031—28-062. *Saunders v Edwards* (1662) Sid. 95; *Bonomi v Backhouse* (1859) E., B. & E. 646; *Gibbs v Guild* (1881) 8 Q.B.D. 296, 302; *Chesworth v Farrar* [1967] 1 Q.B. 407; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1. See also below, paras 28-031—28-032.
- [1065.](#) *Battley v Faulkner* (1820) 3 B. Ald. 288; *Walker v Milner* (1866) 4 F. & F. 745; *Lynn v Bamber* [1930] 2 K.B. 72; *Bagot v Stevens, Scanlan & Co Ltd* [1966] 1 Q.B. 197. cf. *Shaw v Shaw* [1954] 2 Q.B. 429; *Midland Bank Trust Co Ltd v Hett, Stubbs Kemp* [1979] Ch. 384; *Forster v Outred & Co* [1982] 1 W.L.R. 86.
- [1066.](#) *Watson v Winget Ltd* (1960) S.C. 92; *Cartledge v E. Jopling & Sons Ltd* [1963] A.C. 758 (now modified by ss.11(4), 14 of the Limitation Act 1980); *Sparham-Souter v Town and Country Developments Ltd* [1976] 1 Q.B. 858; *Anns v Merton London BC* [1978] A.C. 728; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1; *Ketterman v Hansel Properties Ltd* [1987] 1 A.C. 189; *London Congregational Union Inc v Harriss and Harriss (A Firm)* [1988] 1 All E.R. 15; *D. W. Moore & Co Ltd v Ferrier* [1988] 1 W.L.R. 267; *Lee v Thompson* [1989] 40 E.G. 89; *McGee* (1988) 104 L.Q.R. 376; *Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 W.L.R. 1091.
- [1067.](#) Creating new s.14A of the Limitation Act 1980.
- [1068.](#) *Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham Ltd* [1990] 1 All E.R. 808 and see below, para.28-033. cf. Consumer Protection Act 1987 s.5(5) which sets a different time of accrual for actions for damage to property against a supplier or producer under Pt I of the Act from that which would exist against a contractor under the general law of limitation.
- [1069.](#) See below, para.19-050.
- [1070.](#) Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”) [2012] O.J. L351/1 arts 7(1) and 7(2) replacing Regulation (EC) 44/2001 of 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”) art.5(1) (“matters relating to a contract”) and (3) (“matters relating to tort, delict or quasi-delict”) which itself replaced the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the “Brussels Convention”).
- [1071.](#) See in particular Regulation (EC) 593/2008 on the law applicable to contractual obligations

("Rome I") [2008] O.J. L177/6; Regulation (EC) 864/2007 applicable to non-contractual obligations ("Rome II Regulation") [2007] O.J. L199/40 and generally Dicey, Morris and Collins on The Conflict of Laws, 15th edn (2014), Chs 32–35. On the Rome I Regulation, see below, paras 30-129 et seq.

[1072.](#) See below, paras 9-053—9-054. See also below, para.10-081 (trade unions).

[1073.](#) An example may be found in Companies Act 2006 ss.81 and 83 (replacing ss.4 and 5 of the Business Names Act 1985). The former distinction in the Bankruptcy Act 1914 s.30(1) between demands arising by reason of contract which were provable in bankruptcy and others which were not normally so provable, is not found in the provisions which replaced it in the Insolvency Act 1985 (ss.163, 211(1), (2) and (3)).

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General

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Where the constituent elements of a claimant's case are capable of being put either in terms of a claim in tort or for breach of contract, the general rule is that the claimant may choose on which basis to proceed, though this rule is subject to a number of qualifications, notably where to do so would be inconsistent with the terms of the contract. This traditional position was clearly affirmed by the House of Lords in *Henderson v Merrett Syndicates Ltd*,¹⁰⁷⁴ which drew to a close the uncertainty on this point caused by a dictum of Lord Scarman in the Privy Council in 1985 in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*, to the effect that:

“... their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.”¹⁰⁷⁵

This dictum appeared to favour the exclusion of claims in tort where the parties were in a contractual relationship, though the context of its acceptance by later courts was typically the denial of liability of recovery of pure economic loss in the tort of negligence.¹⁰⁷⁶ However, paradoxically, the House of Lords' decision on the nature and ambit of the tortious liability to be found on the facts before it in *Henderson v Merrett Syndicates Ltd* created new and very considerable uncertainty as regards the relationship of contractual and tortious claims between parties to a contract. For, it accepted that its own earlier decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹⁰⁷⁷ should be interpreted as establishing a “broad principle” of liability in tortious negligence based on the defendant's assumption of responsibility, an assumption which would appear to be satisfied whenever a party to a contract either possessing or holding himself out as possessing a special skill agrees to perform a service for the other party. In this respect, the courts have apparently returned to an approach similar to one taken in the earlier nineteenth century, though subsequently superseded.¹⁰⁷⁸

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The present discussion will start by looking briefly at the older authorities which governed the issue of concurrence of actions in contract and tort; it will then state the modern law allowing an option, first as regards pre-contractual liability and then as regards liability for torts committed in the course of performance of a contract; as to the latter, it will discuss the breadth of the principle of “assumption of responsibility” recognised in *Henderson v Merrett Syndicates Ltd*, and the nature and ambit of the qualifications on the option and on the effects which its exercise will entail.

Older authorities

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Disputes as to the availability of an action in tort against one's fellow contractor are not new and before the reforms of common law procedure of the mid-nineteenth century three positions can be detected in the cases. The first was that a plaintiff could neither join a claim in tort with one in contract in the same action nor opt whether to sue in tort when there was a contract between the parties. For example, in *Orton v Butler*, ¹⁰⁷⁹ Best J. refused to allow the joining of actions in trover (tort) and money had and received (contract), stating that:

"There is a broad distinction between actions ex contractu and ex delicto. Here, it arises out of breach of a contract, and the party ought not to be allowed to proceed in the present mode of framing his count [sc. claim] ex delicto." ¹⁰⁸⁰

Other cases distinguished between the rules against joinder of counts in contract and tort and the question whether a plaintiff was entitled to opt on which of the two bases to put his claim, ¹⁰⁸¹ some expressly recognising the validity of the option. Moreover, where they did it was acknowledged that the plaintiff's choice would affect the rules applicable to his claim. As Abbott J. observed:

"There is nothing to compel a plaintiff to elect that form which may be most convenient to the defendant. The very notion of election imports that the plaintiff may exercise it for his own benefit." ¹⁰⁸²

At the time, those courts which allowed an option between contract and tort thereby enabled a plaintiff to avoid in particular the rules against transmissibility of actions on death which applied to actions in tort ¹⁰⁸³ or the rules of joinder of parties to litigation which applied to actions in contract. ¹⁰⁸⁴ However, the courts did not allow the plaintiff's option to avoid certain other rules which applied to contract, notably, those as to capacity, ¹⁰⁸⁵ nor the express terms of a contract, notably, limitation clauses. ¹⁰⁸⁶

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The third approach to the relationship between actions in contract and tort can be seen in the decision in *Brown v Boorman*. ¹⁰⁸⁷ The plaintiffs retained the defendant as broker to sell their linseed oil on commission. This he did, but in breach of contract delivered it without payment and to the wrong (and later insolvent) person. The plaintiffs sued in case (i.e. tort), contending that the broker owed them a duty at common law to take reasonable care based on his trade or calling. The defendant countered that their proper form of action should have been *assumpsit* (i.e. contract). The House of Lords upheld Tindal C.J.'s judgment for the plaintiffs, Lord Campbell stating that:

"... wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract." ¹⁰⁸⁸

It is difficult not to agree with the defendant's contention that such an approach "would altogether destroy the distinction between *assumpsit* [i.e. contract] and tort", ¹⁰⁸⁹ as it suggests that the option to plead in tort or contract exists in *all* situations of breach of contract and not merely in those where an independent cause of action exists in tort. However, this was not the fate of *Brown v Boorman*. As Pollock stated ¹⁰⁹⁰:

"... notwithstanding the verbal laxity of one or two passages, the House of Lords did not authorize the parties to treat the mere non-performance of a promise as a substantive tort."

Instead, the decision was relied on as authority for the existence of an option for the plaintiff as to whether to sue in tort as long as a distinct and independent action in tort exists. ¹⁰⁹¹

The modern law

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In the modern law, a distinction can usefully be drawn between a claim by a party to a contract on the basis of a pre-contractual liability to be imposed on the other party and one based on a liability arising in the course of performance of the contract.

^{1074.} [1995] 2 A.C. 145. This position is also taken in Canada: *Central Trust Co v Rafuse* (1987) D.L.R. (4th) 481 SCC; *Canadian Pacific Hotels Ltd v Bank of Montreal* (1988) 40 D.L.R. (4th) 385; *B.C. Checo International Ltd v British Columbia Hydro & Power Authority* (1993) 99 D.L.R. (4th) 477. Although there was Australian authority against concurrence (*Hawkins v Clayton* (1988) 164 C.L.R. 539), the approach of the Canadian Supreme Court in *Central Trust Co v Rafuse* was followed in *Bryan v Maloney* (1995) 182 C.L.R. 609, 620–622.

^{1075.} [1986] A.C. 80, 107.

^{1076.} See, e.g. *Banque Keyser Ullmann SA v Skandia (UK) Co Insurance Ltd* [1990] 1 Q.B. 665, [1991] 2 A.C. 249 (affirmed on other grounds; *National Bank of Greece SA v Pinios Shipping (No.1)* [1990] 1 A.C. 637).

^{1077.} [1964] A.C. 465.

^{1078.} See below, para.1-157.

^{1079.} (1822) 5 B. & Ald. 652.

^{1080.} (1822) 5 B. Ald. 652 at [656].

^{1081.} e.g. *Brown v Dixon* (1786) 1 T.R. 274, 276–277.

^{1082.} *Ansell v Waterhouse* (1817) 6 M. & S. 385, 392.

^{1083.} *Hambly v Trott* (1776) 1 Cowp. 371.

^{1084.} *Govett v Radnidge* (1802) 3 East 62.

^{1085.} *Johnson v Pye* (1666) 1 Sid. 258, 1 Keb. 913.

^{1086.} *Nicholson v Willan* (1804) 5 East 507.

^{1087.} (1842) 3 Q.B. 511, (1844) 11 Cl. & Fin. 1, HL.

^{1088.} (1844) 11 Cl. & Fin. 1, 44.

^{1089.} (1844) 11 Cl. & Fin. 1, 12.

^{1090.} Pollock, *Torts*, 1st edn (1887), p.434.

^{1091.} *Hyman v Nye* (1881) 6 Q.B.D. 685; *Baylis v Lintott* (1873) L.R. 8 C.P. 345; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384.

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Representations

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Even at the time when it was doubtful whether a party to a contract could claim in tort against the other party in respect of matters relating to the performance of the contract, it was established that such a party could rely on established liabilities in tort arising from facts which occur in the course of the dealings of the parties before contract. A party to a contract can therefore claim damages for a pre-contractual statement which induced him to contract under various headings: in the tort of deceit, where the statement was made fraudulently ¹⁰⁹²; in the tort of negligence, ¹⁰⁹³ if the claimant can establish the conditions for the existence of a duty of care under *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, ¹⁰⁹⁴ under the provisions of the Misrepresentation Act 1967, ¹⁰⁹⁵ or as a right to redress under the Consumer Protection from Unfair Trading Regulations 2008. ¹⁰⁹⁶ It is also clear that these rights to damages in tort may exist whether or not the misrepresentation has been incorporated into the contract, thereby giving rise to a claim for breach of contractual warranty, ¹⁰⁹⁷ and whether or not the claimant chooses to exercise any right of rescission of the contract on the grounds of misrepresentation. ¹⁰⁹⁸

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More complex, however, is the question whether the claimant's option to rely on one of these liabilities in tort enables him to avoid restrictions which exist on any claim in contract. While it is clear that a party can by contract exclude liability for negligent misstatement at common law or liability in damages for misrepresentation under the 1967 Act to the extent to which such a term satisfies the requirements of reasonableness, ¹⁰⁹⁹ a party to a contract cannot exclude liability in damages for his own fraud. ¹¹⁰⁰ On the other hand, a party to a contract with a minor cannot avoid a defence of infancy by claiming damages in the tort of deceit against the minor on the ground that the latter fraudulently misrepresented his age, even though in general, an infant is liable for his torts, ¹¹⁰¹ because:

“If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants.” ¹¹⁰²

Damages for misrepresentation

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❗ Finally, although there are considerable differences between damages in tort and for breach of contract, ¹¹⁰³ not all of these are significant in the context of pre-contractual statements. In general, an injured party can claim damages for the loss of an expectation or performance interest in contract but not in tort, and in the context of pre-contractual representation the latter rule means that a claimant can recover damages for misrepresentation in tort only so as to put him in a position as though the representation (and, therefore, it is assumed, the contract) had not been made and not damages as though the representation had been true. ¹¹⁰⁴ ❗ By contrast, if a court finds that a party made a contractual promise or warranty that his pre-contractual statement was true, then he can recover damages for breach of contract to put him in the position as though the statement had been true. ¹¹⁰⁵ On the other hand, in some cases where a claim is based on breach of a term which has resulted from the incorporation of a pre-contractual statement, ¹¹⁰⁶ ❗ there will be no difference on this ground between the contractual and tortious measures of damages. In *Esso Petroleum Co Ltd v Mardon*, ¹¹⁰⁷ the Court of Appeal accepted that a representation of “throughput” of petrol of a garage by Esso which later proved false, was incorporated into the contract as a warranty. However, the ability of the representee to claim for breach of contract did not affect the damages which he could recover, in particular it did not allow him to claim for the loss of profits he expected to make from taking a lease of the garage with the throughput represented, despite such claims for lost profits being typical of contract. This refusal resulted from the court’s decision as to the *content* of the warranty: it was construed not as a promise that the throughput would be a certain amount, but rather that Esso had taken reasonable care in making the estimate of throughput. ¹¹⁰⁸ A claim in contract can indeed put an injured party in the position as though the contract had been performed, but if Esso had performed this contractual warranty, and as a result Mardon had been given a true estimate of the throughput of the garage, then Mardon would not have entered into the contract. ¹¹⁰⁹ In this way, damages in contract and in tort ¹¹¹⁰ are based on the same measure, viz to put the claimant in the position as though the contract had not been made. ¹¹¹¹ On the other hand, while it has been stated that a claimant will not recover more damages in tort than he would in contract, ¹¹¹² it is clear that a claimant may indeed recover more damages where his claim is based on fraud or for negligent misrepresentation under the 1967 Act, ¹¹¹³ as the test of remoteness of damage applicable to these claims is more generous than the test which applies to claims for breach of contract. ¹¹¹⁴ Furthermore, it is possible (if unlikely) that someone suing for fraud may be able to recover punitive damages, ¹¹¹⁵ whereas these are not available for claims for breach of contract. ¹¹¹⁶

Liability for non-disclosure

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As will be seen, the courts draw a clear line between cases of misrepresentation and of non-disclosure for the purposes of deciding the availability of rescission for the other party. ¹¹¹⁷ While in general the courts have echoed this distinction in the context of liability in damages, they have accepted that in principle a contractor may be liable in the tort of negligence for a failure to speak, ¹¹¹⁸ but the modern approach has been to restrict liability in these circumstances to cases where the defendant has “voluntarily accepted responsibility”. ¹¹¹⁹ Indeed, even in a case where the law exceptionally imposes a duty of pre-contractual disclosure on a party to a contract, the courts have refused to impose liability in damages in tort to sanction its breach. ¹¹²⁰ While this result was reached before the House of Lords in *Henderson v Merrett Syndicates Ltd* ¹¹²¹ had disapproved the idea that the existence of a contract between the parties is in itself a reason for denying a claim in tort, it may well be that a future court would hold that a person cannot be said to “assume responsibility” for a matter in relation to which he owes a legal duty. Moreover, the idea that the law of tort should not be allowed to “cut across the principles of contract law” could be considered as a consideration of policy arguing against the existence of a duty of care in the tort of negligence, even where this was based on an “assumption of responsibility”. ¹¹²²

Duress

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Duress, whether by means of physical or economic threats, exercised by A against B with the view to

making B enter a contract with A, may in certain circumstances give rise to a right in B to avoid that contract. ¹¹²³ While the circumstances which give rise to this right of avoidance will not necessarily give rise to a right to damages, ¹¹²⁴ in contrast to the position as regards fraud, ¹¹²⁵ they may give rise to the conditions of liability under the tort of intimidation (or tort of causing loss by unlawful means). ¹¹²⁶ This tort is usually applied to cases where A forces B to do or to refrain from doing something to the prejudice of C (“three-party intimidation”), but there is high authority for the proposition that it also applies to cases where A forces B to do something for A’s intended benefit (“two-party intimidation”). ¹¹²⁷ In circumstances where the conditions for the existence of the tort exist, it would seem that it can be relied on by one party to a contract as against the other, although it is more controversial whether this right remains after the coerced party has affirmed the contract. ¹¹²⁸ While the ambit of the doctrine of economic duress as a vitiating element in contract remains somewhat uncertain, ¹¹²⁹ some argue that its ambit should be coterminous and not wider than any liability which would exist under the tort of intimidation. ¹¹³⁰ A consumer may be able to recover damages in respect of an “aggressive practice” committed by a trader under the Consumer Protection from Unfair Trading Regulations 2008 Pt 4A. ¹¹³¹

“Culpa in contrahendo.” ¹¹³²

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Some legal systems consider that cases of fraud or duress are merely examples of a wider category of “fault in the formation of contract”, a category famously termed culpa in contrahendo by the German jurist, von Ihering. ¹¹³³ In French law, despite its general rule against allowing delict to intrude between contractors (a rule known as non-cumul), ¹¹³⁴ pre-contractual fault can give rise to a claim for damages in delict, ¹¹³⁵ there being a very general principle of delictual liability based on fault. ¹¹³⁶ The extent to which English law reaches similar results to those a continental court might reach by applying doctrines like culpa in contrahendo are explored in Ch.2. ¹¹³⁷ However, English law possesses no such general principle and so no claims for damages in tort based on a party’s “pre-contractual fault” can be brought in the absence of proof of an established tort. This had led to an occasional temptation in the courts to resort to the law of contract to found a claim for damages in this type of situation. This was clearest in relation to claims for damages for innocent (i.e. non-fraudulent) misrepresentation before the Misrepresentation Act 1967, where the courts allowed some claims for damages for false pre-contractual statements by way of contractual warranty. ¹¹³⁸ More recently, in *Blackpool and Fylde Aero Club v Blackpool BC*, ¹¹³⁹ the defendant local authority had invited sealed tenders from a limited number of persons for licences to use a local airport, to arrive at their premises by a certain date. The plaintiff delivered such a tender by the stipulated time, but owing to the failure of the defendant’s staff, it did not consider the plaintiff’s tender and failed therefore to award it a licence. The plaintiff’s claim for damages for breach of contract was upheld by the Court of Appeal ¹¹⁴⁰ on the basis that the defendant local authority’s express request for tenders to be made in a particular form by a particular date, ¹¹⁴¹ coupled with the limited number of persons invited to tender, ¹¹⁴² gave rise to an implied contract to consider conforming tenders ¹¹⁴³ and therefore the court found it unnecessary to consider whether the plaintiff could have succeeded in the tort of negligence. ¹¹⁴⁴ Overall, however, it cannot be said that English courts evince any desire to develop a general principle of liability in damages for pre-contractual fault, whether this is put in terms of tort or contract, any more than they wish to recognise a general principle of pre-contractual good faith to which such a liability would be closely related. ¹¹⁴⁵ Moreover, when in 2014 the UK government created rights to redress for consumers against traders in respect of the latter’s unfair commercial practices, it was careful to restrict the practices in question to “misleading actions” and “aggressive commercial practices” so that “misleading omissions” and commercial practices assessed as unfair under the general test in the 2008 Regulations would not have this effect. ¹¹⁴⁶

^{1092.} *Pasley v Freeman* (1789) 3 T.R. 51; *Peek v Derry* (1887) 37 Ch. D. 541 (reversed on other grounds (1889) 14 App. Cas. 337); *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158; *Archer v Brown* [1985] 1 Q.B. 401. cf. *Jack v Kipping* (1882) 9 Q.B.D. 113; *Tilley v Bowman Ltd* [1910] 1 K.B. 745.

^{1093.} *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Howard Marine & Dredging Co Ltd v A.*

Ogden & Sons (Excavations) Ltd [1978] Q.B. 574; *Rust v Abbey Life Insurance Co Ltd* [1978] 2 Lloyd's Rep. 386; *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 A.C. 249, 275. cf. *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp (No.1)* (1989) 35 E.G. 99, 104.

[1094.](#) [1964] A.C. 465.

[1095.](#) See below, paras 7-074—7-084. Liability in damages under s.2(1) is treated as tortious: see *André & Cie SA v Ets. Michel Blanc et Fils* [1977] 2 Lloyd's Rep. 166; *Royscott Trust Ltd v Rogerson* [1991] 2 Q.B. 297 and see below, para.7-077.

[1096.](#) SI 2008/1277 reg.5 and Pt 4A (as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)), on which generally see Vol.II, paras 38-145 et seq. On the question of the nature of a claim for damages under the right to redress for the consumer see Vol.II, para.38-184.

[1097.](#) *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801.

[1098.](#) *Archer v Brown* [1985] 1 Q.B. 401, 415 and see below, para.7-080. After the Misrepresentation Act 1967 s.1(a) a representee's right to rescind is not barred merely by the incorporation of a representation as a term of the contract. cf. the power of the court under s.2(2) of the Misrepresentation Act 1967 to refuse rescission of the contract and award damages in lieu; and see below, para.7-104. A consumer who has the "right to unwind" the contract under the Consumer Protection from Unfair Trading Regulations 2008 regs 27E may also have a right to damages under reg.27J: see Vol.II, para.38-185.


[1099.](#) See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465; *Smith v Eric S. Bush* [1990] 1 A.C. 831; Unfair Contract Terms Act 1977 s.2(2); Misrepresentation Act 1967 s.3 as replaced by Unfair Contract Terms Act 1977 s.8 and see below, paras 7-143 et seq. See similarly the position as regards the exclusion of a consumer's right to redress under the Consumer Protection from Unfair Trading Regulations 2008, this being subject to the test of unfairness contained in the Unfair Terms in Consumer Contracts Regulations 1999 or, on its coming into force, the Consumer Rights Act 2015 Pt 2 subject to their respective conditions: see Vol.II, para.38-191.

[1100.](#) *S. Pearson & Son Ltd v Dublin Corp* [1907] A.C. 351, 353–354, 362 and see below, para.15-146.


[1101.](#) *Johnson v Pye* (1666) 1 Sid. 258 and see below, para.9-053.

[1102.](#) *Jennings v Rundall* (1799) 8 T.R. 335, 336, per Lord Kenyon C.J. and see below, para.9-053.

[1103.](#) See above, paras 1-150—1-151.

[1104.](#)  *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158; *André & Cie SA v Ets Michel Blanc et Fils* [1977] 2 Lloyd's Rep. 166; *East v Maurer* [1991] 1 W.L.R. 461; *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] Q.B. 488; *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778, [2017] 3 All E.R. 157 and see below, paras 7-059—7-077.

[1105.](#) Cartwright, *Misrepresentation, Mistake, and Non-disclosure*, 3rd edn (2012), paras 8–24—8–25 referring to *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All E.R. 1102 at 1104.

[1106.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 9–050—9–058 and Atiyah, *Essays on Contract* (1986), Essay 10.

[1107.](#) [1976] 1 Q.B. 801.

[1108.](#) [1976] 1 Q.B. 801 at 818, 823–824.

- [1109.](#) [1976] 1 Q.B. 801 at 820 (Lord Denning M.R.) and [834] (Shaw L.J.). This reasoning is based on two assumptions: first, that if Esso had taken reasonable care in making its statement as to throughput it would have made an accurate estimate and, secondly, that if Mardon had been given an accurate estimate he would not have entered the contract or perhaps, would not have entered it on the same terms. Ormrod L.J. expressed no view on the claim for loss of profits as it was “virtually incapable of proof”: at 829.
- [1110.](#) The Court of Appeal based its decision in tort on *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465.
- [1111.](#) The Court of Appeal did allow Mardon damages for loss of his “general expectations”, i.e. what he would have expected to have earned if he had not spent his time running the garage: [1976] 1 Q.B. 801, 821.
- [1112.](#) *Chinery v Viall* (1860) 5 H. & N. 28, 29 L.J. Ex. 180; *Johnson v Stear* (1863) 33 L.J.C.P. 130 (both conversion).
- [1113.](#) *Royscott Trust Ltd v Rogerson* [1991] 2 Q.B. 297, in which the Court of Appeal rejected the proposition that a claim for damages under s.2(1) of the Misrepresentation Act 1967 possesses the same test of remoteness of damage as applies generally to claims in the tort of negligence; and see below, para.7-078.
- [1114.](#) See below, paras 26-116—26-118. It is also more generous than the test for remoteness of damage applicable to a claim for damages by a consumer under the Consumer Protection from Unfair Trading Regulations 2008 Pt 4A and especially reg.27J(4), which applies a requirement that the loss was “reasonably foreseeable at the time of the prohibited practice”: and see Vol.II, para.38-185.
- [1115.](#) *Mafo v Adams* [1970] 1 Q.B. 548; *Cassell & Co Ltd v Broome* [1972] A.C. 1027, 1076; *Archer v Brown* [1985] 1 Q.B. 401, 418–421 and see below, para.7-070.
- [1116.](#) See below, para.26-044.
- [1117.](#) See below, paras 7-017 et seq. It should be noted that the consumer's rights to redress under the Consumer Protection from Unfair Trading Regulations 2008 Pt 4A (as inserted by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) do not arise in respect of a trader's misleading omission: Vol.II, paras 38-166 and 38-172.
- [1118.](#) *Rust v Abbey Life Assurance Co Ltd* [1978] 2 Lloyd's Rep. 386; *Cornish v Midland Bank Plc* [1985] 3 All E.R. 513, 522–523; *Al-Kandari v J.R. Brown & Co* [1988] Q.B. 665, 672; *Banque Keyser Ullmann SA v Skandia (UK) Co Insurance Ltd* [1990] 1 Q.B. 665, 794. cf. *Argy Trading Developments Ltd v Lapid Developments Ltd* [1977] 1 W.L.R. 444, 461; *Barclays Bank Plc v Khaira* [1992] 1 W.L.R. 623; *Ashmore v Corp of Lloyd's* [1992] 2 Lloyd's Rep. 1, 5 (and see [1992] 2 Lloyd's Rep. 620). See also Cartwright, *Misrepresentation, Mistake, and Non-disclosure*, 3rd edn (2012), para.17–38.
- [1119.](#) *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665 at 794, per Slade L.J.; *Green v Royal Bank of Scotland* [2013] EWCA Civ 1197, [2014] Bus. L.R. 168 at [17] (no duty to give information unless without it a relevant statement made within the context of the assumption of responsibility is misleading). cf. below, paras 1-166—1-173 concerning the significance more generally of a “voluntary assumption of responsibility” for liability for pure economic loss in the tort of negligence.
- [1120.](#) *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665.
- [1121.](#) [1995] 1 A.C. 145.
- [1122.](#) For the relevance of considerations of policy in this context, see below, paras 1-171 et seq.
- [1123.](#) See below, paras 8-001 et seq.

- [1124.](#) *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 385, cf. 400; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665 at 780; and see below, para.8-056.
- [1125.](#) See above, para.1-161 and below, para.7-047.
- [1126.](#) See Clerk & Lindsell on Torts, 21st edn (2014), paras 24–59 et seq. In *OGB Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 the HL preferred to refer to the “tort of causing loss by unlawful means” rather than to “intimidation”, seeing threats as only one example of “unlawful means” for this purpose: see below, paras 1-174–1-175. Where the defendant’s conduct threatens physical injury to the claimant, the latter may possess an action of assault: Clerk & Lindsell on Torts, para.15–13.
- [1127.](#) *Rookes v Barnard* [1964] A.C. 1129, 1205, 1209 and see Clerk & Lindsell at paras 24–69–24–70.
- [1128.](#) See below, para.8-056.
- [1129.](#) See below, paras 8-015 et seq.
- [1130.](#) Clerk & Lindsell at paras 24–70.
- [1131.](#) Pt 4A was inserted by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). The right of redress may include damages for financial loss *other than* “the difference between the market price of a product and the amount payable for it under a contract” (reg.27J(1)(a) and (3)) and for “alarm, distress or physical inconvenience or discomfort” (reg.27J(1)(b)), though damages are recoverable “only in respect of loss that was reasonably foreseeable at the time of the prohibited practice” (reg.27J(4)). See generally Vol.II, paras 38-160 et seq. especially at 38-173 and 38-185.
- [1132.](#) This terminology is adopted for the purposes of applicable law by Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (“Rome II”) art.12.
- [1133.](#) On the German position see Markesinis, *The German Law of Obligations*, Vol.I; Markesinis, Lorenz and Dannemann, *The Law of Contracts and Restitution: a Comparative Introduction* (1997), pp.64 et seq.
- [1134.](#) *Bell v Peter Browne & Co* [1990] 2 Q.B. 495, 511. The full term for the rule is non-cumul des responsabilités contractuelle et délictuelle and see Whittaker in Bell, Boyron and Whittaker, *Principles of French Law*, 2nd edn (2008), pp.328–9.
- [1135.](#) Whittaker at pp.308–309.
- [1136.](#) i.e. arts 1382–1383 C. civ. and see Whittaker at pp.364 et seq.
- [1137.](#) See below, paras 2-220 et seq.
- [1138.](#) *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801, 817.
- [1139.](#) [1990] 1 W.L.R. 1195.
- [1140.](#) The case came to the court by way of a preliminary issue as to the existence of liability.
- [1141.](#) [1990] 1 W.L.R. 1195 at 1204.
- [1142.](#) [1990] 1 W.L.R. 1195 at 1202.
- [1143.](#) The public character of the defendant was also relied on by the plaintiff as support for the existence of the contract as it had as a matter of public law a duty to comply with its standing orders (to consider tenders) and a fiduciary duty to ratepayers to act with reasonable prudence

in managing its financial affairs: *[1990] 1 W.L.R. 1195* at 1201.

[1144.](#) *[1990] 1 W.L.R. 1195* at 1204.

[1145.](#) See above, paras 1-039 et seq. and below, para.2-201.

[1146.](#) Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A (inserted by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) on which see Vol.II, paras 38-160 et seq. especially at 38-160 and 38-166.

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Chapter 1 - Introductory
Section 7. - The Relationship between Contract and Tort
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General

1-165

As Greer L.J. observed in 1936:

“... where the breach of duty alleged arises out of a liability independent of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of the contract.” ¹¹⁴⁷

In the modern law, it may be stated that a party to a contract may choose to base his claim on an established and independent tort against the other party, but this choice will not be allowed to subvert the contract's express ¹¹⁴⁸ or implied terms ¹¹⁴⁹ nor any legal immunity attaching to the other party qua contractor. ¹¹⁵⁰ On the other hand, where the contract is silent as to the issue to which a tort relates, in principle this is no reason for denying the existence of that tort, though an exception may properly be made where the tort is based on the defendant's “assumption of responsibility”. ¹¹⁵¹ In general, ¹¹⁵² though, the choice whether to sue in tort or contract does allow a claimant to gain the benefit of any incidental rules of the regime of liability applicable, ¹¹⁵³ though the modern tendency has been to reduce the differences between these two regimes in cases of concurrence. ¹¹⁵⁴

Henderson v Merrett Syndicates Ltd

1-166

As has been noted, in *Henderson v Merrett Syndicates Ltd* ¹¹⁵⁵ (*Henderson*) the House of Lords held that a party to a contract may rely on a tort committed by the other party, as long as doing so is not inconsistent with the express or implied terms of the contract. However, in finding a duty of care on which to base the plaintiffs' claim in tort, Lord Goff of Chieveley relied on *Hedley Byrne* as establishing a very broad principle of liability based on an “assumption of responsibility” and this principle suggests a very considerable overlap between the tort of negligence and liability in contract between parties to contracts. ¹¹⁵⁶ As will be seen, moreover, the basis of a finding of an “assumption of responsibility” is so closely related to the finding of an agreement in respect of the same matter that the claim to true independence of the tortious liability thereby established is open to question.

1-167

In *Henderson*, the plaintiffs were all Lloyd's “Names” who had agreed to take unlimited liability in

respect of certain proportions of risks to be underwritten in the insurance market, but who had done so through different forms of arrangement. In the case of “direct Names”, ¹¹⁵⁷ those persons who acted as their members’ agents also acted as their managing agents (being known sometimes as “combined agents”, though being termed “managing agents” here) and therefore any claim for negligence in respect of their claims was within privity of contract. The issue which came before the House of Lords was whether the “direct Names” could opt to sue their managing agents in the tort of negligence in respect of the management of the underwriting, the limitation period for their action for breach of contract having expired. In this respect, Lord Goff of Chieveley, who gave the leading speech and with whom Lords Keith of Kinkel, Browne-Wilkinson, Mustill and Nolan concurred, held that prima facie the managing agents did owe a duty of care in the tort of negligence to the “Names”. Such a duty was, according to Lord Goff, to be based on a broad principle found in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, ¹¹⁵⁸ according to which a person possessed of special skill or knowledge may owe a duty of care in tort by assuming a responsibility to another person within a relationship (whether special or particular to a transaction and whether contractual or not): the principle was not, therefore, restricted to cases of statements. ¹¹⁵⁹ The House of Lords further held that, on the facts of the case, there was no reason why the “Names” should not opt to sue on the breach of such a duty of care in the tort of negligence rather than for breach of an implied term in their contract with the managing agents. Lord Goff considered that there was “no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy”, ¹¹⁶⁰ though he added that this general right of option was:

“... subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.” ¹¹⁶¹

Contract inconsistent with liability in tort

1-168

This decision therefore affirms the general availability of an option to sue in either tort or contract where the constituent elements allow, the exception being where the contract is inconsistent with a claim in tort. While Lord Goff’s discussion of the “inconsistency of the contract” did not go beyond reference to its express or implied terms (on the facts there was no reason for it to do so), it is submitted that neither the decision itself in *Henderson* nor Lord Goff’s speech casts doubt on the proposition that such an “inconsistency” may be found in other features of the contract, notably the existence of a certain contractual immunity enjoyed by the party to the contract against whom the claim in tort is brought. ¹¹⁶²

Assumption of responsibility

1-169

However, with respect, Lord Goff’s approach in *Henderson* to the existence of a duty of care in tort on which a party to a contract may choose to rely is more problematic. As has been noted, this approach rested on a broad principle of assumption of responsibility drawn from the speeches of the members of the House of Lords in *Hedley Byrne*. ¹¹⁶³ While the notion of “assumption of responsibility” is clearly present in those speeches, they also contained various other elements on which the imposition of a duty of care was to be based, including the special skill and knowledge of the defendant and his or her “special relationship” with the plaintiff. During the period from its decision in 1963 to the mid-1990s, ¹¹⁶⁴ the courts either combined these various elements or emphasised one or more of them as the facts of the case or their own preference suggested, ¹¹⁶⁵ but *Hedley Byrne* was not, in general, used to expand liability for pure economic loss beyond the situation of liability for negligent *misstatements*. ¹¹⁶⁶ This restriction on the ambit of the “broad principle of assumption of responsibility” was, however, firmly rejected by Lord Goff in *Henderson* ¹¹⁶⁷ and it seems that the principle applies where: (i) the defendant has agreed to perform a service or otherwise to do something for the claimant, whether under a contract or not ¹¹⁶⁸; (ii) the defendant possessed or held himself out as

possessing special skill or knowledge in relation to these services or this task ¹¹⁶⁹; and (iii) some evidence of reliance by the claimant can be made out. As regards the last of these conditions, in cases of negligent misstatement the claimant's reliance provides the causal link between the defendant's statement and the claimant's loss. ¹¹⁷⁰ However, outside this type of case and as between parties to a contract, the element of "reliance" by the claimant may be found in the claimant's entering the contract under which the services, etc. are agreed to be done by the defendant. ¹¹⁷¹ Such a basis of liability in tort is not merely "equivalent to contract"; it is likely in very many cases to be parasitic on it. ¹¹⁷²

Robinson v P E Jones (Contractors) Ltd. ¹¹⁷³

1-170

However, in 2011 the Court of Appeal took a step back from this apparent result of the reasoning in *Henderson*. There the claimants had bought a house from the defendant, a builder, on terms which included a clause which limited the defendant's liability to the liability arising under the National House-Building Council's standard form of agreement (which the parties also executed). The claimants later claimed damages for the financial consequences of a defect in the house as built for them in the tort of negligence, their claim in contract being time-barred. In these circumstances, the Court of Appeal denied the existence of a duty of care in the tort of negligence on the basis that the claimants' claim was for pure economic loss against a builder for defects in the building. ¹¹⁷⁴ For the Court of Appeal, the existence of an effective limitation clause ¹¹⁷⁵ was inconsistent with the imposition of a duty of care in tort based on an assumption of responsibility, applying the clear approach taken by the House of Lords in *Henderson*. ¹¹⁷⁶ However, the Court of Appeal expressed views which more generally took a more cautious approach to assumption of responsibility under *Hedley Byrne*. So, Jackson L.J. (with whom Maurice Kay L.J. and Stanley Burton L.J. agreed) saw nothing in the case before him:

"to suggest that the defendant "assumed responsibility" to the claimant in the *Hedley Byrne* sense. The parties entered into a normal contract whereby the defendant would complete the construction of a house for the claimant to an agreed specification and the claimant would pay the purchase price. The defendant's warranties of quality were set out and the claimant's remedies in the event of breach of warranty were also set out. The parties were not in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans upon which the claimant would act." ¹¹⁷⁷

Even apart from the limitation clause, Jackson L.J. therefore would have been disinclined to find a duty of care based on assumption of responsibility. Stanley Burton L.J. added that:

"It is important to note that a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party. The duty of care in contract extends to any defect in the building, goods or service supplied under the contract, as well as to loss or damage caused by such a defect to another building or goods. The duty of care in tort, although said to arise from an assumption of liability, is imposed by the law. In cases of purely financial loss, assumption of liability is used both as a means of imposing liability in tort and as a restriction on the persons to whom the duty is owed ... The provider of a service, such as an accountant or solicitor, owes a duty of care in tort to his client because his negligence may cause loss of the client's assets." ¹¹⁷⁸

These passages therefore emphasise that the mere existence of a contractual agreement to undertake something for the contracting party will not necessarily be treated as an "assumption of responsibility" for the task which is the subject matter of their contractual obligation.

Fair, just and reasonable

1-171

! According to Lord Goff in *Henderson*, where an alleged duty of care is based on the doctrine of assumption of responsibility there is no need to enter the question of whether it is “fair, just and reasonable” to impose such a duty, even in cases where the claimant’s loss is purely economic:

“... the concept [of assumption of responsibility] provides its own explanation why there is no problem in cases of this kind about liability for economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for [sic, to] that other in respect of economic loss which flows from the negligent performance of those services.” ¹¹⁷⁹

It may be argued in support of this proposition that where a claimant has satisfied the conditions for the application of the “broad principle”, there is no need for an inquiry as to the desirability as a matter of policy of the imposition of liability for *pure economic loss* as the principle itself contains the requisite factors—such as “special skill or knowledge” and “reliance”—which balance the justice of its imposition. ¹¹⁸⁰ However, in the dictum quoted above Lord Goff may be thought to go further: for it appears to suggest, if not that a person who “assumes responsibility” does so for economic loss (a position which gives to “*assumption of responsibility*” the meaning of agreeing to be liable which was clearly rejected by the House of Lords), then at least that such a person is to be held liable for a type of loss which flows from the nature of his agreement (to perform a certain type of service) which he has made. If so, this surely expresses no more than the idea that in these circumstances pure economic loss is a natural and probable (or indeed foreseeable) type of harm arising from the breach of his agreement. And if this is so, then it is at most an argument in favour of recovery for pure economic loss, rather than a unanswerable reason for it. With the greatest respect, Lord Goff’s suggestion that there “should be no need” to inquire into the “fairness, justice and reasonableness” of imposition of a duty of care should not be interpreted to mean that, apart from the issue of liability for pure economic loss, questions of policy are incapable of acting to negative a *prima facie* duty arising from an assumption of responsibility. Such an interpretation would, it is submitted, be inconsistent with the careful enquiry undertaken by members of the House of Lords in *Arthur J.S. Hall v Simons* ¹¹⁸¹ into the considerations of policy relevant to the question whether barristers and other advocates should enjoy a degree of immunity from liability in respect of the conduct and management of litigation. Rather, as Hamblen L.J. (with whom Gloster V.P. and Irwin L.J. agreed) observed in *Burgess v Lejonvarn*, in cases of assumption of responsibility,

“[w]hilst there is no need to make a further inquiry into whether it would be fair, just and reasonable to impose liability, that is because such considerations will have been taken into account in determining whether there has been an assumption of responsibility.” ¹¹⁸²

!


Moreover, in *Marc Rich & Co AG v Bishop Rock Marine Co*, ¹¹⁸³ the House of Lords confirmed that the mere fact that a defendant’s conduct has caused damage to property of a foreseeable type does not rule out an inquiry as to the “justice and reasonableness” of the imposition of a duty of care in the tort of negligence. It would be indeed a paradox if the courts were to inquire into the justice and reasonableness of imposing liability for foreseeable damage to property caused by negligence, but not into the justice and reasonableness of imposing liability for albeit foreseeable pure economic loss.

Effect of broad liability in tort

1-172

! One effect of judicial acceptance of a very broad principle of “assumption of responsibility” under

Hedley Byrne may be seen to be the creation of a very wide means of circumventing the doctrine of consideration: for as long as a defendant is possessed of special skill or knowledge, his agreement with the claimant to perform a service within that skill or pertaining to that knowledge will give rise to a cause of action in tort based on the negligent performance of those services, whether they were to be

paid for or not. ¹¹⁸⁴  A second type of effect may be the disapplication of other established rules of contract law. For example, in *Barclays Bank Plc v Fairclough Building Ltd (No.2)*, ¹¹⁸⁵ building sub-contractors had engaged cleaning contractors to clean an asbestos cement roof, but in doing so negligently the cleaners created a danger from the asbestos which required considerable expenditure by the owner of the building to make it safe. ¹¹⁸⁶ The Court of Appeal upheld the builders' claim for an indemnity against the cleaners in respect of their own liabilities, but reduced the award on the basis of their contributory negligence in failing to take steps to inform themselves of the problems involved in the cleaning of the asbestos cement in the way intended. The Court of Appeal accepted that contributory negligence is a defence to a claim for breach of contract only where it is concurrent with the existence of a liability in tort based on negligence, ¹¹⁸⁷ but found such a liability in the cleaners in their breach of a duty of care based on their "assumption of responsibility", the latter arising simply from their contractual undertaking to do a job which required special skill and which they held themselves out as capable of doing, coupled with the roofing contractors' reliance on this, as evidenced by their entering into the same contract. In the result, the cleaners were entitled to rely on their own duty of care in tort to allow them to reduce by one half their own liability for breach of contract. Clearly, then, while in some cases, notably those turning on issues of limitation of actions such as *Henderson* itself, judicial acceptance of such a wide basis for establishing a duty of care in tort will benefit claimants, allowing them to avoid disadvantageous incidental rules applicable to actions in contract, paradoxically in others, it will instead benefit defendants.

1-173

The following discussion will look first at the question whether a threatened breach of contract gives rise to liability in the tort of intimidation, before turning to examine the qualifications on the general rule allowing a claimant to opt whether to sue in contract or in tort and at how such an option affects the regime of liability applicable to the plaintiff's claim.

Threatened breach of contract as a tort

1-174

While some dicta in *Brown v Boorman* ¹¹⁸⁸ suggest that any breach of contract gives rise to liability in tort, ¹¹⁸⁹ such a broad interpretation of that case does not reflect the modern law: a breach of contract may be linked historically to tort, but does not itself constitute one. ¹¹⁹⁰ However, it would seem that what has often been called the tort of intimidation (and is now likely to be known as the tort of causing loss by unlawful means ¹¹⁹¹) could allow at least *threatened* breaches of contract to give rise to liability in tort. The tort is committed, inter alia, where A uses "unlawful means" to force B to do something to his prejudice and it is clear that it includes a threatened breach of contract ¹¹⁹² and it appears that this applies to "two-party" intimidation as much as to "three-party" intimidation. ¹¹⁹³ Thus, according to Clerk & Lindsell on Torts, the tort of intimidation extends to a threat of breach of contract or at least to a threat of *some* breaches of contract, ¹¹⁹⁴ despite the fact that the victim of such a threat may also have an action for anticipatory breach of contract. ¹¹⁹⁵

1-175

If so, then it would appear that rules which govern claims in contract, for example ruling out punitive damages or relating to remoteness of damage, could be avoided. ¹¹⁹⁶ Indeed, an earlier edition of Clerk & Lindsell on Torts suggests that it is not clear whether a party who has affirmed the contract after a threatened breach is thereby prevented from relying on the tort of intimidation. ¹¹⁹⁷ However, if a claimant who was the victim of such a threat were allowed to rely on this tort rather than on the contract, it would be odd to deny him the same option where the other party had not merely threatened to break the contract, but had carried out this threat. ¹¹⁹⁸ If this situation were allowed to give rise to liability in the tort of intimidation, then the law would be fast approaching the recognition of a distinction based on whether or not a defendant's breach of contract was "wilful" or "intended to injure" and there is no reason to think that English courts are inclined to do so. ¹¹⁹⁹ It is submitted that

there is no convincing reason for allowing a party to a contract to avoid the restrictions which the law already has decided should apply to that party's claim simply by claiming in tort. For this reason, the view that "two-party" and "three-party" intimidation should be treated differently where breach of contract is relied on as the unlawful means is to be preferred.¹²⁰⁰ Thus, while a threatened breach of contract may constitute the tort of intimidation/tort of causing harm by unlawful means, as between parties to a contract a threatened breach should not in itself be considered sufficient "unlawful means" for the purposes of that tort; other *independent* "unlawful" elements should be required, for example, tortious means.¹²⁰¹

Breach of contract as an "aggressive commercial practice"

1-176

In 2014 the Consumer Protection from Unfair Trading Regulations 2008 were amended so as to create new "rights to redress" for consumers in respect of certain categories of unfair commercial practices.¹²⁰² Under this new law, a consumer may recover, inter alia, damages in respect of an "aggressive commercial practice" where the consumer has entered into a contract with a trader for the sale or supply of a "product" (as specially defined by the Regulations¹²⁰³) by the trader or a contract with a trader for the sale of goods to the trader, or where the consumer makes a payment to a trader for the supply of a product, and the aggressive commercial practice is a significant factor in the consumer's decision to enter into the contract or make the payment.¹²⁰⁴ For these purposes, a "commercial practice" is aggressive if:

"(a)

it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and

(b)

it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise."¹²⁰⁵

It is clear that a threat to break a contract or a breach itself may constitute an aggressive commercial practice for these purposes and, where this threat or breach is a significant factor in the consumer's decision to make a payment to the trader which was not due, the consumer may have a right to receive back the payment from the trader¹²⁰⁶ and/or a right to damages against the trader for any loss caused, to include financial loss or "alarm, distress or physical inconvenience or discomfort" if the aggressive commercial practice had not taken place.¹²⁰⁷

Contractual standards of care: can tort be stricter?

1-177

It is clear that where either the express or implied terms of the contract or the law itself governs the standard of care owed by the defendant to the claimant, the latter cannot seek to impose a higher standard by claiming in tort, notably the tort of negligence.¹²⁰⁸ Where a contract expressly restricts a party's standard of care, it would seem that ordinary principles of construction apply, rather than construction contra proferentum which applies to exemption clauses proper, i.e. those clauses which intend to restrict or exclude a party's *liability*.¹²⁰⁹ In the case of implied terms, those which relate to the safety of a person or of his property often impose either reasonable care¹²¹⁰ or some stricter duty on the contractor,¹²¹¹ and so any liability in tort in the latter would not impose any higher standard

than in contract. However, implied terms whose breach gives rise to economic loss in the other party sometimes impose a more restricted standard of care than that imposed by the general law, and here the courts have refused to allow the other party to circumvent this contractual standard by claiming in tort. This was the particular issue in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* ¹²¹² which gave rise to Lord Scarman's dictum advising against the intervention of tort between parties to a contract, ¹²¹³ and this was the basis on which the decision of the Privy Council in that case which denied a claim in tort was explained by the House of Lords in *Henderson v Merrett Syndicates Ltd*. ¹²¹⁴ *Tai Hing Cotton Mill Ltd* itself concerned a claim by a bank against its customer for economic loss caused by the latter's alleged negligence in the running of its own account. The Privy Council held that as a matter of authority a bank customer owed only a duty to act honestly in relation to the conduct of his own account under the contract with the bank and should not, therefore, be held to a duty to take reasonable care whether by way of implied term or of breach of an alleged duty of care in the tort of negligence. ¹²¹⁵ Similarly, where a party to a contract owes only a "duty to act rationally", i.e. to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally in the exercise of a contractual discretionary power, and owes no duty to act with reasonable care under an implied term in the contract, then, apart from the situation where the party acts in excess of that power, it will owe no duty of care in tort ¹²¹⁶: once a claimant's:

"case on implied statutory or contractual term fails, there is ... no room for the imposition of a tortious duty of care, which is more extensive than that which was provided for under the [contract]." ¹²¹⁷

Therefore, a clearing broker conducting a close out under a mandate with an options trader did not owe the latter a duty to take reasonable care in contract or in the tort of negligence. ¹²¹⁸

Contractual standards and equitable principles

1-178

The courts have taken a similar approach where the relationship between the parties is contractual, but where it has traditionally been subject to regulation by equitable principle. Thus, in *Parker-Tweedale v Dunbar Bank Plc* ¹²¹⁹ Nourse L.J. stated that any duty of a mortgagee to a mortgagor or of a creditor to a guarantor in respect of the property or debt respectively arose in equity out of that particular relationship, it being:

"... both unnecessary and confusing for the duties owed by a mortgagee to the mortgagor and the surety, if there is one, to be expressed in terms of the tort of negligence." ¹²²⁰

Similarly, according to Lord Templeman, giving judgment on behalf of the Privy Council, where a creditor was "not obliged to do anything" for the benefit of a surety under these equitable principles, for example in relation to the recovery of the debt, no duty of care in the tort of negligence can arise. ¹²²¹ Indeed, it has been said that "the duty arises in equity, not in contract or tort". ¹²²²

Contractual standard stricter

1-179

In certain types of case, the courts have refused to construe a contract or imply a term in it so as to circumvent the traditional standard of care or scope of liability applied to the type of case in question, even where this has usually been put as a matter of tort. For example, in *Thake v Maurice*, ¹²²³ a majority of the Court of Appeal refused to interpret a contract to perform a vasectomy as importing an obligation that the patient would be rendered sterile as a result, holding that it contained only one of reasonable care in warning the latter of the possibility of future fertility. Although not put in these terms by the court, it could be said that the established standard of care in tort was applied to the

claim in contract despite persuasive factual considerations which could have lead in a different direction. ¹²²⁴ However, in many other situations the courts have accepted that the standard of care owed by a defendant in contract by reason of an implied term is higher than the reasonable care which would be imposed in the tort of negligence. ¹²²⁵ An example may be found in the decision of the Privy Council in *Wong Mee Wan v Kwan Kin Travel Services Ltd.* ¹²²⁶ There a travel agent was held liable for the death of one of its customers on the basis of the negligence of one of its agents, even though there was no negligence on its own part, on the basis that the contract included an obligation that the services which the travel agent had engaged to perform *would be carried out* with reasonable care.

Stricter contractual standard does not affect tort

1-180

Finally, in *Aiken v Stewart Wrightson Members Agency Ltd* ¹²²⁷ the question arose whether the fact that the defendant owed a contractual duty *more onerous* than one of reasonable care could and should affect the standard of care owed in the tort of negligence. The case concerned a claim by Lloyd's "indirect Names" against their "members' agents", i.e. the agents who had contracted with them to advise them on their choice of syndicates and to place them on any syndicate once chosen, leaving the placing of the insurance to "managing agents". It was conceded by the members' agents that they owed the plaintiff "Names" a contractual duty that:

"... the actual underwriting would be carried out with reasonable care and skill so that the members' agent remains directly responsible to its Names for any failure to exercise reasonable care and skill by the managing agent of any syndicate to whom such underwriting has been delegated." ¹²²⁸

The "Names" contended that the members' agents also owed them a duty of care in the tort of negligence of the same content, a "parallel and co-extensive duty of care in tort", arguing that it was inherent in Lord Goff's view expressed in *Henderson v Merrett Syndicates Ltd* ¹²²⁹ that any liability in tort should not be inconsistent with the terms of the contract that the latter "ought in logic and in law to be definitive also of the nature and extent of their duty in tort". ¹²³⁰ However, Potter J. rejected this argument both as a matter of authority ¹²³¹ and principle. The latter he considered well expressed in a dictum of Le Dain J. in *Central Trust Co v Refuse* ¹²³²:

"A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract."

Potter J. therefore concluded that on the facts before him the:

"... common law duty of care ... falls short of the specific obligation or duty imposed by the express terms of the contract, unless that common law duty of care can be shown to be non-delegable in character for the purposes of the law of tort,"

a proviso which was not satisfied in the case itself. ¹²³³

Contractual exclusion of liability in tort

1-181

! The law has taken a similar but not identical approach to cases where a contract term excludes or

limits *liability* of one contractor to another. Since at least the early nineteenth century, exemption clauses have been held capable of excluding or limiting liability in tort, ¹²³⁴ though it should be noted that where the clause limits liability, a (limited) claim in tort may still exist. ¹²³⁵ While at times the interpretation of exemption clauses *contra proferentem* has led to the courts distinguishing between the two types of liability, holding that a particular clause covered a strict contractual liability but did not cover liability for negligence in tort, ¹²³⁶ there would appear to be no real reason to characterise a contractor's liability for negligence in these circumstances as tortious rather than contractual and in other cases the courts have simply inquired whether a particular clause should be construed to cover cases of negligence as well as any stricter liability. ¹²³⁷ Of course, in many situations, the effectiveness of such a term will be subject to the provisions of s.2 of the Unfair Contract Terms Act 1977, which applies to cases of tortious as well as to contractual negligence. ¹²³⁸

Incompatibility of express term and liability in tort

1-182

Johnstone v Bloomsbury Health Authority ¹²³⁹ concerned an alleged incompatibility between an express term of a contract and the existence of an established liability in the tort of negligence in a rather unusual way. The plaintiff was a junior hospital doctor who worked under a contract of employment which stipulated a working week of 40 hours and provided for a possible 48 additional hours availability for work. He claimed that in compliance with this contract he had sometimes worked in excess of 88 hours per week and had become ill as a result. The issue before the Court of Appeal was whether his claim for a declaration that he should not be required to work more than a 72-hour week should be struck out. The plaintiff relied on his employer's duty, which exists both as a matter of contract and the tort of negligence, ¹²⁴⁰ to take reasonable care as to his health at work, but the defendant countered that the express provision in the contract as to his hours of work limited the impact of this implied term and that no wider tortious duty could be imposed, relying on Lord Scarman's dictum in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*. ¹²⁴¹ The majority of the Court of Appeal refused to strike out the plaintiff's claim, but for different reasons. Stuart-Smith L.J. considered that while it was quite possible for an express term to exclude an implied one, the express term in question had not attempted to do so. ¹²⁴² Sir Nicolas Browne-Wilkinson V.C. agreed with Stuart-Smith L.J.'s decision on this point, but on more restricted grounds. The Vice-Chancellor considered that the approach of the Privy Council in *Tai Hing Cotton Mill Ltd*:

"... shows that where there is a contractual relationship between the parties their respective rights and duties have to be analysed wholly in contractual terms and not a mixture of duties in tort and contract. It necessarily follows that the scope of the duties owed by one party to the other will be defined by the terms of the contract between them." ¹²⁴³

However, the Vice-Chancellor held that the clause in question did not on its terms impose an absolute obligation on the doctor to work the extra hours, but merely gave the defendant a discretion as to the number of hours extra that were to be worked and that this right should be considered subject to their ordinary duty not to injure the plaintiff. ¹²⁴⁴ Leggatt L.J., dissenting, considered that the express term on the facts did indeed cut down the impact of the employer's implied term as to the safety of its employee and, following *Tai Hing Cotton Mill Ltd*, no tortious obligation could be any greater. ¹²⁴⁵ It is submitted that the approach of all members of the Court of Appeal in *Johnstone v Bloomsbury Health Authority* to these issues is consistent with that adopted subsequently by the House of Lords in *Henderson v Merrett Syndicates Ltd*, ¹²⁴⁶ since the latter confirmed that no concurrent liability in tort would be allowed where this would be inconsistent with the terms of the contract between the parties. ¹²⁴⁷ However, the decisions of the majority in *Johnstone* also shows that judges will be slow to interpret a contract as incompatible with an established liability in tort, perhaps particularly where this relates to personal injuries.

Contract removing condition of or giving rise to a defence to liability in tort

1-183

A contract's terms can affect liability in tort in another way as they may remove one of the conditions for its existence or give rise to the existence of a defence, and this is particularly clear where the consent of an injured party excludes liability. Thus, in cases concerning medical treatment involving physical contact with the patient, the contact is prima facie a battery unless the claimant has consented to the treatment,¹²⁴⁸ but where a person is able to and has consented, this will exclude liability in tort as well as contract.¹²⁴⁹ Similarly, a contractual licence given by an owner of land prevents any liability arising in the licensee in the tort of trespass as long as the latter does not act beyond the permission.¹²⁵⁰ A contractual consent can also allow the application of the defence of *volenti non fit injuria*. For example, in *Chapman v Ellesmere*,¹²⁵¹ a racing steward who acted under a licence from the Jockey Club was held unable to sue members of a committee appointed under that club's rules in the tort of defamation in respect of the publication of a report on his role in a particular race, because on accepting his licence he had agreed to rules under which publication of such a report was specifically permitted.

Legal immunities for contractors

1-184

Where the law itself rather than a contractual term grants a party to a contract a certain immunity from liability, the courts have looked to the reason for this immunity and decided whether it applies equally to a claim in tort as to the one in contract. For example, while the courts recognised that a solicitor enjoyed a certain immunity from liability in negligence in relation to the conduct and management of a case for reasons of policy, this immunity applied both to tort and to contract.¹²⁵² However, the approach of the courts to the very wide¹²⁵³ immunity from liability at common law¹²⁵⁴ of landlords to their tenants has been very different. In *Rimmer v Liverpool City Council*,¹²⁵⁵ while the Court of Appeal did not consider itself able as a matter of authority to impose a duty of care in the tort of negligence on a landlord as to the safety of the premises at the time of letting, it did impose a duty of care on a landlord qua designer of the premises let as to the reasonable safety of their design to the tenant qua person who might reasonably be expected to be affected.¹²⁵⁶ As Stephenson L.J. noted, *Cavalier v Pope*,¹²⁵⁷ the leading authority which supported the landlord's immunity, should be restrictively interpreted¹²⁵⁸ for at the time it was decided:

“... contractual duties were regarded as excluding delictual duties and a contractual relationship determined completely the rights and obligations of the related parties, as well as the rights of third parties.”¹²⁵⁹

In this context, and as regards liability for personal injuries, the courts showed themselves willing to allow the tort of negligence to develop in order to circumvent an immunity attaching to a particular contract where that immunity was no longer considered justified as a matter of policy, but which was supported by superior authority.¹²⁶⁰

The decision of the Court of Appeal in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*¹²⁶¹ concerned a situation in which a legal rule (as opposed to the terms of the contract) provided one party to a contract with a remedy based on breach of a duty in the other, but where that breach of duty had not previously been held to give rise to liability in damages. One issue before the court was whether breach by an insurer of its duty to disclose matters to the assured during the course of the contract could give rise to liability in damages as well as the possibility of rescission of the contract by the assured.¹²⁶² Having held that it should not imply a relevant term as to disclosure into the contract either on the basis of the “bystander test”¹²⁶³ or the “test of necessity”,¹²⁶⁴ the court considered that, whatever the degree of proximity of the parties or the fairness and reasonableness of recognising a duty of care in tort, it should still apply the “principle established in *Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank Ltd*”.¹²⁶⁵ According to May L.J.:

“... the [insurer] was entitled ... to look to the contract between the parties to discover what was the obligation of the [insurer] with regard to reporting to the [assured].” ¹²⁶⁶

Thus, legal recognition of a *limited* remedy for a party to a contract for breach of a particular legal duty imposed on the other party, was seen by the court as a reason for refusing to impose a duty of care in the tort of negligence so as to give an *additional* remedy.

1-185

⚠ It should be noted, however, that *Bank of Nova Scotia* was decided before the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd* ¹²⁶⁷ and therefore at a time when *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* ¹²⁶⁸ was still seen as an authority against allowing a liability in tort (at least for economic loss) to be relied on by one party to a contract against the other and some of these dicta should be seen in this light. ¹²⁶⁹ While it would be open to a future court simply to distinguish the decision on this basis, it is submitted that it is more likely that the latter will be interpreted as an illustration of the proposition that new or doubtful liabilities in tort should not be imposed between parties to a contract where to do so would subvert the policy of the law of contract as reflected in its grant of a more limited remedy than recognition of the tort would entail. Such a proposition could be seen as the reflection of the idea that any liability in tort between the parties to a contract should not be inconsistent with that contract or, more directly, as constituting a consideration of policy arguing for the rejection of a duty of care in tort. ¹²⁷⁰ So, for example, in *Johnson v Unisys Ltd* ¹²⁷¹ a majority of the House of Lords held that a claim for damages by an employee for breach of contract for the manner of his dismissal by his employer had rightly been struck out as disclosing no reasonable cause of action on the basis that any implied term concerning the manner of dismissal would be inconsistent with the statutory scheme of unfair dismissal put in place by Parliament. Lord Hoffmann considered that the same reasoning precluded any imposition of a duty of care in the tort of negligence and observed that:

“It is of course true that a duty of care can exist independently of the contractual relationship. But the grounds upon which ... it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care.” ¹²⁷² ⚠

Contractual silence

1-186

In the preceding situations, either the contract's terms or the law itself has regulated the obligation or liability imposed on the defendant. More difficult has been the case where the contract is silent as to an issue which is allegedly governed by a tort, for silence is ambiguous: where the parties have not provided for a certain issue, this can mean either that they did not address that issue, even implicitly, or it can mean that they consciously chose *not* to provide for that issue. ¹²⁷³ The typical case in which this problem has arisen has been where a contract has been held not to contain a relevant implied term and so the claimant has sued instead in the tort of negligence. Clearly, the choice for a court is whether to hold that the contract's silence excludes the recognition of any liability in tort, or, conversely, that it has no effect on the recognition of any liability in tort, which arises or does not arise according to its own rules. The acceptance by the House of Lords in *Henderson v Merrett Syndicates Ltd* of the general rule that a party to a contract may rely on a tort committed by the other party even in the course of performance of the contract would appear at first sight to have settled this question in favour of the latter position, but, as been already noted, that same decision's acceptance of the “broad principle” of assumption of responsibility drawn from *Hedley Byrne* reintroduces the question in this particular context. The following will, therefore, look first at the general position and then at the

approach taken by the courts to the question of tortious “assumptions of responsibility” between parties to a contract which is silent as to the issue on which the assumption is alleged to have been made.

The general position

1-187

In *Henderson v Merrett Syndicates Ltd* it was held, inter alia, that a party to a contract may rely on a tort committed by the other party, as long as doing so is not inconsistent with its express or implied terms: contract does not necessarily exclude tort. ¹²⁷⁴ While *Henderson* itself concerned a case where the defendant owed a contractual duty concurrent with the alleged tortious duty, it could be argued that a contract’s silence is by its nature not inconsistent with the existence of any liability in tort. In support of this interpretation, it can be noted that to allow a person’s mere entering into a contract with another to have the effect of excluding the latter’s liability in tort would mean that the law allowed by implication (the implication that by their silence the parties had intended that the issue in question should not be regulated) what it traditionally allowed only by a very clear contractual expression, ¹²⁷⁵ a paradox which would only be heightened by the fact that such an express exemption clause would, in many cases, be subject to legislative control. ¹²⁷⁶ In general, therefore, a contract’s silence should not be interpreted as a choice to oust the general law of tort.

Contractual silence and “assumption of responsibility”

1-188

⚠ However, more difficulty arises in relation to cases of recovery of pure economic loss in the tort of negligence based on the idea of “assumption of responsibility” drawn from the speeches of the members of the House of Lords in *Hedley Byrne*. Certainly, until the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd* ¹²⁷⁷ the courts on more than one occasion refused to recognise a duty of care in the tort of negligence in respect of pure economic loss based on an “assumption of responsibility” of one party to a contract to the other where that contract was silent as to the issue in question. For example, in *Reid v Rush & Tompkins Group Plc* ¹²⁷⁸ ⚠ the plaintiff was injured in a car accident in Ethiopia in the course of his employment for his English employer, but as he could not recover compensation there from the person responsible, he sued his employer, arguing that the latter owed him an obligation either to insure him against this type of accident or to advise him that he ought himself to take out appropriate insurance. However, having refused to find an implied term in his contract of employment either as to insurance or advising him of his position, ¹²⁷⁹ the Court of Appeal rejected his claim for pure economic loss in the tort of negligence, refusing to accept his argument that the defendant had voluntarily accepted this responsibility. According to Ralph Gibson L.J.:

“Where there is a contract between the parties, and any ‘voluntary assumption of responsibility’ occurred, if at all, at the time of making and by reason of the contract, it seems unreal to me to try to separate a duty of care arising from the relationship created by the contract from one ‘voluntarily assumed’ but not specifically assumed by a term of the contract itself.” ¹²⁸⁰

Having cited with approval Lord Scarman’s dictum in *Tai Hing Cotton Ltd v Liu Chong Hing Bank Ltd* ¹²⁸¹ the learned Lord Justice added that:

“... it is not open to this court to extend the duty of care owed by this defendant to the plaintiff by imposing a duty in tort which ... is not contained in any express or implied term of the contract,” ¹²⁸²

Similarly, in *National Bank of Greece SA v Pinios Shipping Co (No.1)*, *The Maira*,¹²⁸³ while Lloyd L.J. accepted that “in a large class of cases it was always, and maybe still is, possible for the plaintiff to sue either in contract or in tort”¹²⁸⁴ he considered that:

“... it has never been the law that a plaintiff who has the choice of suing in contract or tort can fail in contract yet nevertheless succeed in tort; and if it ever was the law, it has ceased to be the law since *Tai Hing Cotton Ltd.*”¹²⁸⁵

Here, again, therefore, the silence of the contract prevented the imposition of a duty of care in tort.¹²⁸⁶

1-189

However, as this brief discussion makes clear, this approach to the imposition of a duty of care based on an assumption of responsibility in the context of contractual silence was heavily influenced by the general judicial disfavour with which *any* liability in tort between the parties to a contract was viewed, and such an approach was thoroughly disapproved by the House of Lords in *Henderson v Merrett Syndicates Ltd.*¹²⁸⁷ However, even after the latter decision a logical difficulty remains with the imposition of liability in tort based on an assumption of responsibility where the contract is silent. As has been seen, the current meaning given to the notion of “assumption of responsibility” by the courts is that the defendant agreed to undertake a task or perform some service for the claimant. In cases of “contractual silence”, *ex hypothesi*,¹²⁸⁸ the court has already decided that a defendant did not make any relevant agreement (as a matter of the express or implied construction of the contract). How then can a court hold that a defendant did not agree for one legal purpose, but did do so for another? It would be understandable if a court should consider it illogical to find the existence of such a duty of care owed by one contractor to another having already decided that there has been no *contractual* assumption of responsibility.

1-190

However, in *Holt v Payne Skillington*,¹²⁸⁹ the Court of Appeal took a rather different view of this matter. In this case, the plaintiffs had indicated to the defendant estate agents that they wished to purchase a property in London with the view to letting it on “holiday lets”, a use which they made clear they required so as to benefit from tax relief in respect of a capital gain they had already made.¹²⁹⁰ One of the estate agent’s employees had, at some time before any retainer, assured them that he knew about the local planning requirements which would need to be satisfied to allow the plaintiffs to use whatever property they bought for this purpose. In the result, however, the property which the estate agents put forward and which the plaintiffs bought could not be used for holiday lets under the relevant planning rules. At first instance, the judge held the estate agents liable in the tort of negligence, but *not* liable for breach of contract on the basis that there was no express term of the retainer agreement (nor of a second “valuation agreement”) between the parties that the agents should investigate the planning issue. The estate agents appealed against this decision as to their liability in tort, but no appeal was made by the plaintiffs on the decision made against them in contract. Before the Court of Appeal, therefore, the estate agents argued that any duty of care in tort which they might have owed to the plaintiffs could not be wider than the express and implied terms of the contract between them and contended that the judge’s decision on the terms of their contracts meant that they could not be liable in tort. Hirst L.J., however, rejected this argument, relying on a passage of Lord Goff of Chieveley’s speech in *Henderson v Merrett Syndicates Ltd*¹²⁹¹ and stating that:

“... there is no reason in principle why a *Hedley Byrne* type of duty of care cannot arise in an overall set of circumstances where, by reference to certain limited aspects of those circumstances, the same parties enter into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort. In such circumstances, the duty of care in tort and the duties imposed by the contract will be concurrent but not coextensive.”¹²⁹²











The Court of Appeal held, therefore, that the judge below was entitled to rely on a factual context wider than the contractual agreements between the parties to establish a duty of care in tort. ¹²⁹³ This approach clearly accords with the general position taken in *Henderson v Merrett Syndicates Ltd* in favour of allowing tort to apply between parties to a contract, but it appears to ignore the thrust of the “logical argument” outlined in the previous paragraph against finding a tortious assumption of responsibility in a case of contractual silence. In this regard, however, there is, with respect, a particular difficulty with the decision in *Holt*: for while Hirst L.J. based the estate agent’s liability in tort on the principle of assumption of responsibility, ¹²⁹⁴ he found (as he had been invited to by *both* parties) the: “... essential characteristics of a situation giving rise to a cause of action in negligence based on a duty of care of the *Hedley Byrne* type”, in a passage of Lord Oliver’s speech in *Caparo Industries Plc v Dickman*, ¹²⁹⁵ which looks to the defendant’s giving of advice to a person who he knows is likely to rely on it, rather than to any agreement to do a task by the defendant. ¹²⁹⁶ This approach to the *Hedley Byrne* principle was entirely understandable on the facts, since it was clearly the bad or inadequate advice which the plaintiffs were given by the estate agents’ employee which formed the basis of any imposition of liability in tort. Certainly, where liability under *Hedley Byrne* is put in terms of a negligent misstatement given by a person who can foresee that it will be relied on rather than in the broader terms of an “assumption of responsibility” in the sense of an agreement to perform a service for the other party, then there is nothing inconsistent in finding a duty of care under *Hedley Byrne* but no express or implied duty of care in contract. By contrast, however, to the extent to which a defendant’s having “assumed responsibility” for doing something is to mean that he “agreed to do it”, then it is submitted that it is much more difficult to hold that a party “agreed to do it” for the purposes of the tort but did not “agree to do it” for the purposes of the contract. ¹²⁹⁷ So, in *Outram v Academy Plastics Ltd* ¹²⁹⁸ the Court of Appeal held that where a contract of employment did not contain an express or implied term imposing on the employer a duty to inform his employee of a right arising from the contract, no duty of care in the tort of negligence would be imposed to the same effect based on an assumption of responsibility or otherwise. ¹²⁹⁹


Scope of duty in tort reflected in scope of contractual implied term


1-190A

! The discussion in the preceding paragraphs has considered whether the existence or content of a contract between the parties should affect any claimed liability in tort arising between them, but in *Greenway v Johnson Matthey Plc* ¹³⁰⁰ the High Court considered the converse question, that is, whether the scope of a duty in tort arising in one party to a contract to the other should affect the scope of the former’s liability for breach of contract. In *Greenway v Johnson Matthey Plc* the claimants were employees of the defendants and had, during their employment, been exposed to platinum salts. This had created a sensitivity to the salts which would have developed into an allergy had exposure continued (which it did not, as the sensitivity was discovered), but otherwise the sensitivity was without symptoms. The claimants claimed damages alleging that they had lost earnings as they had changed jobs (or tasks within their employment) as a result of the need to avoid the relevant salts. In these circumstances, the High Court held that the claimants had not suffered any actionable injury for the purposes of their claims in tort (whether in the tort of negligence or for breach of statutory duty): properly analysed, their claim was for pure economic loss. ¹³⁰¹ Having so decided, it further held that the claimants’ alternative claim for breach of the implied term in their contract of employment that their employer should take reasonable care of their safety did not lead to any different result. This implied term “arises because the law imposes it in view of the relationship between the parties” and “is in substance the same as the tortious obligation which arises for exactly the same reasons”. ¹³⁰² The scope of the rule of public policy in these cases is to safeguard the health and safety of employees and this is reflected in the fact that the protection is from personal injury but not for economic or financial loss suffered without personal injury. ¹³⁰³

“Put another way, it is because the implied contractual duty is precisely coterminous with and reflects the obligations imposed by the law of tort—and, in particular, the tort of negligence, that the outcome must be the same however the cause of action is sought to be classified.” ¹³⁰⁴

Subsequently, the Court of Appeal upheld the High Court's decision in *Greenway v Johnson Matthey Plc*,¹³⁰⁵  agreeing that the claimants had not suffered any actionable physical injury, but only pure economic losses.¹³⁰⁶  The Court of Appeal considered that the "classic formulation of the duty owed by an employer to an employee is focussed on protection of the employee from physical injury, not protection from economic harm ... and this is true both in contract and in tort".¹³⁰⁷  Moreover, "having regard to the general policy reasons which inform the analysis of whether a standard term or duty of care should be implied into a contract of employment, ... the proposed term or duty to hold the employee harmless from economic loss should not be taken to be implied".¹³⁰⁸  First, it was not possible for a term to be implied in the claimants' contracts of employment, "either as a usual feature of employment contracts in general or in these particular contracts in their commercial setting", especially as the terms of the collective agreement incorporated into the individual employment contracts had made specific provision as to the extent of the defendant employer's responsibility as regards the financial welfare of employees affected by the possibility of developing platinum sensitisation.¹³⁰⁹  Echoing the language of the famous approach of Lord Bridge of Harwich to the existence of a duty of care in the tort of negligence in *Caparo Industries Plc v Dickman*,¹³¹⁰  the Court of Appeal added that it would not be "fair, just or reasonable" to hold that the defendant's *contractual* duty extended to protecting the claimants against the financial consequences of losing their jobs, etc. beyond the protection provided by those collective agreements (notably, the receipt of special termination payments).¹³¹¹  Finally, the Court of Appeal held that no duty of care should be imposed in the tort of negligence in respect of the claimants' pure economic losses, seeing such an imposition on an employer as being recognised only in very specific situations.¹³¹²  Moreover, where it had been recognised, as in *Spring v Guardian Assurance Plc*,¹³¹³  "[t]he policy arguments relevant to implication of the duty in contract and the imposition of a duty of care in tort were closely similar".¹³¹⁴  According to the Sales L.J. (with whom Davis L.J. and Lord Dyson M.R. agreed):

"This is significant. Where the nexus between parties is founded in a contractual relationship, as here, it is the contract which they have made with each other which is the primary source and reference point for the rights they have and the obligations they owe each other. Although a duty of care in tort may run in parallel with the contractual duty and have the same content, it is difficult to see how the law of tort could impose obligations in this area which are more extensive than those given by interpretation of the contract which the parties have made for themselves. The usual rule is that freedom of contract is paramount, and if the parties have agreed terms to govern their relationship which do not involve the assumption of responsibility by the employer for some particular risk, the general law of tort will not operate to impose on the employer an obligation which is more extensive than that which they agreed." ¹³¹⁵ 

As a result, since there is no implied contractual term according to which the defendant employer is obliged to protect the claimants in relation to their financial losses arising in the circumstances of this case, nor could there be a duty in tort to protect them in relation to pure economic loss suffered by reason of those financial losses.¹³¹⁶  It will be seen, therefore, that while the High Court started with the restricted scope of a relevant duty of care in the tort of negligence (not extending to pure economic loss) and then held that any implied contractual duty could not differ in scope, the Court of Appeal instead held that the lack of any relevant implied contract term meant that no duty of care in tort should go any further. At the time of writing this Supplement, permission to appeal by the claimants in this case has been granted by the Supreme Court.

The contractual regime

1-191

Both common law and legislation attach particular legal consequences to the classification of a claim

as contractual and together these consequences can be considered to form the “contractual regime”. As has been noted, some rules of this regime are significantly different from their counterparts in the law of torts, particularly in the context of rules as to the capacity of minors, damages, limitation of actions and the conflict of laws. ¹³¹⁷ It is clear from the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd* ¹³¹⁸ that, in principle, the option of a party to a contract to sue in tort rather than in contract attracts the application to his claim of those rules incidental to tort, since on the facts of that case proceeding in tort allowed the plaintiffs to avoid the expiry of the limitation period for their action for breach of contract. Moreover, the general terms of the acceptance by the House of Lords of a party’s option to sue in tort (if one is established on the facts) rather than in contract supports the converse of this proposition, so that a party who could sue in tort, but chooses instead to sue in contract, thereby gains whatever advantages may be had from those rules which are incidental to claims in contract. However, it is submitted that these general effects of an option will not be universally followed by the courts (as the example of contractual capacity of minors will show) and, perhaps more importantly, where (even before *Henderson v Merrett Syndicates Ltd*) the courts have accepted a claimant’s option, they have sometimes reduced the practical differences between the rules incidental to one or other basis of liability, so that the choice of legal basis does not affect the outcome of the case.

Capacity of minors

1-192

A minor’s capacity to make a contract and to commit a tort are very different. ¹³¹⁹ However, as has been seen, a party to a contract with a minor cannot in general avoid a minor’s contractual incapacity by suing in tort where to do so would subvert the policy of the common law in protecting minors from making unfavourable contracts. ¹³²⁰ This approach is particularly clear in the context of a fraudulent misrepresentation by a minor as to his age, ¹³²¹ but has been applied to other torts. ¹³²² However, the courts have allowed a person who has contracted with a minor to sue the latter in tort, but only if the minor’s tort can be considered as arising *independently* of the contract. ¹³²³ For example, in one case a minor who hired a mare “merely for a ride” and was warned at the hiring that she was unfit for jumping, having lent her to a friend who killed her by that act, was held liable in the tort of trespass which was “wholly independent of any contract”. ¹³²⁴ Here, it cannot be said that the tort was unrelated to the contract: the tort consisted in permitting something to be done which the minor had been expressly forbidden by the contract to do. ¹³²⁵ In this type of case, the courts are concerned to limit the protection which the rules of contractual capacity give to a minor where this policy is considered to be outweighed by the tort’s appeal for sanction and this is the case where a contractual permission for use of property by the minor is exceeded. ¹³²⁶


Damages

1-193

There are important differences in the rules under which damages are awarded for breach of contract and in tort. ¹³²⁷ However, in cases of concurrence of liability in contract and tort, in many cases the courts have found means to prevent a claimant recovering more damages merely by the way in which his claim is put. Thus, although a claim for breach of contract can compensate the claimant for loss of his expectation or performance interest, whereas a claim in tort can compensate only his status quo interest, ¹³²⁸ in cases of concurrence of liability the courts are slow to allow the claimant to recover damages based on the former measure merely because the claim can be classified as contractual, and instead award damages for loss of his “general expectations”. ¹³²⁹ In this type of case, indeed, the significant distinction appears to be between cases where the content of the contractual obligation is to take reasonable care and where it is stricter, a “guarantee” that something is the case or will occur. ¹³³⁰


1-194


⚠ This has already been seen in relation to pre-contractual statements which are held to have been

incorporated into the contract,¹³³¹ but that the proper distinction in these cases turns on the content of the defendant's obligation, rather than on the mere classification of his liability can be supported by other cases which concern professional negligence, whether contractual or tortious. In *Ford v White & Co*¹³³² a firm of solicitors was sued for contractual¹³³³ negligence by the plaintiffs who had been advised that a particular restrictive covenant did not affect a plot of land which they were intending to purchase (whereas it did).¹³³⁴ The plaintiffs' claim for the difference between the value of the property with and without the restriction was rejected by the court. Although Pennycuik J. accepted that in general damages for breach of contract should put the injured party in "as good a situation as if the contract had been performed",¹³³⁵ this did not mean that the plaintiffs should be put in a better position than if the defendant solicitors had performed their duty, as though the latter had warranted that their view of the restrictive covenant was right.¹³³⁶ A similar view was taken by the House of Lords in relation to a claim by a finance company against a valuer of a house intended as security for a loan.¹³³⁷  Their Lordships held that the finance company could recover damages for the negligence of the valuer representing the difference in what the secured property could make if sold (less the expenses of this) and the amount which they had lent in reliance on the valuation. The House of Lords rejected the finance company's claim that it could recover the interest which it had hoped to charge the borrower on the transaction (but had not been able to), accepting the valuer's argument that this would put them in a position as if he had warranted performance of the loan contract by the borrower,¹³³⁸ rather than the proper damages for the valuer's negligence.¹³³⁹ *Thake v Maurice*¹³⁴⁰ supplies an example of this difference in the context of medical negligence. At first instance, Peter Pain J. had found on the facts that the defendant surgeon had warranted to his patient that a vasectomy operation would be successful,¹³⁴¹ but the majority of the Court of Appeal disagreed,¹³⁴² holding that the defendant could be held bound only to take reasonable care in the giving of information as to the effect of the operation and finding it unnecessary to distinguish for this purpose between claims of contractual or tortious negligence, referring to this as the "negligence claim".¹³⁴³ However, Kerr L.J. disagreed with the majority's interpretation of the contract and would have upheld the existence of a contractual warranty as to the success of the operation (the "contractual claim").¹³⁴⁴ If this approach had been accepted, he considered that it would affect the damages recoverable by the plaintiffs, as damages in tort (i.e. the negligence claim) would be lower than those in contract.¹³⁴⁵ In tort, damages for pain and suffering caused by the pregnancy should be reduced to take into account the distress of having to undergo an abortion (which *would* have been the case even if the patient had been properly advised as to the risk of pregnancy after the operation), but this was not the case in contract,¹³⁴⁶ where if the defendant's warranty had not been broken the plaintiff's wife would not have become pregnant and so would not have suffered either proceeding. It is clear, however, that though put in terms of a contrast between tort and contract, the contrast which Kerr L.J. was intending to draw was between a duty to take reasonable care whether in tort or contract and a contractual duty to see that a particular result occurs.

Remoteness of damage

1-195

 Another important difference between claims in tort and contract is said to be found in relation to the applicable tests of remoteness of damage.¹³⁴⁷ In contract, the court asks whether the kind of loss is within the reasonable contemplation of the parties,¹³⁴⁸ whereas in the tort of negligence, it asks whether the type of harm is reasonably foreseeable.¹³⁴⁹ Although the difference between these has

been termed "semantic, not substantial",¹³⁵⁰ members of the House of Lords in *The Heron II*¹³⁵¹  considered, and some authors agree,¹³⁵² that a real difference in the two tests exists in relation to the degree of probability required, the position in contract being less generous than that in tort. However, where a case concerns concurrent liability in tort and contract, the courts have sometimes proved unwilling to allow the way in which the claimant puts his claim to affect the quantum of damages recoverable. Thus, in the Court of Appeal's decision in *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*¹³⁵³ which was such a case, Scarman L.J., with whom Orr L.J. agreed, assimilated the tests of remoteness in tort and in contract.¹³⁵⁴ The unwillingness of the courts to allow a claimant in the tort of negligence to recover more than a claim in contract may be illustrated by the decision in *How Engineering Services Ltd v Southern Insulation (Medway) Ltd*.¹³⁵⁵ There the question arose as to how the existence of a contract between the parties would affect the losses for which a defendant would be liable in the tort of negligence. The particular issues before the court concerned a claim by a

building sub-contractor against a sub-sub-contractor for negligence on the basis of a duty of care in tort alongside the contract between them. In rejecting the sub-sub-contractor's application to strike out this claim or for summary judgment in its favour, Akenhead J. held ¹³⁵⁶ that sub-sub-contractor could and did owe the sub-contractor such a concurrent duty of care in tort which was "definable by reference to the contractual responsibilities and liabilities assumed by the parties to the contract". ¹³⁵⁷ For this purpose, the learned judge considered "the scope of the contractual or tortious duty" in relation to the losses recoverable, following dicta of Lord Hoffmann on the importance of defining the "scope of duty" in *South Australia Asset Management Corp v York Montague Ltd* ¹³⁵⁸ and applying Lord Hoffmann's approach to the question of remoteness of damage in claims for *breach of contract* in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* according to which a party in breach is liable for those kinds of loss "which would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking". ¹³⁵⁹ In Akenhead J.'s view:

"[o]nce one ha[s] determined the kind of loss which the innocent party is contractually entitled to expect to recover, that measure of loss can effectively be applied to the breach of any concurrent duty of care in tort, save and to the extent there is some overriding principle in the law of tort which prevents it (if any). Generally, at least, the damages recoverable in negligence will not exceed what would have been recoverable in contract." ¹³⁶⁰

❗ On the facts before him, Akenhead J. held that the scope of the concurrent tortious duty of care owed by the sub-sub-contractor to the sub-contractor:








"involves the execution by [the sub-sub-contractor] of the works, which it was contractually employed to carry out, with reasonable care and skill ... Put simply, the cost of remedial works was the, or one, kind of loss which was within the scope of both the contractual and tortious duties. Almost inevitably, a sub-sub-contractor in [the defendant's] position would, objectively speaking, foresee or anticipate that, if it did work badly, (assuming that it itself did not do the remedial works) it would have to pay up the line through the sub-sub-contract damages or compensation for the cost of putting that bad work right" ¹³⁶¹

even though the "contractual route through which [this loss] comes" was a chain of collateral warranties between the sub-contractor and main contractor, and between the main contractor and the employer. ¹³⁶² However, in a very different context in *Yapp v Foreign and Commonwealth Office* the Court of Appeal denied that the cases support the proposition that: "where there is concurrent liability in tort and in contract arising out of a contractual relationship claims under either head should be governed by the contractual rather than the tortious rule as to remoteness". ¹³⁶³ There the claimant claimed for psychiatric injury against his employer either for breach of contract or in the tort of negligence. In the view of the Court of Appeal "in claims for breach of the common duty of care it is immaterial that the duty arises in contract as well as in tort: they are in substance treated as covered by tortious rules"; in such a case "in order to establish whether the duty is broken it will be necessary to establish ... whether psychiatric injury was reasonably foreseeable; and if that is established no issue as to remoteness can arise when such injury eventuates". ¹³⁶⁴ On the other hand, where an employee claims for breach of the implied term of mutual trust and confidence or for breach of an express term, the contractual test of remoteness applies. ¹³⁶⁵

1-195A

❗ However, in *Wellesley Partners LLP v Withers LLP* ¹³⁶⁶ ❗ the Court of Appeal expressed the opposite view as to the proper approach to remoteness of damage in cases of concurrence of liability in contract and tort from the one which that court (differently constituted ¹³⁶⁷ ❗) had expressed in

Yapp v Foreign and Commonwealth Office, ¹³⁶⁸ ! which was not discussed in *Wellesley Partners LLP*. In *Wellesley Partners LLP*, the claimants were a partnership of executive recruitment consultants which had instructed the defendant firm of solicitors to draft amendments to their partnership agreement so as to allow a third party investor to gain an interest in the partnership. The amendments which were drafted (and agreed) allowed the investor to withdraw half its funds *within* a period of 41 months from its formation, rather than (as instructed by the partnership) only *outside* such a period: this failure was held to constitute negligence in the solicitors. ¹³⁶⁹ ! One issue before the Court of Appeal was whether the claimants could recover a percentage of the profits which might have been made if the investment had remained in place until the end of 41 months, in particular in relation to a recruitment handling contract or contracts with a major bank. In this respect, it held that where a claimant is able to sue either for breach of contract or for pure economic loss in the tort of negligence based on an assumption of responsibility which is assumed under a contract, the contract law test for remoteness of damage applies even if the claim is brought in tort: "[i]t would be anomalous ... if the party pursuing the remedy in tort in these circumstances were able to assert that the other party has assumed a responsibility for a wider range of damage than he would be taken to have assumed under the contract". ¹³⁷⁰ ! In so holding, the Court of Appeal related the remoteness of damage rule for breach of contract (as reformulated by Lord Hoffmann in *The Achilleas* in terms of assumption of responsibility ¹³⁷¹ !) to the basis of liability in tort in the context (assumption of responsibility as explained by *Henderson v Merrett Syndicates Ltd* ¹³⁷² !). The Court of Appeal therefore disagreed with the judge at trial on the remoteness test applicable, though it held that the application of the contract test rather than the tort test did not make any difference on the facts as the damage claimed by the partnership was of a kind for which the solicitors had assumed responsibility under their contract and was in the reasonable contemplation of the parties as not unlikely to result from a breach. ¹³⁷³ ! The Court of Appeal in *Wellesley Partners LLP* therefore took a different view on the question as to the proper test of remoteness applicable to a claim in the tort of negligence concurrent with a claim for breach of contract from the one which it had taken in *Yapp*. ¹³⁷⁴ ! In neither case were these views necessary for the courts' decisions on the facts before them, as in both cases they held that the two tests of remoteness (in tort and in contract) would have led to the same result. ¹³⁷⁵ ! Moreover, the two approaches to the proper test of remoteness, while apparently opposing, may be reconciled by reference to their contexts. In *Yapp*, the claim was for damages by an employee against his employer for psychiatric injury suffered as a result of withdrawing him from his post without informing him of the case against him for doing so (which was held to have been unfair) ¹³⁷⁶ ! and the Court of Appeal held (summarising the authorities in that context) that in such a claim "for breach of the common law duty of care" it is immaterial that the duty arises in contract as well as tort. ¹³⁷⁷ ! In such a context, therefore, the defendant's liability in the tort in respect of psychiatric injury (which did not rest on any assumption of responsibility) could be seen as primary as compared with its contractual liability arising from breach of the term implied in law on the employer to take reasonable care of the employee's health and safety. ¹³⁷⁸ ! By contrast, in *Wellesley Partners LLP* the defendant's liability in contract was for breach of an express term of the contract (that is, to follow their client's instructions as to the terms of the amendment agreement) whereas its liability in tort was for pure economic loss based on an assumption of responsibility where the assumption stemmed from the contract itself: indeed, the judges in the Court of Appeal restricted their decision on the test of remoteness to the situation where the tort was based on such a contractual assumption of responsibility. ¹³⁷⁹ ! A distinction between claims for psychiatric injury (and, it is submitted, other harms, such as personal injury and damage to property) where liability in tort in the defendant does not rest on an assumption of responsibility (*Yapp*) and claims for pure economic loss where it does (*Wellesley Partners LLP*) would echo the approach of Lord Denning M.R. in his minority reasoning in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* (who distinguished between concurrent claims for physical damage and pure economic loss ¹³⁸⁰ !) with the difference that under *Wellesley Partners LLP* the contract test of remoteness would apply to a claim for pure economic loss in tort only where it is based (as would normally be the case) on an assumption of responsibility. More generally, while the Court of Appeal in *Wellesley Partners LLP* acknowledged that the House of Lords in *Henderson v Merrett Syndicates Ltd* treated liability in the tort of negligence that is based on a "broad principle" of assumption of responsibility in *Hedley Byrne* as independent from any liability in contract, ¹³⁸¹ ! its

own decision treats the liability of the defendant solicitors in tort for negligence as dependent on their liability for breach of the contract of retainer. ¹³⁸²  However, a better approach would be to hold that the contract test should apply whenever one party has had the opportunity to alert the other to the type of loss of which he is at risk, and that such an opportunity should be assumed (or perhaps presumed) where the parties are in a contractual relationship. ¹³⁸³  Most recently, in *Wright v Lewis Silkin LLP* ¹³⁸⁴  the Court of Appeal noted its earlier judgment in *Wellesley Partners LLP*, seeing the two cases as having in common that they both involved claims for negligence against solicitors by their clients in which there was concurrent liability and describing the decision in *Wellesley Partners LLP* as being that “where there were contractual and tortious duties to take care in carrying out instructions, the test for recoverability of damage should be the same, and it should be the contractual one”. ¹³⁸⁵  It was, however, common ground between the parties in *Wright v Lewis Silkin LLP* that *Wellesley Partners LLP* bound the court in *Wright v Lewis Silkin LLP*, no reference being made either by the parties or the court in the latter case to the contrasting approach of the Court of Appeal in *Yapp v Foreign and Commonwealth Office*. ¹³⁸⁶  In *Wright v Lewis Silkin LLP* the Court of Appeal held that the main element of the loss claimed by the claimant (a 20 per cent chance of recovering the voluntary payment of a severance sum from his former Indian employers) caused by his solicitor’s failure to advise him in relation to an exclusive jurisdiction clause was too remote, not being of a kind that either party at the time would have had in mind as not unlikely to result from this negligence. ¹³⁸⁷  On the other hand, the claimant’s additional litigation costs were not too remote, being “exactly the kind of loss to be expected”. ¹³⁸⁸ 

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It should also be recalled, moreover, that the “foreseeability test” of remoteness of damage ¹³⁸⁹ does not apply to claims for damages in the tort of deceit, where the claimant can recover all the damage directly flowing from the tortious act, ¹³⁹⁰ and the Court of Appeal has made clear that the latter test also applies to claims for damages under s.2(1) of the Misrepresentation Act 1967, whose imposition rests on a fiction of fraud. ¹³⁹¹ This suggests that in some cases a representee will have an advantage in claiming damages for misrepresentation, rather than for breach of a contractual warranty which results from the incorporation of a statement into the contract, ¹³⁹² as the former allows recovery of all losses flowing from the misrepresentation even if unforeseeable, “provided that they [are] not otherwise too remote”. ¹³⁹³ On the other hand, a consumer’s claim for damages as a “right to redress” against a trader in respect of the latter’s “misleading action” or “aggressive commercial practice” (the “prohibited practice”) under the Consumer Protection from Unfair Trading Regulations 2008 is limited to “loss that was reasonably foreseeable at the time of the prohibited practice”. ¹³⁹⁴

Contributory negligence

1-197

In *Forsikringsaktieselskapet Vesta v Butcher*, ¹³⁹⁵ the Court of Appeal took a very similar approach to the defence of contributory negligence as it had done in *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* ¹³⁹⁶ to remoteness of damage, and held that while s.1 of the Law Reform (Contributory Negligence) Act 1945 does not in general apply to claims for breach of contract so as to allow a court to reduce any award of damages on the ground of contributory negligence, it does apply to claims based on the breach of a contractual obligation to take reasonable care (“contractual negligence”) as long as this is concurrent with liability for breach of a duty of care in tort. ¹³⁹⁷ This approach leads to the paradox that a court’s recognition of a duty of care in the tort of negligence in *addition* to and concurrent with a contractual obligation to take reasonable care owed to a claimant may lead to the *reduction* of the latter’s damages on the ground of contributory negligence, whereas its refusal to do so would rule out such a reduction. ¹³⁹⁸

Limitation of actions

1-198

As has been seen, differences as to the rules of limitation of actions exist according to whether the claim is brought in tort or contract ¹³⁹⁹ and this has often been a reason for a claimant to put a claim in tort rather than for breach of contract. Traditionally, the courts allowed a claimant's choice whether to sue for breach of contract or in tort to determine which of the two regimes of limitation will apply and this practice was confirmed in *Henderson v Merrett Syndicates Ltd.* ¹⁴⁰⁰ However, although the general rule is that an action in contract accrues on its breach, whereas an action in tort accrues only on damage being suffered by the claimant, ¹⁴⁰¹ in those cases where the courts accept that the claimant would have had ¹⁴⁰² a claim for pure economic loss in the tort of negligence concurrent with a claim in contract, their approach has been to assimilate the two rules as to accrual, by finding that the claimant suffered damage for the purposes of the rule in tort at the same date as the breach of contract. ¹⁴⁰³ On the other hand, rather than reducing differences of rule as to limitation of actions in contract and in tort, the Latent Damage Act 1986 added a further one, as its provision according to which "negligence actions" for latent damage can accrue on the latter's discovery rather than on its occurrence, has been held to apply only to actions based on negligence in *tort*. ¹⁴⁰⁴

The conflict of laws: jurisdiction


1-199

❗ It was clearly established at common law that in cases with a foreign element where English law allows a person alternative claims in contract and in tort, his election between them brings with it the appropriate rules both of jurisdiction and choice of law. ¹⁴⁰⁵ However, within its scope, Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Ibis Regulation") governs jurisdiction both in "matters relating to a contract" and "matters relating to tort". ¹⁴⁰⁶ In a case where English substantive law would in principle allow a claimant to choose whether to put his claim in terms of contract or of tort, it would appear instead that the Court of Justice of the EU would regard the claim as "relating to a contract" for this purpose and so outside the scope of the jurisdictional rule for tort. ¹⁴⁰⁷ Moreover, the classification of a claim as contractual or tortious for these purposes is in principle a matter for EU law as these concepts should have an "autonomous" interpretation. ¹⁴⁰⁸ This view of the position was taken by the Court of Appeal in *Source Ltd v TUV Rheinland Holding AG.* ¹⁴⁰⁹ In that case, the plaintiffs claimed that the English courts had jurisdiction to hear their claim in tortious negligence against the defendants, a claim which arose out of and was concurrent with a claim against them for breach of their contractual obligation to exercise reasonable care and skill in presenting a report following the inspection of goods which they (the plaintiffs) had wished to import from China and Taiwan. The Court of Appeal noticed that the European Court of Justice in *Kalfelis v Schröder*, ¹⁴¹⁰ had held that the phrase "matters relating to tort" in art.5(3) of the Brussels Convention (a predecessor to the Brussels Ibis Regulation art.7(2)) refers to:

"... all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)." ¹⁴¹¹

For Staughton L.J., with whom Waite and Aldous L.JJ. agreed, this means that a claim which may be brought under a contract or independently of a contract on the same facts, save that a contract does not need to be established, is excluded from art.5(3) by the European Court's words "which are not related to a 'contract' within the meaning of Art.5(1)". ¹⁴¹² In the result, therefore, both the contractual and tortious claims of the plaintiffs "related to a contract" and they could not by relying on art.5(3) bring the tortious claim before the English courts. ¹⁴¹³ In a series of recent cases, the Court of Justice of the EU has confirmed its approach to the relationship of the contract and tort provisions in the



Brussels Regulation taken in *Kalfelis v Schröder* in relation to the Brussels Convention ¹⁴¹⁴ ❗ and has therefore made clear that the question whether a particular claim falls within "matters relating to contract" or "matters relating to tort, delict or quasi-delict" must be judged by reference to autonomous EU law understandings of these concepts; and that for this purpose the latter concept "covers all actions which seek to establish the liability of the defendant and do not concern 'matters relating to a

contract' within the meaning of Article 5(1)(a)" of the Brussels Regulation. ¹⁴¹⁵  As a result, where a national court finds that a claim is a "matter relating to a contract", a national court does not enjoy jurisdiction on the basis that the claim could be viewed as relating to tort as a matter of national law.

¹⁴¹⁶ 

Conflict of laws: applicable law

1-200

 Under the Rome Convention on the Law Applicable to Contractual Obligations ¹⁴¹⁷ it was held that there is nothing to prevent a party to a contract from framing his claim in tort so as to attract the choice of law rules applicable to that basis of liability, rather than in contract whose applicable law would be determined by that Convention. ¹⁴¹⁸ However, after the enactment of the Regulation (EC) 864/2007 on the law applicable to non-contractual obligations ("Rome II Regulation") ¹⁴¹⁹ and the replacement for most purposes of the Rome Convention by Regulation (EC) 593/2008 on the law applicable to contractual obligations ("Rome I"), ¹⁴²⁰ it is highly unlikely that a claimant will have the option as to how to frame his or her claim given that the two EU regulations will classify claims within their scope autonomously as being "contractual" or "non-contractual" for these purposes and these classifications are likely to be held mutually exclusive. ¹⁴²¹ 

^{1147.} *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 K.B. 399, 405.

^{1148.} See below, paras 1-177, 1-183.

^{1149.} See below, para.1-177.

^{1150.} See below, para.1-184.

^{1151.} See below, paras 1-186—1-190.

^{1152.} The notable exception is in the case of contractual capacity.

^{1153.} See below, para.1-191.

^{1154.} See above, paras 1-150 et seq.

^{1155.} [1995] 2 A.C. 145.

^{1156.} *Burrows* (1995) C.L.P. 103, 118 et seq.; *Whittaker* (1997) 17 Legal Studies 169.

^{1157.} For the position of "indirect Names" see below, para.1-211.

^{1158.} [1964] A.C. 465.

^{1159.} [1995] 2 A.C. 145 at 180–181.

^{1160.} [1995] 2 A.C. 145 at 193–194.

^{1161.} [1995] 2 A.C. 145 at 194.

^{1162.} See below, paras 1-184 et seq.

^{1163.} *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465.

- [1164.](#) It would seem that the speech of Lord Goff in *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296 marked the turning point.
- [1165.](#) e.g. *Caparo Industries v Dickman* [1990] 2 A.C. 605; *Smith v Eric S. Bush* [1990] 1 A.C. 831.
- [1166.](#) An exception could be found in the decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520, but this decision has not been followed but has been distinguished on various grounds: see below, paras 1-207 et seq.
- [1167.](#) [1995] 2 A.C. 145 at 178–181.
- [1168.](#) See especially *White v Jones* [1995] 2 A.C. 207, 273–274 (Lord Browne-Wilkinson, referring to “assumption of responsibility for the task not the assumption of legal liability”), 280, 288 (Lord Mustill). See also *Barclays Bank Plc v Fairclough Building Ltd (No.2)* [1995] I.R.L.R. 605; below, para.1-172.
- [1169.](#) *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 180, per Lord Goff of Chieveley.
- [1170.](#) *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 180 and see *Hunt v Optima (Cambridge) Ltd* [2014] EWCA Civ 714, [2015] 1 W.L.R. 1346 especially at [54] and [66]–[67] and below, para.7-035.
- [1171.](#) *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 180, 182.
- [1172.](#) cf. *Lennon v Metropolitan Police Commissioner* [2004] EWCA Civ 130, [2004] 1 W.L.R. 2594 where the principle in *Henderson v Merrett Syndicates* [1995] 2 A.C. 145 was applied so as to impose liability on a police authority vicariously in respect of its agent's express assumption of responsibility towards one of its constables (technically not being a contractual employee) in respect of the task of transferring him without loss of allowance to another police force.
- [1173.](#) [2011] EWCA Civ 9, [2011] 3 W.L.R. 815.
- [1174.](#) [2011] EWCA Civ 9 at [44] and [92].
- [1175.](#) The Court of Appeal held the term “reasonable” under s.2(2) and 3 of the Unfair Contract Terms Act 1977: [2011] EWCA Civ 9 at [58]–[64].
- [1176.](#) [2011] EWCA Civ 9 at [80] and [84] and see above, para.1-166.
- [1177.](#) [2011] EWCA Civ 9 at [83].
- [1178.](#) [2011] EWCA Civ 9 at [94]. See similarly [2011] EWCA Civ 9 at [76].
- [1179.](#) [1995] 2 A.C. 145, 181. This proposition was treated as established by *Henderson* by Lord Steyn in *Williams v Natural Life Health Foods Ltd and Mistlin* [1998] 1 W.L.R. 830, 834.
- [1180.](#) cf. the approach of Lord Steyn to the question of “justice and reasonableness” in *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] 1 A.C. 221 at 236 et seq., where he weighs various factors for and against the imposition of a duty of care on the facts.
- [1181.](#) [2002] 1 A.C. 615 and see especially 688 et seq. (Lord Hoffmann), the HL not following its earlier decision in *Rondel v Worsley* [1969] 1 A.C. 191. In *Jones v Kaney* [2011] UKSC 13, [2011] 2 A.C. 398 a majority of the SC (Lord Phillips of Worth Matravers P.S.C., Lord Browne of Eaton-under-Heywood, Lord Collins of Mapesbury and Lord Dyson of Tonaghmore J.J.S.C.; Lord Hope of Craighead D.P.S.C. and Baroness Hale of Richmond J.S.C. dissenting) overruled *Stanton v Callaghan* [2000] Q.B. 75 and held that expert witnesses do not enjoy any immunity from liability in negligence, rejecting arguments of the public interest in favour of such an immunity. Although the SC recognised that expert witnesses (unlike witnesses of fact) choose to provide their services (at [18], per Lord Phillips of Worth Matravers P.S.C.) and even owe their clients a *contractual* duty to take reasonable care ([2011] UKSC 13 at [67] and [95]), the

SC did not uphold the duty of care in the tort of negligence on the basis of an “assumption of responsibility”, even though Lord Dyson considered that liability in tort was based on *Hedley Byrne*: [2011] UKSC 13 at [95].

1182.

❗[2017] EWCA Civ 254, [2017] P.N.L.R. 24 at [64] referring in particular to Lord Hoffman’s speech in *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2006] 3 W.L.R. 1 at [35]–[36].

1183.

[1996] 1 A.C. 211.

1184.

❗See, e.g. *Burgess v Lejonvarn* [2017] EWCA Civ 254, [2017] P.N.L.R. 24 esp. at [86]–[87] in which the claimants’ friend who had provided project management services in a professional context to them not under a contract (for lack of agreement as to terms, intention to create legal relations and consideration) was held to a duty of care in tort based on an assumption of responsibility. The CA emphasised that the duty thereby imposed was “not a duty to provide [the] services. It is a duty to exercise reasonable skill and care in providing the professional services which [the defendant] did in fact provide”, adding that “[a] duty expressed in these terms does not trespass on the realm of contract”: at [88] and [89] per Hamblen L.J.

1185.

[1995] I.R.L.R. 605.

1186.

cf. *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214 which concerned the claim by the owner of the buildings against the main building contractors.

1187.

Forsikringsaktieselskapet Vesta v Butcher [1989] A.C. 852 and see below, para.26-077.

1188.

(1842) 3 Q.B. 511, (1844) 11 Cl. & Fin. 1 HL.

1189.

See above, para.1-157.

1190.

But compare paras 1-169—1-170.

1191.

OGB Ltd v Allan, *Douglas v Hello! Ltd*, *Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 especially at [6]–[8].

1192.

Rookes v Barnard [1964] A.C. 1129.

1193.

For example, where A threatens B, his creditor, that he will not pay a debt owed unless B accepts a smaller sum in full satisfaction, A may be liable to B in the tort of intimidation: *D.&C. Builders Ltd v Rees* [1966] 2 Q.B. 617, 625.

1194.

Clerk & Lindsell on Torts, 21st edn (2014), para.24–65. In *Morgan v Fry* [1968] 2 Q.B. 710, 737, Russell L.J.’s judgment suggests that not every threat to break a contract of employment would be sufficient to constitute the tort of intimidation.

1195.

See below, para.24-022.

1196.

Clerk & Lindsell on Torts, 19th edn (2006) at para.25–86, especially at n.87, referring to *Kenny v Preen* [1963] 1 Q.B. 499 in which the Court of Appeal refused to award punitive damages where the claim was only for breach of contract, and see above, para.1-151.

1197.

Clerk & Lindsell on Torts, 19th edn (2006) at para.25–86, n.91.

1198.

Cane, *Tort Law and Economic Interests*, 2nd edn (1996), p.130.

1199.


cf. *Kenny v Preen* [1963] 1 Q.B. 499; *McCall v Abelesz* [1976] Q.B. 585, 594 and see below, para.26-044 and cf. the refusal of English courts to distinguish between deliberate and other breaches of contract for the purposes of the validity of exemption clauses, below, para.15-019 and see Unfair Contract Terms Act 1977 s.1(4). In *Bank of Nova Scotia v Hellenic Mutual War*


Risks Association (Bermuda) Ltd [1990] 1 Q.B. 818, 894, May L.J. observed that “a deliberate contract breaker is guilty of no more than breach of contract”.


- [1200.](#) Winfield and Jolowicz on Tort, 19th edn (2014), paras 18–21—18–23.
- [1201.](#) In *OGB Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 at [61] Lord Hoffmann was careful to put aside the question of possible recovery by a claimant who has been compelled by unlawful intimidation to act to his own detriment: “[s]uch a case of ‘two party intimidation’ raises altogether different issues”.
- [1202.](#) SI 2008/1277 (“2008 Regulations”) especially Pt 4A as inserted by Unfair Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) on which see generally Vol.II, paras 38-145 et seq.
- [1203.](#) 2008 Regulations regs 2(1), 27C and 27D, on which see Vol.II, paras 38-148 and 38-161.
- [1204.](#) 2008 Regulations reg.27A and 27B on which see further Vol.II, paras 38-165, 38-166, 38-175 and 38-177.
- [1205.](#) 2008 Regulations reg.7(1) on which see further Vol.II, para.38-173.
- [1206.](#) 2008 Regulations reg.27H on which see further Vol.II, para.38-182.
- [1207.](#) 2008 Regulations reg.27J especially (1) on which see further Vol.II, para.38-186.
- [1208.](#) An exception to this rule is found in the case of personal fraud in a contractor liability for which cannot be excluded by contract: *S. Pearson & Son Ltd v Dublin Corp* [1907] A.C. 351, 353–354, 362. Fraud may occur in the course of performance of a contract as well at the precontractual stage, for example, where a solicitor's clerk acts fraudulently in relation to his commission: see *Lloyd v Grace, Smith & Co* [1912] A.C. 716, where a solicitor's employee's fraud was held to give rise to liability in both tort and contract in the solicitor. Of course, in many situations the standard of care owed by a contractor is the same in tort and in contract, notably where the tort is one of negligence and the relevant contractual obligation is one of reasonable care: see below, paras 14-017, 14-037.
- [1209.](#) cf. *Trade and Transport Inc v Ilno Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 230–231 and see below, para.15-012 but cf. Unfair Contract Terms Act 1977 s.13(1), below, para.15-069.
- [1210.](#) e.g. *Readhead v Midland Ry Co* (1867) L.R. 2 Q.B. 412, (1869) L.R. 4 Q.B. 379 (carriage of persons); *Davie v New Merton Board Mills* [1959] A.C. 604 (employment); Occupiers' Liability Act 1957 s.5(1); *Thake v Maurice* [1986] 1 Q.B. 644 (medical liability).
- [1211.](#) e.g. *Samuels v Davis* [1943] 1 K.B. 526 (dentist who designed and constructed prosthesis liable strictly to patient) and see Sale of Goods Act 1979 s.14.
- [1212.](#) [1986] A.C. 80.
- [1213.](#) [1986] A.C. 80, 107.
- [1214.](#) [1995] 2 A.C. 145 see especially at 186.
- [1215.](#) cf. *Blackwood v Robertson* 1984 S.L.T. 68 (lesser standard of care between partners).
- [1216.](#) *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), [2013] 1 B.C.L.C. 125 at 130, relying on *Socimer International Bank Ltd v Standard Bank London Ltd* (No.2) [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558 at [66] on which see above, para.1-054. See similarly *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [78]–[89].


- [1217.](#) [2012] EWHC 584 (Comm) at [132], referring, inter alia, to the paragraph in the 30th edition equivalent to the present paragraph and the cases cited therein.
- [1218.](#) [2012] EWHC 584 (Comm) at [133]–[134].
- [1219.](#) [1991] Ch. 12 (and see *Shamji v Johnson Matthey Bankers Ltd* [1986] B.C.L.C. 278).
- [1220.](#) [1991] Ch. 12 at 18 (and cf. at 24–25, Purchas L.J.), thereby disapproving Salmon L.J.’s dictum in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch. 949, 966 which talks of a duty of care in the context of the liability of a mortgagee; and see *Downsview Nominees Ltd v First City Corp Ltd* [1993] A.C. 295, 315 and *AIB Finance Ltd v Debtors* [1998] 2 All E.R. 929, 937; *Yorkshire Bank Plc v Hall* [1999] 1 W.L.R. 1713, 1728; *Raja v Lloyds TSB Bank Plc* [2001] EWCA Civ 210, [2001] Lloyd’s Rep. Bank. 113; and see Megarry and Wade, *The Law of Real Property*, 6th edn (2000), para.25-018.
- [1221.](#) *China and South Seas Bank v Tan* [1990] 1 A.C. 536, 543–544.
- [1222.](#) *Raja v Lloyds TSB Bank Plc* [2001] EWCA Civ 210 at [31], per Mance L.J.
- [1223.](#) [1986] 1 Q.B. 644. Peter Pain J. at first instance and Kerr L.J. on appeal took the opposite view on this issue from the majority in the Court of Appeal and see below, para.1-194.
- [1224.](#) cf. *Readhead v Midland Ry Co* (1867) L.R. 2 Q.B. 412, (1869) L.R. 4 Q.B. 379, in which the court held that a passenger injured while travelling on a railway could sue the company only on the basis of breach of a duty to take reasonable care, rejecting the plaintiff’s contention that the company owed an obligation to provide a carriage fit for its purpose, by analogy with cases on sale of goods.
- [1225.](#) The stricter type of contractual term was implied by the courts in the context of sale of goods: *Jones v Just* (1868) L.R. 3 Q.B. 197 (see now Sale of Goods Act 1979 s.14). See further, *Samuels v Davis* [1943] 1 K.B. 526 (liability of dentist in respect of manufacture and supply of dental prosthesis); Supply of Goods and Services Act 1982 s.4 and below, para.14-034.
- [1226.](#) [1996] 1 W.L.R. 38.
- [1227.](#) [1995] 1 W.L.R. 1281.
- [1228.](#) [1995] 1 W.L.R. 1281 at 1290.
- [1229.](#) [1995] 2 A.C. 145, 194 and see above, paras 1-166—1-167.
- [1230.](#) [1995] 1 W.L.R. 1281 at 1294.
- [1231.](#) [1995] 1 W.L.R. 1281 at 1295. Notably, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80.
- [1232.](#) (1986) 31 D.L.R. (4th) 481, 521-522.
- [1233.](#) [1995] 1 W.L.R. 1281, 1301, 1305.
- [1234.](#) *Nicholson v Willan* (1804) 5 East 507 and see below, paras 15-001 et seq.
- [1235.](#) *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285; *How Engineering Services Ltd v Southern Insulation (Medway) Ltd* [2010] EWHC 1878 (TCC), [2010] B.L.R. 537 at [14], where Akenhead J. observed that where a duty of care in the tort of negligence exists concurrently with a contract between the parties “[t]hat duty of care will be definable by reference to the contractual responsibilities and liabilities assumed by the parties to the contract and, if for instance, certain types of loss are, on the proper interpretation of the contract, excluded or otherwise irrecoverable, the duty of care is similarly circumscribed”.


- [1236.](#) *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285 at 1294 where Denning L.J. held that the plaintiff “can avoid the exemption clause by framing his claim in tort”.
- [1237.](#) e.g. *Hollier v Rambler Motors (A.M.C.) Ltd* [1972] 2 Q.B. 71. In principle a valid exemption clause in a contract between the parties may exclude any liability in the tort of negligence otherwise arising on the basis that it would be inconsistent with the contract: *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [84].
- [1238.](#) Unfair Contract Terms Act 1977 s.1(1) and see below, paras 15-064, 15-081—15-083 (where the impact on the 1977 Act of the Consumer Rights Act 2015 is explained). Such an attempted exclusion may also fall within the controls of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) or, on its coming into force, the Consumer Rights Act 2015 Pt 2: on which see Vol.II, paras 38-201 et seq. and 38-358 et seq. and 38-377 respectively.
- [1239.](#) [1992] Q.B. 334.
- [1240.](#) See *Davie v New Merton Board Mills* [1959] A.C. 604 (negligence); *Matthews v Kuwait Bechtel Corp* [1959] 2 Q.B. 57 (contract).
- [1241.](#) [1986] A.C. 80, 107; see above, para.1-154.
- [1242.](#) [1986] A.C. 80.
- [1243.](#) [1986] A.C. 80 at 350.
- [1244.](#) [1986] A.C. 80 at 350–351.
- [1245.](#) [1986] A.C. 80 at 349.
- [1246.](#) [1995] 2 A.C. 145.
- [1247.](#) See above, paras 1-166—1-167.
- [1248.](#) *Chatterton v Gerson* [1981] 1 Q.B. 432, 442–443. For the extent to which the consent needs to be “informed” see *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 2 W.L.R. 768. That the consent of the claimant goes to the existence of the tort of battery rather than being merely an example of *volenti non fit injuria* is supported by the fact that the claimant must show his own lack of consent: *Freeman v Home Office (No.2)* [1984] Q.B. 524, 539.
- [1249.](#) *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] A.C. 871 at 904–905. Although the SC in *Montgomery v Lanarkshire Health Board*, above, n.1176, departed from what was said in *Sidaway* on informed consent, it did not discuss this point.
- [1250.](#) There is no need for such a licence to be contractual for the defence to arise. See Clerk & Lindsell on Torts, 21st edn (2014), para.19–46.
- [1251.](#) [1932] 2 K.B. 431.
- [1252.](#) *Saif Ali v Sydney Mitchell & Co* [1980] A.C. 198 applying to solicitors *Rondel v Worsley* [1969] A.C. 191. In *Arthur J.S. Hall v Simons* [2002] 1 A.C. 615 this immunity was rejected and these earlier decisions not followed.
- [1253.](#) The immunity extended to positive acts of malfeasance as well as to non-feasance and to claims for personal injuries: *Travers v Gloucester Corp* [1947] 1 K.B. 71.
- [1254.](#) *Cavalier v Pope* [1906] A.C. 428. See now Defective Premises Act 1972 ss.3, 4.
- [1255.](#) [1985] 1 Q.B. 1.
- [1256.](#) [1985] 1 Q.B. 1 at 13.

- [1257.](#) [1906] A.C. 428.
- [1258.](#) *Rimmer v Liverpool City Council* [1985] 1 Q.B. 1 at 9.
- [1259.](#) [1985] 1 Q.B. 1 at 11.
- [1260.](#) cf. *McNerny v Lambeth LBC* (1988) 21 H.L.R. 188 (no liability in tort of negligence in landlord to tenant for condensation damage and illness) and *Baxter v Camden LBC (No.2)* [2001] Q.B. 1 (no liability in tort of nuisance in landlord to tenant owing to noise from neighbouring property also owned by landlord) in both of which the rule in *Cavalier v Pope* [1906] A.C. 428 was applied.
- [1261.](#) [1990] 1 Q.B. 818 (reversed on other grounds [1992] 1 A.C. 233).
- [1262.](#) cf. *Banque Keyser Ullmann SA v Skandia (UK) Co Insurance Ltd* [1990] 1 Q.B. 655 (affirmed on other grounds [1991] 2 A.C. 249). On the new law governing duties of disclosure and representation in contracts of insurance see Consumer Insurance (Disclosure and Representations) Act 2012 and Insurance Act 2015, on which see Vol.II, paras 42-033 et seq.
- [1263.](#) [1990] 1 Q.B. 818; [1990] 1 Q.B. 655 at 897–898 and see below, para.14-009.
- [1264.](#) [1990] 1 Q.B. 818 at 898–899 and see below, paras 14-005—14-010 (where later developments are explained).
- [1265.](#) [1990] 1 Q.B. 818, at 901, per May L.J.
- [1266.](#) [1990] 1 Q.B. 818 at 902.
- [1267.](#) [1995] 2 A.C. 145.
- [1268.](#) [1986] A.C. 80.
- [1269.](#) See above, para.1-154.
- [1270.](#) On this role of policy in recognition of the duty of care in the tort of negligence, see especially *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] 1 A.C. 211. For the significance of considerations of policy in relation to liability in the tort of negligence based on an “assumption of responsibility”, see above, para.1-171.
- [1271.](#) [2001] 2 W.L.R. 1076 and see *Eastwood v Magnox Plc* [2004] UKHL 35, [2005] 1 A.C. 503.
- [1272.](#)  [2001] 2 W.L.R. 1076 at 1097 and see also at 1122, per Lord Millett. cf. *Greenway v Johnson Matthey Plc* [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487 (impact of absence of implied term for duty of care in the tort of negligence), on which see below para.1-190A.
- [1273.](#) cf. *Ali v Christian Salvesen Food Services Ltd* [1997] 1 All E.R. 721, especially at 726 in which the Court of Appeal refused to imply a term in a collective agreement which represented “a carefully negotiated compromise between two potentially conflicting objectives” and which was “wholly silent” as to the issue about which it was argued a term should be implied.
- [1274.](#) [1995] 2 A.C. 145 and see above paras 1-166—1-167.
- [1275.](#) See below, paras 15-008 et seq. and cf. *Smith v Charles Baker & Sons* [1891] A.C. 325 (mere entry of contract with knowledge of risk not sufficient for defence of volenti non fit injuria).
- [1276.](#) This would be the case notably as regards “business liability for negligence” under the Unfair Contract Terms Act 1977 s.2 or in the case of a term in a “consumer contract” under the Unfair Terms in Consumer Contracts Regulations 1999 or (on its coming into force) the Consumer Rights Act 2015 Pt 2.

- [1277.](#) [1995] 2 A.C. 145 and see above, paras 1-166—1-167.
- [1278.](#)  [1990] 1 W.L.R. 212 and see also *Van Oppen v Clerk to the Bedford Charity Trustees* [1990] 1 W.L.R. 235 and *Greenway v Johnson Matthey Plc* [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487 (appeal to SC pending) (below para.1-190A), which was itself seen the CA as an analogous case to *Reid v Rush & Tompkins Group Plc* : [2016] EWCA Civ 408 at [41].
- [1279.](#) Relying on *Liverpool City Council v Irwin* [1977] A.C. 239 and see below, para.14-011.
- [1280.](#) [1990] 1 W.L.R. 212 at 229.
- [1281.](#) [1986] A.C. 80, 107 above, para.1-154.
- [1282.](#) [1990] 1 W.L.R. 212, 232.
- [1283.](#) [1990] 1 A.C. 637.
- [1284.](#) [1990] 1 A.C. 637 at 650.
- [1285.](#) [1990] 1 A.C. 637. If given a general application, this statement would clearly prevent a claimant from suing in tort after the expiry of a limitation period applicable to a contractual action, on which see below, para.1-198.
- [1286.](#) See similarly, *Bank of Nova Scotia v Hellenic War Risks Association (Bermuda) Ltd* [1990] 1 Q.B. 818 and see above, para.1-184 and *Greater Nottingham Co-Operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] Q.B. 71.
- [1287.](#) Above, paras 1-166 et seq.
- [1288.](#) On the assumption that the implied term is put before the court for its consideration.
- [1289.](#) [1995] 49 Con. L.R. 99.
- [1290.](#) The plaintiffs also claimed against their solicitors, but no issue relating to the latter's liability arose before the Court of Appeal.
- [1291.](#) [1995] 2 A.C. 145, 193.
- [1292.](#) [1995] 49 Con. L.R. 99, 114.
- [1293.](#) This approach was followed by the HC in *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep. 487 (duty of care arising from failure in carrying out pre-contractual disclosure).
- [1294.](#) This can be seen Hirst L.J.'s reliance on passages from Lord Goff's speech in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, 178 and 193–194.
- [1295.](#) [1990] 2 A.C. 605, 638.
- [1296.](#) [1995] 49 Con. L.R. 99, 114.
- [1297.](#) cf. *Tesco Stores Ltd v The Norman Hitchcox Partnership Ltd* [1998] 56 Con. L.R. 52, 163–165.
- [1298.](#) [2000] I.R.L.R. 499 at [21]–[23].
- [1299.](#) See similarly *Freemont (Denbigh) Ltd v Knight Frank Ltd* [2014] EWHC 3347 (Ch), [2015] P.N.L.R. [34], [148]–[149] (surveyor's restricted contractual duty limiting any duty of care in tort).
- [1300.](#) [2014] EWHC 3957 (QB), [2015] P.I.Q.R. P10 (appeal pending).

- [1301.](#) [2014] EWHC 3957 (QB) at [32]–[33], applying *Cartledge v E. Jopling* [1963] A.C. 758; *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39, [2008] 1 A.C. 281.
- [1302.](#) [2014] EWHC 3957 (QB) at [38] and [46] per Jay J.
- [1303.](#) [2014] EWHC 3957 (QB) at [47], applying the approach to the “scope of the duty” of Lord Hoffmann in *SAMCO v York Montague* [1997] A.C. 191 at 211-212.
- [1304.](#) [2014] EWHC 3957 (QB) at [47] per Jay J.
- [1305.](#)  [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487 (appeal to SC pending).
- [1306.](#)  [2016] EWCA Civ 408 at [29]–[33].
- [1307.](#)  [2016] EWCA Civ 408 at [37] per Sales L.J. (with whom Davis L.J. and Lord Dyson M.R. agreed).
- [1308.](#)  [2016] EWCA Civ 408 at [37] per Sales L.J.
- [1309.](#)  [2016] EWCA Civ 408 at [39]–[40].
- [1310.](#)  [1990] 2 A.C. 605, 618.
- [1311.](#)  [2016] EWCA Civ 408 at [40] and [45].
- [1312.](#)  [2016] EWCA Civ 408 at [47].
- [1313.](#)  [1995] 2 A.C. 296.
- [1314.](#)  [2016] EWCA Civ 408 at [48] per Sales L.J.
- [1315.](#)  [2016] EWCA Civ 408 at [49], referring to *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294 at 303.
- [1316.](#)  [2016] EWCA Civ 408 at [51].
- [1317.](#) See above, paras 1-150—1-153.
- [1318.](#) [1995] 2 A.C. 145, above, para.1-166.
- [1319.](#) See below, paras 9-053—9-054.
- [1320.](#) See above, para.1-160.
- [1321.](#) *Johnson v Pye* (1665) 1 Sid. 258.
- [1322.](#) See below, para.9-053.
- [1323.](#) See below, para.9-054.
- [1324.](#) *Burnard v Haggis* (1863) 32 L.J.N.S. 189, 191, per Keating J. This passage does not appear in the other report at (1863) 14 C.B.(N.S.) 45.


- [1325.](#) (1863) 14 C.B.(N.S.) 45, 53, (1863) 32 L.J.N.S. 189, 191.
- [1326.](#) See also *Ballett v Mingay* [1943] K.B. 281.
- [1327.](#) See above, paras 1-150—1-151.
- [1328.](#) See above, para.1-150 and below, paras 7-055, 7-077 and 26-019 et seq.
- [1329.](#) See above, para.1-150.
- [1330.](#) And cf. Cane, *Tort Law and Economic Interests*, 2nd edn (1996), pp.142–145 and Whittaker (1996) 16 O.J.L.S. 191, 207 et seq.
- [1331.](#) See above, para.1-161.
- [1332.](#) [1964] 1 W.L.R. 885.
- [1333.](#) [1964] 1 W.L.R. 885 at 891.
- [1334.](#) And cf. *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 W.L.R. 916, where the court did not generally feel it necessary to classify the claim beyond that it was for negligence, though the test of remoteness applied was found in *Hadley v Baxendale* (1854) 9 Exch. 341; *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 W.L.R. 916 at 926.
- [1335.](#) [1964] 1 W.L.R. 885, 887, citing Lord Haldane in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] A.C. 673, 689.
- [1336.](#) [1964] 1 W.L.R. 885 at 888. As the property with the restriction was worth the price which they paid, the plaintiffs' loss was held to be nil: at [891]. cf. *Murray v Lloyd* [1989] 1 W.L.R. 1260.
- [1337.](#)  *Swingcastle Ltd v Alistair Gibson* [1991] 2 A.C. 223. cf. *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*; *sub nom. South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 especially at 216–217; *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33, [2011] 3 All E.R. 655 at [73] (scope of duty of lawyers advising on invalid loan agreement treated as same in contract and tort); and see below, para.26-031. See also *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2017] 2 W.L.R. 1029. cf. above, para.1-190A (scope of duty in tort reflected in scope of duty in implied contract term).
- [1338.](#) *Swingcastle Ltd v Alistair Gibson* [1991] 2 A.C. 223, 225.
- [1339.](#) *Swingcastle Ltd v Alistair Gibson* [1991] 2 A.C. 223 at 238. While the House of Lords noted that the action before it was founded in tort, it did not consider the principles applicable to be any different from those in contract.
- [1340.](#) [1986] 1 Q.B. 644.
- [1341.](#) [1986] 1 Q.B. 644 at 658.
- [1342.](#) [1986] 1 Q.B. 644 at 685, 688.
- [1343.](#) [1986] 1 Q.B. 644 at 679 (Kerr L.J.), with whom Neill and Nourse L.JJ. agreed on this point: at 684, 685.
- [1344.](#) [1986] 1 Q.B. 644 at 678.
- [1345.](#) [1986] 1 Q.B. 644 at 683. This point had been agreed by the parties.
- [1346.](#) [1986] 1 Q.B. 644.


- [1347.](#) See McGregor on Damages, 19th edn (2014), Ch.8; Cartwright (1996) 55 C.L.J. 488 and see Cane n.1241, at pp.145–147, for a discussion of the different treatment in tort and contract of damages for “lost chances”.
- [1348.](#) See below, paras 26-107 et seq. which includes discussion of the significance for remoteness of damage in contract of the defendant’s “assumption of responsibility” for a particular kind of loss after *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61.
- [1349.](#) *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound (No.1)* [1961] A.C. 388.
- [1350.](#) *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] Q.B. 791, 807. See similarly *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] Q.B. 375, 405, per Sir Thomas Bingham M.R. (though the decision of the Court of Appeal was reversed on other grounds sub nom. *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191).
- [1351.](#)  *Koufos v C. Czarnikow Ltd* [1969] 1 A.C. 350, 385–386, 422–423 and cf. at 413; *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351 at [74] and [146] and see below, para.26-115.
- [1352.](#) See Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002), pp.331-333.
- [1353.](#) [1978] Q.B. 791.
- [1354.](#) [1978] Q.B. 791 at 806–807. Lord Denning, M.R. agreed with the result of the majority, but justified it by drawing a distinction between claims for physical damage and ones for economic loss: at 802–804. For further discussion of this decision, see Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (2004), pp.88 et seq.; Cane above, n.1241 at pp.146–147; McGregor on Damages, 19th edn (2014), para.22-009. cf. *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1369 where Glidewell L.J. adopted an approach to causation which he considered applicable to a claim for breach of contract and to one in “tort in a situation analogous to a breach of contract”.
- [1355.](#) [2010] EWHC 1878 (TCC), [2010] B.L.R. 537 (preliminary issue as to duty of care); *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC), 133 Con. L.R. 211 (trial), Akenhead J.
- [1356.](#) Applying *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 on which see above, para.1-167.
- [1357.](#) [2010] EWHC 1878 (TCC) at [14].
- [1358.](#) [1996] UKHL 10, [1997] A.C. 191 at [8], [9] and [14]–[15].
- [1359.](#) *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61 at [22]; [2010] EWHC 1878 (TCC) at [16]. On the wider significance of this decision see below, paras 26-126 et seq. and cf. above, para.1-190A.
- [1360.](#) [2010] EWHC 1878 (TCC) at [16] *in fine*.
- [1361.](#) [2010] EWHC 1878 (TCC) [23] and [24].
- [1362.](#) [2010] EWHC 1878 (TCC) at [23] and [25]. At trial, Akenhead J. found that A was not in any material breach of duty: *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC), 133 Con. L.R. 211 at [106].
- [1363.](#) [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 at [119] n.8 per Underhill L.J. (with whom Davis and Patten L.JJ agreed) and rejecting the position adopted by Burrows, *Remedies for Torts and*

Breach of Contract, 3rd edn (2004) and suggested by McGregor on Damages at n.1265, para.22-009.


[1364.](#) [2014] EWCA Civ 1512 at [119] per Underhill L.J. and cf. *Greenway v Johnson Matthey Plc* [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487 (above, para.1-190A).


[1365.](#) [2014] EWCA Civ 1512 at [119] per Underhill L.J.


[1366.](#)  [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351.


[1367.](#)  The Court of Appeal in *Yapp* consisted of Underhill, Davis and Patten L.JJ; the Court of Appeal in *Wellesley Partners LLP* consisted of Longmore and Floyd L.JJ. and Roth J.

[1368.](#)  [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 (discussed in Vol.I, para.1-195).


[1369.](#)  [2015] EWCA Civ 1146 at [41], [54] and [58]–[59] (decision at trial not appealed on this point).


[1370.](#)  [2015] EWCA Civ 1146 at [68] per Floyd L.J. and see also at [75], explicitly approving the position proposed by McGregor on Damages at n.1265, para.22–009 that was rejected by the CA in *Yapp* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 at [119] n.8 and at [80]. See similarly, at [151] (approving the view of Burrows, *Commercial Remedies* (2003) 27 at 35), [157] and [163] (Roth J.); [183]–[186] (Longmore L.J.).

[1371.](#)  *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 A.C. 61. In this respect, the CA in *Wellesley Partners LLP* adopted a similar approach to Akenhead J. in *How Engineering Services Ltd v Southern Insulation (Medway) Ltd* [2010] EWHC 1878 (TCC), [2010] B.L.R. 537 (noted in the Vol.I, para.1-195), though the earlier decision was not discussed by the CA.

[1372.](#)  [1995] 2 A.C. 145. See [2015] EWCA Civ 1146 at [69], [74], [80]–[83] (Floyd L.J.) and [155] (Roth J.). In this respect, the CA in *Wellesley Partners LLP* adopted a similar approach to Akenhead J. in *How Engineering Services Ltd v Southern Insulation (Medway) Ltd* [2010] EWHC 1878 (TCC), [2010] B.L.R. 537 (noted in the Vol.I, para.1-195), though the earlier decision was not discussed.


[1373.](#)  [2015] EWCA Civ 1146 at [81]–[89] (Floyd L.J.); [179] (Roth L.J.) and [188] (Longmore L.J.).











[1374.](#)  [2014] EWCA Civ 1512 and see Vol.I, para.1-195.

[1375.](#)  In *Yapp* the CA held that the claimant's depressive illness was not reasonably foreseeable under the *tort* test (seen as more favourable to the claimant), and therefore was also too remote in his claim for breach of contract: [2014] EWCA Civ 1512 at [121]–[124], [133]. In *Wellesley Partners LLP* the partnerships losses were held not too remote under the contract test thereby leading to the CA affirming the result at trial which had held them not too remote under the tort test: [2015] EWCA Civ 1146 at [81] (Floyd L.J.); [179] (Roth L.J.) and [188] (Longmore L.J.).

[1376.](#)  [2014] EWCA Civ 1512 at [60] and [67].





[1377.](#)  [2014] EWCA Civ 1512 at [119].

[1378.](#)  [2014] EWCA Civ 1512 at [42]–[43]. The CA also referred to breach of the implied term of mutual trust and confidence, but this was not seen as paralleled with any breach of duty at common law.

- [1379.](#)  [2015] EWCA Civ 1146 at [80] and [151].
- [1380.](#)  [1978] Q.B. 791 at 802–804 noted in Vol.I, para.1-195 n.1265.
- [1381.](#)  [2015] EWCA Civ 1146 at [68].
- [1382.](#)  cf. the discussion in Main Work, Vol.I, paras 1-188—1-190 on the question whether one party to a contract can be held to have “assumed responsibility” to the other contracting party under the *Hedley Byrne* principle even where the contract contained no express or implied term as to the claimed subject-matter of such an assumption of responsibility. See also Vol.I, paras 1-169—1-172 on assumption of responsibility under *Hedley Byrne* more generally.
- [1383.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015) para.20–112 and see similarly McGregor on Damages 19th edn (2014) para.22–009.
- [1384.](#)  [2016] EWCA Civ 1308, [2017] P.N.L.R. 16.
- [1385.](#)  [2016] EWCA Civ 1308 at [60] per Jackson L.J. (with whom Patten L.J. agreed).
- [1386.](#)  [2014] EWCA Civ 1512, [2015] I.R.L.R. 112 and see Main Work, Vol.I, para.1-196.
- [1387.](#)  [2016] EWCA Civ 1308 at [65] and [66]. The CA further held that this loss was outside the scope of the solicitor’s duty to advise about the possibility of including an exclusive jurisdiction clause: at [73]–[74]. On the importance of scope of duty in relation to a solicitor’s liability for negligence see *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2017] 2 W.L.R. 1029.
- [1388.](#)  [2016] EWCA Civ 1308 at [63] per Jackson L.J.
- [1389.](#) *The Wagon Mound (No.1)* [1961] A.C. 388.
- [1390.](#) *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158.
- [1391.](#) *Royscott Trust Ltd v Rogerson* [1991] 2 Q.B. 297; and see below, paras 7-077—7-078.
- [1392.](#) See above, para.1-161.
- [1393.](#) *Royscott Trust Ltd v Rogerson* [1991] 2 Q.B. 297 at 307, per Balcombe L.J.
- [1394.](#) Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) (as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.27J(4) on which see Vol.II, para.38-185.
- [1395.](#) [1989] A.C. 852, 858.
- [1396.](#) [1978] Q.B. 791.
- [1397.](#) And see *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560; *Youell v Bland Welch & Co Ltd* (No.2) [1990] 2 Lloyd’s Rep. 431; *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214; *Barclays Bank Plc v Fairclough Building Ltd* (No.2) [1995] I.R.L.R. 605; *UCB Bank Plc v Hephherd Winstandley & Pugh* [1999] Lloyd’s Rep. P.N. 963; *Trebor Bassett Holdings Ltd v ADT Fire and Security Plc* [2012] EWCA Civ 1158, [2012] B.L.R. 441 and see below, para.26-077.
- [1398.](#) *Barclays Bank Plc v Fairclough Building Ltd* (No.2) [1995] I.R.L.R. 605, above, para.1-172.
- [1399.](#) In particular, in principle, accrual of actions for breach of contract occurs on breach, whereas

accrual for actions in tort occurs when the damage is suffered. The latter rule has caused not inconsiderable difficulty in cases for negligently caused economic loss: see *D.W. Moore & Co Ltd v Ferrier* [1988] 1 W.L.R. 267, 279–280; *Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham Ltd* [1990] 1 All E.R. 808; *Bell v Peter Browne & Co* [1990] 2 Q.B. 495; *F.G. Whitley & Sons & Co Ltd v Thomas Bickerton* (1993) 07 E.G. 100; *Knapp v Ecclesiastical Insurance Group* [1997] All E.R. (D) 44 (Oct); *McCarroll v Statham Gill Davies* [2003] EWCA Civ 425, [2003] P.N.L.R. 25; *Watkins v Jones Maidment Wilson* [2008] EWCA Civ 134, 118 Con. L.R. 1; *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2009] Bus. L.R. 42; *Axa Insurance Ltd v Akther & Darby Solicitors* [2009] EWCA Civ 1166, [2010] 1 W.L.R. 1662; and *Pegasus Management Holdings SCA v Ernst & Young* [2010] EWCA Civ 181, [2010] 3 All E.R. 297. cf. *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 W.L.R. 1627; *Law Society v Sephton & Co* [2006] 2 A.C. 543. The general approach of the English courts has not been followed by the H.C. Aus.: *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 and see above, para.1-152.

- [1400.](#) [1995] 2 A.C. 145. In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch. 384, it was held that a claim in tort could exist even if the claim in contract was statute-barred, though the contract claim still existed on the facts. In *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1, a case in which the plaintiff's claim in contract was statute-barred, the House of Lords had to decide when a claim in tort accrued, on the plaintiff's suffering of the damage or on its discovery: [1983] 2 A.C. 1 at 12. This discussion would have been pointless if the expiry of the contractual limitation period had been thought to have prevented any concurrent claim in tort even if the latter's limitation period had not expired.
- [1401.](#) *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1 at 19 and see above para.1-152.
- [1402.](#) i.e. apart from the question whether the claim is statute-barred.
- [1403.](#) See *D.W. Moore & Co Ltd v Ferrier* [1988] 1 W.L.R. 267, 280; *Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham Ltd* [1990] 1 All E.R. 808, 820–821; *Bell v Peter Browne & Co* [1990] 2 Q.B. 495, 501-504; *Lee v Thompson* [1989] 40 E.G. 89; *Havenledge Ltd v Graeme John & Partners* [2001] Lloyd's Rep. P.N. 223 at [35] et seq. cf. *Forster v Outred & Co* [1982] 1 W.L.R. 86; *F.G. Whitley & Sons Co Ltd v Thomas Bickerton* (1993) 07 E.G. 100 at 108 and see Cane above, n.1241, at pp.134–136.
- [1404.](#) Limitation Act 1980 s.14A; *Iron Trades Mutual Insurance Co Ltd v J.K. Buckenham* [1990] 1 All E.R. 808, see above, para.1-152.
- [1405.](#) *Matthews v Kuwait Bechtel Corp* [1959] 2 Q.B. 57; *Coupland v Arabian Gulf Oil Co* [1983] 1 W.L.R. 1136 and see Dicey and Morris on The Conflict of Laws, 11th edn (1987), Vol.1, pp.328, 329, 345.
- [1406.](#) [2014] O.J. L351/1 arts 7(1) and 7(2) (in force on January 10, 2015) replacing Regulation 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels I Regulation") arts 5(1) and 5(3), which itself replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. For the law under the Brussels I Regulation see Dicey, Morris and Collins on The Conflict of Laws, 15th edn (2014), Ch.11.
- [1407.](#) *Kalfelis v Schröder* (189/87) [1988] E.C.R. 5565, 5577 (A.G. Darmon), 5585 and see Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 11-284, 11-299.
- [1408.](#) Case 814/79 *Netherlands State v Rüffer* [1980] E.C.R. 3807, 3832-3833, 3836; *Kalfelis v Schröder* (C-189/87) [1998] E.C.R. 5565; *Jakob Handte & Co GmbH v Société Traitements Mécanochimiques des Surfaces (TMCS)* (C-26/91) [1993] I.L.Pr. 5; *eDate Advertising and Martinez* (C-161/10) October 25, 2011 at para.38; *ÖFAB, Östergötlands Fastigheter AB v Koot* (C-147/12) July 18, 2013 at para.27 and see Dicey and Morris and Collins, 15th edn (2014), paras 11-268—11-272, 11-285.
- [1409.](#) [1998] Q.B. 54.

- [1410.](#) *Kalfelis v Schröder (189/87) [1988] E.C.R. 5565*. The equivalent provision of art.5(1) in the Brussels Convention is art.7(1) of the Brussels Ibis Regulation.
- [1411.](#) *[1988] E.C.R. 5565* at [5585] and see *ÖFAB, Östergötlands Fastigheter AB v Koot (C-147/12) July 18, 2013* at para.32.
- [1412.](#) *[1998] Q.B. 54, 63*.
- [1413.](#) The decision of the Court of Appeal in *Source Ltd v TUV Rheinland Holding A.G. [1998] Q.B. 54* was held to represent the law by Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), para.11-299 (the point is not addressed in the 15th edn) but its authority was doubted by Tuckey J. in *Raiffeisen Zentralbank Österreich Aktiengesellschaft v National Bank of Greece SA [1999] 1 Lloyd's Rep. 408, 411* on the basis that its wide approach to art.5(1) is inconsistent with the restrictive approach taken by the HL in *Kleinwort Benson Ltd v Glasgow City Council [1999] 1 A.C. 153*. See also *Domicrest Ltd v Swiss Bank Corp [1999] Q.B. 548, 561*; *William Grant & Sons International Ltd v Marie Brizard Espana Sa [1998] S.C. 536*.
- [1414.](#)  *C-189/87 [1988] E.C.R. 5565* at para.17.
- [1415.](#)  *Brogstetter v Fabrication de Montres Normandes EURL (C-548/12) March 13, 2014* at para.20; *ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14) January 21, 2016* paras 43–45; *Kolassa v Barclays Bank Plc (C-375/13) January 28, 2015* at para.44; *Granarolo SpA v Ambrosi Emmi France SA (C-196/15) July 14, 2016* at para.20.
- [1416.](#)  *Granarolo SpA v Ambrosi Emmi France SA (C-196/15) July 14, 2016* at para.28.
- [1417.](#) Introduced into English law by the Contracts (Applicable Law) Act 1990 and see generally, below, paras 30-017 et seq.
- [1418.](#) *Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157* especially at [33] and see below, para.30-031.
- [1419.](#) Regulation 864/2007 [2007] O.J. L199/40 and see Dicey, Morris and Collins on the Conflict of Laws 15th edn (2014), Ch.35.
- [1420.](#) [2008] O.J. L177/6. On which see below, paras 30-129 et seq. and Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2014) paras 32-011 et seq.
- [1421.](#)  *ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14) January 21, 2016* paras 43–45; *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15) July 28, 2016* paras 36–53 and 58. See also *Committeri v Club Mediterranee SA [2016] EWHC 1510 (QB)* at [49]–[53]. Below, para.30-150.

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Introduction

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One of the most basic characteristics of liability in tort is that it can exist in the absence of any contractual relationship existing between the parties: there is in general no need for any voluntary element on the part of someone on whom duties or liabilities in tort are imposed. ¹⁴²² However, a contract may affect liabilities in tort beyond its parties either positively or negatively. Positively, in certain circumstances someone not party to a contract, C, may be liable in tort for behaviour which induces breach of B's contract with A (the tort of inducing breach of contract) ¹⁴²³ and, secondly, A may be liable to C for threatening B that he will break his contract with B (so-called "three-party" intimidation). ¹⁴²⁴ A contract may have a negative effect on torts involving third parties in two ways. First, in certain circumstances the fact that A and B are parties to a contract has sometimes been seen as a reason for refusing to impose or for modifying any liability in tort in A to C. This idea, long derided as the "privity of contract fallacy", enjoyed during the later 1980s and early 1990s a resurgence of judicial popularity in the context of liability for pure economic loss in the tort of negligence, and to a much lesser extent, in the context of liability in the same tort for damage to property. ¹⁴²⁵ However, since 1994 the courts have taken rather different approaches to these questions, in general corraling liability in negligence for pure economic loss within the doctrine of "assumption of responsibility" and treating the disruption of contractual arrangements as a possible reason of policy for refusing to accept a novel duty of care. Secondly, the existence of a contract between A and B may be a reason for refusing to impose liability on C to either A or B, depending on the terms of the contract between A and B. This issue arises clearly in the context of the question whether A and B can by contract ensure that a third party, C, enjoys the benefit of an exemption clause so as to be protected from liability to A or B, whether or not C is in privity of contract with that person. These situations will be examined in turn.

The tort of inducing breach of contract

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It was clearly established by *Lumley v Gye* ¹⁴²⁶ in 1853 that if A intentionally induces B to break her contract with C, ¹⁴²⁷ then A can be liable in damages for any harmful consequences that this causes C ¹⁴²⁸ or restrained by injunction from continuing to prejudice C's contractual rights in this way. ¹⁴²⁹ The courts accept that in this way C may be able to recover more damages against A than he would be able to against B, this being seen as a reason for imposing the liability in tort, rather than for denying it. ¹⁴³⁰ While at one time this liability in tort was held to extend to cases where A's interference with C's rights does not constitute a breach of contract by reason, for example, of the presence of a force majeure clause, the House of Lords has since held that it may not arise in the absence of a breach of contract: the tort liability is accessory to the breach of contract. ¹⁴³¹ Moreover, liability under this tort does not extend to interference with remedies arising out of a broken contract. Thus, where A has received shares from B in breach of B's contractual obligations to C, while A may be ordered to

retransfer the shares to B and may be restrained by injunction from retransferring them to D, it is no tort in A to retransfer them nor in D to receive them.¹⁴³²

The tort of causing loss by unlawful means: “three-party intimidation”

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The tort of causing loss by unlawful means is committed, inter alia,¹⁴³³ where A threatens B that he will commit an act, or use means, unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage to C, an instance of tortious liability often called “three-party intimidation”.¹⁴³⁴ In *Rookes v Barnard*,¹⁴³⁵ the House of Lords recognised the existence of this liability in tort and further held that a threatened breach of contract by A can constitute unlawful means for this purpose.¹⁴³⁶ In the Court of Appeal the view had been expressed that to extend the tort to threats of breach of contract “would overturn or outflank some elementary principles of contract law”,¹⁴³⁷ notably, privity of contract.¹⁴³⁸ However, for the House of Lords the two causes of action (for breach of contract and for the “tort of intimidation”) were “quite independent”,¹⁴³⁹ “the vice of [C’s] argument is the threat to break and not the breach itself”.¹⁴⁴⁰ Thus, it is the independence of liability in tort which allows its extension into what had previously been an exclusively contractual domain.¹⁴⁴¹

A contractor’s liability beyond privity and independent torts

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At common law, in principle privity of contract prevents any breach by A of a term of a contract made with B from giving rise to any contractual liability in A to C, a third party to the contract. This position has been qualified significantly by the Contract (Rights of Third Parties) Act 1999, which allows parties to a contract to create rights in third parties (not being party to the contract) in certain circumstances.¹⁴⁴² But can C sue A in tort instead? First, it is clear that the mere breach of a contract by A does not in itself give rise to liability in tort to C. As Pollock stated in 1887¹⁴⁴³:

“... there is a certain tendency to hold that facts which constitute a contract cannot have any other legal effect. We think we have shown that such is not really the law ... the authorities commonly relied on for this proposition¹⁴⁴⁴ really prove something different and much more rational, namely that if A breaks his contract with B ... that is not of itself sufficient to make A liable to C, a stranger to the contract, for consequential damage.”

Secondly, therefore, where the facts which constitute a breach of contract in A to B also constitute the grounds of an *independent* liability in tort in A to C, the existence of that contract does not in itself prevent liability in A to C.¹⁴⁴⁵ Thus, as has been seen, where A *threatens* to break his contract with B, this may give rise to an action in C in the tort of causing loss by unlawful means¹⁴⁴⁶ and this tort may also apply to cases of actual as opposed to threatened breach of contract.¹⁴⁴⁷ Similarly, where a tenant, A, commits an act which constitutes a breach of the terms of his lease with his landlord, B, this does not prevent his neighbour, C, from suing A in private nuisance for any harm which he suffers as a result as long as the conditions for the existence of that tort are fulfilled.¹⁴⁴⁸

“If it is the tenant who has undertaken the repair [sc. of the premises], of course he is liable, but his liability is based on the fact that he is the occupier of the premises; any additional obligation which he may have undertaken by contract with the landlord cannot affect his liability in tort to third parties.”¹⁴⁴⁹

On the other hand, where the landlord has undertaken to the tenant to repair, he can be liable in nuisance to a third party based on the control which this gives him despite not being an occupier¹⁴⁵⁰ in addition to his liability to the tenant.¹⁴⁵¹ Finally, where an agent publishes defamatory material

concerning the claimant, the fact that this publication also constitutes a breach of his contract actionable at the suit of his principal ¹⁴⁵² does not prevent the claimant from suing the agent in the tort of defamation. ¹⁴⁵³

Privity of contract and the tort of negligence ¹⁴⁵⁴

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At two stages in the development of the tort of negligence, it has been argued that A's breach of contract to B should not be considered capable of giving rise to liability in this tort for harm caused to C. The leading nineteenth-century authority was *Winterbottom v Wright*, ¹⁴⁵⁵ in which the plaintiff was employed to drive a mail-coach by one Atkinson, who had been engaged to carry mail by the Postmaster-General. The latter had hired a coach from the defendant, who had undertaken to him that it would be kept in a fit, proper, safe and secure state. The plaintiff's claim for damages in respect of injuries suffered when the coach broke down on a journey owing to its dangerous state was rejected by the court, which accepted the defendant's contention that:

"... wherever a wrong arises merely out of the breach of a contract ... whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue." ¹⁴⁵⁶

However, this approach ¹⁴⁵⁷ was of course rejected by the House of Lords in *Donoghue v Stevenson*. ¹⁴⁵⁸ As Lord Macmillan put it:

"... there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort." ¹⁴⁵⁹

The approach in *Winterbottom v Wright* ¹⁴⁶⁰ came to be derided as the "privity of contract fallacy". ¹⁴⁶¹

Liability for pure economic loss

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While the courts were still willing to extend liability in the tort of negligence, the "contractual environment" of a claim in the tort of negligence was even considered a ground for the imposition of a duty of care, rather than a reason for rejecting one. Thus, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ¹⁴⁶² one of the circumstances on which the House of Lords relied for finding the existence of a "special relationship" so as to give rise to liability for pure economic loss caused by a negligent misstatement was that the relationship of the parties was "equivalent to contract". ¹⁴⁶³ While Lord Devlin considered that the reason that the plaintiff's claim could not be considered contractual was the absence of consideration for the defendants' undertaking, ¹⁴⁶⁴ on the facts there was also no obvious privity between the parties. ¹⁴⁶⁵

The Junior Books case

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The courts' recognition of liability for negligently caused pure economic loss was taken one stage further in 1982 by the decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd*, ¹⁴⁶⁶ where it held that a specialist flooring sub-contractor who had built a defective but not dangerous floor could owe a duty of care to the owner of the building who had to replace it as a result. ¹⁴⁶⁷ Clearly, there was no privity of contract between the parties, but the majority of their Lordships found that there was a "special relationship" between them, which again rested on a variety of factors, of which one was the

fact that it fell “only just short of a direct contractual relationship”.¹⁴⁶⁸ At the time of its decision, *Junior Books* appeared to mark a radical departure, for it allowed recovery of pure economic loss beyond privity of contract other than where it was consequential on the defendant’s negligent misstatement. However, the fate of *Junior Books* was not a happy one, its approach to liability for pure economic loss not being followed by subsequent courts.¹⁴⁶⁹ While the courts gave many reasons in the many cases in which recovery for pure economic loss in the tort of negligence has been denied,¹⁴⁷⁰ in some cases the presence of a contract or contracts has proven particularly important. In *Junior Books* itself, Lord Roskill noted that any exclusion clause in the main contract¹⁴⁷¹ may exclude or modify the liability in the sub-contractor directly to the building owner,¹⁴⁷² and Lord Fraser of Tullybelton considered that the terms of the subcontract may have a similar effect.¹⁴⁷³ However, later courts considered the *possibility* that the imposition of a duty of care will upset contractual standards or allocations of risk as itself a reason for refusing to impose one, thereby preferring Lord Brandon’s approach in his dissenting speech in *Junior Books*.¹⁴⁷⁴

“Contractual structure” and liability in tort

1-208

Thus, the existence of a “contractual structure” of which the parties to the litigation are members but according to which they are not in privity of contract was relied on as a reason for refusing to impose liability for economic loss in the tort of negligence. For example, in *Balsamo v Medici*¹⁴⁷⁵ Walton J. refused to allow a claim in the tort of negligence by a principal against an unauthorised sub-agent on the ground that otherwise the *Anns* principle¹⁴⁷⁶ of the tort of negligence “will come perilously close to abrogating completely the concept of privity of contract”.¹⁴⁷⁷ In 1987 in *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)*,¹⁴⁷⁸ there was a chain of contracts, consisting of a building owner (A), a main building contractor (B), a sub-contractor (C) and a manufacturer of glass which had been incorporated into a building (D). The glass had failed to come up to specification and B, who had settled with A, claimed damages in the tort of negligence against D for the economic loss which it had thereby been caused. The Court of Appeal rejected this claim. According to Bingham L.J.:

“Just as equity remedied the inadequacies of the common law, so has the law of torts filled gaps left by other causes of action where the interests of justice so required. I see no such gap here, because there is no reason why the claims beginning with [A] should not be pursued down the contractual chain.”¹⁴⁷⁹

Thus the courts treated the fact that A owes a duty under a contract to B to be an important factor in denying liability to C for negligently caused pure economic loss¹⁴⁸⁰ and considered that where B owes a contractual duty to C, there is no good reason for adding an additional duty of care in A for C’s benefit.¹⁴⁸¹

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Nevertheless, at least in some situations the existence of a contractual duty in A to B was not allowed to rule out the existence of a duty of care in respect of pure economic loss owed by A to C concerning the same issue. This was the position in the decision of the House of Lords in *Smith v Eric S. Bush*,¹⁴⁸² in which a valuer had been engaged by a mortgagee to report on a property of modest value to be bought by the plaintiff. The plaintiff bought the property in reliance on the report and suffered economic loss as a result. The House of Lords unanimously held that the valuer owed the plaintiff a duty of care in the circumstances, which included the fact that the valuer knew that the plaintiff would be told of their advice and that he would act in reliance on it. The House of Lords further held that a contractual disclaimer under which the valuer worked did not prevent the duty of care in tort from arising on the basis that it was incompatible with any “voluntary assumption of responsibility”, but was to be treated as an exemption clause and subjected to the reasonableness test imposed by the Unfair Contract Terms Act 1977.¹⁴⁸³ Moreover, Lord Griffiths disapproved the notion of “assumption of responsibility” as a test for the imposition of a duty of care in the tort of negligence, considering it “not a helpful or realistic test of liability”.¹⁴⁸⁴

Assumption of responsibility

1-210

However, since 1994 the House of Lords has taken a very different approach to the imposition of liability for pure economic loss in the tort of negligence and by so doing has allowed liability to be imposed on one party to a contract beyond privity. The basis on which it has tended to choose to rely for the imposition of liability has been an “assumption of responsibility” in the defendant to the claimant, this idea being drawn from the Lords’ earlier decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ¹⁴⁸⁵ but its application being extended beyond the context of negligent misstatement. ¹⁴⁸⁶ This “broad principle of *Hedley Byrne*” or of “assumption of responsibility” has already been seen in relation to liability in the tort of negligence between the parties to a contract, but now its impact beyond the parties will be assessed. In this respect, three cases are of particular importance. ¹⁴⁸⁷

Henderson v Merrett Syndicates Ltd

1-211

The first and most important is *Henderson v Merrett Syndicates Ltd*. ¹⁴⁸⁸ This case concerned claims in the tort of negligence by various underwriting members of Lloyd’s (“Names”) against the underwriting agents who had acted for them. In the case of the “indirect Names”, with whom we are now concerned, they had entered agreements with underwriting agents, known as “members’ agents”, who advised “Names”, inter alia, on their choice of syndicates and placed them on a syndicate once chosen, but who entrusted the placing of the insurance to others, “managing agents” for the syndicate which they had chosen. The claims of the “indirect Names” therefore bypassed two contracts: the first being the agency contract between themselves and the members’ agents and the second being the sub-agency contract between the members’ agents and the managing agents. Despite this, however, the House of Lords found no difficulty in finding a duty of care owed by the managing agents directly to the “indirect Names”. Lord Goff of Chieveley, who gave the leading speech and with whom Lords Keith of Kinkel, Browne-Wilkinson, Mustill and Nolan concurred, based this decision on a finding of an assumption of responsibility by the managing agents to the “indirect Names”, this being found in the managing agents’ agreement to undertake the commission for the indirect Names, coupled with the formers’ special skill. However, the wider significance of this decision was far from clear. Lord Goff:

“... strongly suspect[ed] that the situation ...[was] most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties.” ¹⁴⁸⁹

With respect, no very clear indication was given as to what was special about the facts of *Henderson* for this purpose: the managing agents had agreed to take on their commission and were aware of the position of their ultimate principals, but then so are many other sub-agents. Clearly, the context of the Lloyd’s insurance market may have played some part, but the precise nature of its role does not appear from the speeches. On the other hand, Lord Goff did see the case of a claim by a building owner against his sub-contractor in respect of a failure to conform to the required standard as an example of where “ordinarily” such an assumption of responsibility would be inconsistent with a contractual structure. ¹⁴⁹⁰ Clearly, then, it was not intended that any doubt should be thrown on the decision of the House in *Murphy v Brentwood DC*. ¹⁴⁹¹

White v Jones

1-212

The second important decision is *White v Jones*, ¹⁴⁹² in which a majority of the House of Lords held

that a solicitor who had negligently failed to execute a testament before the decease of the testator owed a duty of care in the tort of negligence to the would-be legatee under that testament. The House of Lords considered whether the legatee should be able to sue in contract, rather than in tort, the contract in question being between the testator and the defendant solicitor. While Lord Goff of Chieveley considered this attractive, he thought that it “would be open to criticism as an illegitimate circumvention of [the] longestablished doctrines” of privity and consideration.¹⁴⁹³ Instead, he preferred to hold the defendant liable in tort on the basis that his “assumption of responsibility ... should be held in law to extend” to the plaintiff, though the contract between the testator and the solicitor remained significant in that its terms set the content of the duty of care in tort.¹⁴⁹⁴ Lord Nolan also relied on the defendant’s “assumption of responsibility”, though apparently seeing this as real rather than (as with Lord Goff) deemed.¹⁴⁹⁵ Lord Browne-Wilkinson preferred to consider the facts before him as justifying the imposition of a duty of care as a matter of “justice and reasonableness” as an “extension of the principle of assumption of responsibility”.¹⁴⁹⁶ By contrast, Lords Mustill and Keith of Kinkel dissented, finding no special reason why a special exception should be made in the circumstances, the latter expressing the view that the principle of privity of contract should not be circumvented by extending the law of tort.¹⁴⁹⁷ This decision of the majority is clearly a remarkable example of the willingness of our judges to find legal justifications for the imposition of a duty where they find it necessary in the interests of justice and, as both their own and the minority’s speeches make clear, despite established principle, whether tortious or contractual. However, the speeches of their lordships in the case itself and subsequent judicial discussions of it have made clear that the situation in *White v Jones* was exceptional¹⁴⁹⁸ and the decision has not been as influential on subsequent judicial developments as has *Henderson v Merrett Syndicates Ltd*.¹⁴⁹⁹

Williams v Natural Life Health Foods Ltd and Mistlin

1-213

The importance of *Henderson v Merrett Syndicates Ltd*, and more particularly, the significance of Lord Goff’s exposition there of the principle of “assumption of responsibility” can be seen in the decision of the House of Lords in 1998 in *Williams v Natural Life Health Foods Ltd and Mistlin*.¹⁵⁰⁰ In that case, the second defendant, M, who had worked in the health food trade for several years, formed a company, the first defendant, to franchise the concept of health food shops. M was the company’s managing director and principal shareholder, having only two employees. The plaintiffs approached the company with the view to acquiring a franchise, dealing with one of the employees, but also relying on a brochure produced by the company which advertised M’s experience in the trade. The plaintiffs entered a franchise agreement with the company, but the turnover of the shop was substantially less than predicted by the company and they traded for only 18 months and at a loss. The question before the House of Lords was whether M owed the plaintiffs a duty of care so as to allow him to be liable personally in damages for the loss caused by their entering the contract of franchise. According to Lord Steyn, who gave judgment on behalf of the House, the governing principles for the case were to be found in the “extended *Hedley Byrne* principle” to be found in Lord Goff’s speech in *Henderson v Merrett Syndicates Ltd*, which Lord Steyn saw as a:

“... rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services.”¹⁵⁰¹

He noted that the test of “assumption of responsibility” is an objective one and this means that the primary focus of the courts should be on what was said or done by the defendant or on his behalf in dealings with the plaintiff. This meant that the question for the House was:

“... whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees.”¹⁵⁰²

However, applying this principle to the facts, Lord Steyn held that there was not enough to show a

personal assumption of responsibility in M to the plaintiffs: while the brochure produced by the company made clear that its expertise came from M's experience, in the absence of more and in particular of personal dealings with the plaintiffs, no duty of care arose. ¹⁵⁰³

1-214

Lord Steyn in *Williams v Natural Life Health Foods Ltd and Mistlin* accepted the view expressed by Lord Goff in *Henderson* that once a court finds that a defendant has "accepted responsibility" towards the claimant in the relevant sense, there is no need to investigate whether it is "just, fair and reasonable" to impose liability for pure economic loss. ¹⁵⁰⁴ This aspect of Lord Goff's views has already been discussed, ¹⁵⁰⁵ but here a striking contrast can be noted with Lord Steyn's own approach to the imposition of a duty of care *not* based on an "assumption of responsibility" taken earlier in *Marc Rich & Co AG v Bishop Rock Marine Co.* ¹⁵⁰⁶ In the latter case, the plaintiffs were cargo owners whose property was lost when the vessel in which it was carried sank. They claimed damages against the shipowners on the basis that the sinking had been caused by the latter's failure to act with due diligence in relation to the seaworthiness of the vessel at the beginning of the voyage, but they also claimed damages from a classification society, one of whose surveyors had inspected the vessel during its voyage and had recommended that its voyage should continue. Lord Steyn, ¹⁵⁰⁷ considered that since *Dorset Yacht Co Ltd v Home Office* ¹⁵⁰⁸ it had been settled law that considerations of fairness, justice and reasonableness as well as the elements of foreseeability and proximity are relevant to the imposition of a duty of care in the tort of negligence, whatever the nature of the harm sustained by the plaintiff and, therefore, including the situation where the plaintiff has sustained damage to property. ¹⁵⁰⁹ On the facts before the House in *Marc Rich*, Lord Steyn considered that the property damage suffered by the cargo owners was only indirect as it was the shipowners rather than the classification society which were primary responsible for the vessel's sailing in an seaworthy condition nor was there any direct contact between the plaintiffs and the classification society and therefore no element of reliance so as to give rise to an assumption of responsibility in the sense explained by Lord Goff in *Henderson v Merrett Syndicates Ltd.* ¹⁵¹⁰ Even so, Lord Steyn was prepared to assume that there was sufficient proximity between the cargo owners and the classification society, but considered that it was not "fair, just and reasonable" to impose a duty of care. First, such a duty would outflank the bargain between the shipowners and the cargo-owners. He stated:

"The dealings between shipowners and cargo owners are based on a contractual structure, the Hague Rules, and tonnage limitation on which the insurance of international trade depends ... Underlying it is the system of double or overlapping insurance of the cargo. Shipowners take out liability risks insurance in respect of breaches of their duties of care in respect of the cargo. The insurance system is structured on the basis that the potential liability of shipowners to cargo owners is limited under the Hague Rules and by virtue of tonnage limitation provisions. And insurance premiums payable by owners obviously reflect such limitations on the shipowners' exposure." ¹⁵¹¹

While Lord Steyn found various other policy factors which argued against imposing a duty of care, including the non-profit-making nature of the defendant, the scale of the classification society's potential liability and the added complication to the settlement of proceedings concerning lost or damaged cargo of such societies' involvement, clearly the limited nature of the rights of A (the cargo owners) under a contract with B (the shipowners) was significant in the House of Lords' decision not to impose a duty of care in the tort of negligence on C to A, even in respect of damage to property. ¹⁵¹²

Subsequent cases

1-215

⚠ There have been many subsequent cases determining whether or not liability based (in part) on an assumption of responsibility may establish liability in the tort of negligence beyond privity of contract.

¹⁵¹³ ⚠ Of these, *Briscoe v Lubrizol* ¹⁵¹⁴ is a good example of the way in which the contractual

structure of the parties' relations may still argue for the rejection of an "assumption of responsibility" in the tort of negligence. In that case, under the terms of a contract of employment, L, the employer, undertook to B, their employee, to arrange a disability insurance scheme, subject to "acceptance by insurers". B was registered under the scheme, and later became incapable of work, but L's claim in respect of B's disability was rejected by their insurer, P. B then claimed, inter alia, damages in the tort of negligence against P on the basis that they were negligent in rejection of the claim (it being accepted that there was no privity of contract between these parties). The insurer's contention that this claim should be struck out was accepted both at first instance and by the Court of Appeal. Giving judgment, Roch L.J. denied the existence of a duty of care on the facts before him, by whichever legal approach this was canvassed, whether in terms of the three-fold test of foreseeability, proximity and "justice and reasonableness", an assumption of responsibility or taking an "incremental approach".¹⁵¹⁵ Roch L.J. agreed with the court below that the contractual provisions between the employer and insurer showed completely the reverse of any "assumption of responsibility": "[t]here was a very carefully structured contractual framework ...[which] imposed a curtain between the [employee] and the [insurer]".¹⁵¹⁶ While Roch L.J. accepted that:

"the existence of a contractual regime is not necessarily fatal to a claim such as the [employee's]; ... it is nevertheless a powerful indication against the existence of a duty."¹⁵¹⁷

The assumption of responsibility by the insurer was to the employer, not to the employees under the scheme: a finding of a duty of care would therefore (in the words of counsel for the insurer) "spell the end of the doctrine of privity of contract".¹⁵¹⁸ Nor did the Court of Appeal consider that recognition of a duty of care was required as a matter of justice and reasonableness or appropriate as an incremental development. Moreover, the more eclectic approach to deciding whether or not a duty of care should be imposed in the tort of negligence (especially as regards pure economic loss) seen in *Briscoe v Lubrizol*, and which looks in turn at "assumption of responsibility", the "three-fold test" in *Caparo Industries Plc v Dickman*¹⁵¹⁹ and the "incremental approach", was taken by the House of Lords in *Customs and Excise Commissioners v Barclays Bank Plc*¹⁵²⁰ though the third approach was seen as "of little value as a test in itself" and as "an important cross-check".¹⁵²¹ In that case, the House of Lords unanimously held that a third party (here, the bank) with notice of a "freezing order" (formerly known as a *Mareva* injunction) who nevertheless released the property subject to the order did not owe a duty of care to the person for whose benefit the order had been made (here, the Customs and Excise). While the grounds of the decisions of the five members of the House differed, the principal points can be summarised as follows. First, the involuntary nature of the position of the bank as recipient of the order was inconsistent with any assumption of responsibility, even if this were understood to mean the undertaking of a task for another person.¹⁵²² Secondly, the courts had developed a very powerful means for protecting those who fear that their legitimate claims are to be thwarted by disposal of available assets by the development of freezing orders and these are buttressed by the sanction of contempt of court. In this respect, a distinction is drawn between the strict liability of the person against whom an order has been made, and the requirement that a third party with notice of an order is liable for contempt only if he knowingly takes a step to frustrate the court's purpose. It would be inconsistent with this to impose the higher standard of reasonable care by means of a duty of care in tort.¹⁵²³ Thirdly, their Lordships were concerned with the practical effects of the imposition of liability in damages for negligence by third parties with notice of a freezing order. While it may appear reasonable in this respect to impose liability for negligence in a business such as a bank, the new duty of care would also apply to any non-business with notice of such an order which would be unreasonable.¹⁵²⁴ In *BSkyB Ltd v HP Enterprise Services UK Ltd*,¹⁵²⁵ the court determined the existence of a duty of care in the tort of negligence in respect of pure economic loss under the "three-fold test" in *Caparo Industries Plc v Dickman*,¹⁵²⁶ holding that where corporate parties to a wider group have between them chosen the parties with whom to have a contract, it would not be fair, just and reasonable to recognise the existence of a duty of care so that another member of the group can pursue a claim which circumvents these contractual arrangements.¹⁵²⁷ !

The effect of contractual terms on established torts beyond privity

1-216

In general, a term in a contract between A and B will not affect liability in A to C under an established tort since to allow it to do so would contravene the principle of privity of contract. ¹⁵²⁸ However, the courts have allowed exceptions to be developed to this general rule and these are particularly clear where the term in question expressly allocates the risk of some event, often by way of an exemption clause. Two situations ought to be distinguished.

Clauses in contract between tortfeasor and another

1-217

First, although in general A's contractual exclusion of liability to B will not affect A's liability to C, ¹⁵²⁹ it has been held to do so in certain circumstances. Thus, where a court relies on a defendant's "assumption of responsibility" for the imposition of a duty of care, any disclaimer of liability will apparently affect any third party who wishes to rely on breach of that duty, ¹⁵³⁰ though in the case of liability for negligent misstatements, it appears that such a clause will only be effective if notice of it has come to the third party. ¹⁵³¹ So too, where an owner of property entrusts it to a bailee and expressly or implicitly consents to the latter subcontracting work to a sub-bailee subject to certain exemption conditions, the owner will not be able to sue that sub-bailee in tort except subject to these conditions. ¹⁵³²

Clauses in contract between injured party and another

1-218

Secondly, if A contracts with B on terms that A will not be able to sue C, the courts found various ways to give effect to this agreement despite privity of contract, even before this was made overtly possible by the Contracts (Rights of Third Parties) Act 1999. ¹⁵³³ In *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)* ¹⁵³⁴ the Privy Council found that a stevedore engaged to unload goods by a carrier was protected from liability to their shipper in the tort of negligence for damage to the goods by a clause in the contract between the shipper and the carrier which was expressed to exempt the stevedore from liability and to be made by the carrier as his agent. Here, then, an exemption clause was given effect by the finding of a collateral contract between A and C, through the agency of B. However, on occasion the courts have instead refused to recognise the existence of a duty of care in the tort of negligence where to do so would disrupt the "contractual structure" in which the parties worked, not only in the context of pure economic loss, ¹⁵³⁵ but also in one of physical damage to the claimant's property. In *Norwich City Council v Harvey*, ¹⁵³⁶ the plaintiff owned a building, which it wished to have extended and it employed building contractors to do so on standard terms according to which the "existing structures" should be at its own risk as regards loss or damage by fire while the works were in progress and should be insured against these risks. The building contractors engaged sub-contractors to undertake the roofing of the extension on this basis and owing to the negligence of one of the latter's employees, a fire was started which spread to and damaged the plaintiff's existing building. The Court of Appeal rejected the plaintiff's claim for this damage to its property, refusing to recognise the existence of a duty of care in these circumstances. "On the basis of what is just and reasonable" ¹⁵³⁷ May L.J. did not think that:

"... the mere fact that there is no strict privity between the employer and the subcontractor should prevent the latter from relying on the clear basis on which all the parties contracted in relation to damage to the employer's building caused by fire, even when due to the negligence of the contractors or sub-contractors." ¹⁵³⁸

However, after the Contracts (Rights of Third Parties) Act 1999, parties to a contract may make provision for the protection from liability of third parties in tort, subject to that Act's requirements as to the necessary intention and more generally. ¹⁵³⁹


- [1422.](#) See above, para.1-147. cf. below, paras 1-210—1-215 on liability in the tort of negligence beyond privity on the basis of an “assumption of responsibility”.
- [1423.](#) See below, para.1-202.
- [1424.](#) See below, para.1-203. Contracts may have other consequences for the incidence of liability in tort. For example, where A has sold goods to B, who has resold them to C, the question whether the contract between A and B is void for mistake or merely voidable for fraud determines whether title to the property has passed to B and therefore whether C is liable to A in the tort of conversion: see *Ingram v Little* [1961] 1 Q.B. 31; *Lewis v Averay* [1973] 1 W.L.R. 510; *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919.
- [1425.](#) See below, paras 1-098, 1-208—1-209.
- [1426.](#) (1853) 2 E.B. 216.
- [1427.](#) A’s intention must be to induce such a breach and so a person who sets out to protect their own interests in the belief that they have a lawful right to do what they are doing does not have the requisite intention for these purposes: *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] 2 W.L.R. 904 at [124], [137], [174], [181]–[182].
- [1428.](#) As was the case in *Lumley v Gye* (1853) 2 E.B. 216 itself.
- [1429.](#) As was the case in *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch. 106 (although as explained in the text the extended view of the tort in this case will not be followed after *OGB Ltd v Allan*, *Douglas v Hello! Ltd*, *Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1).
- [1430.](#) *Lumley v Gye* (1853) 2 E.B. 216 at 234.
- [1431.](#) *OGB Ltd v Allan*, *Douglas v Hello! Ltd*, *Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 especially at [44] and [189] not following *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch. 106; *Merkur Island Shipping Corp v Laughton* [1983] 2 A.C. 570, 607-610.
- [1432.](#) *Law Debenture Trust Corp Plc v Ural Caspian Oil Corp Ltd* [1994] 3 W.L.R. 1221 especially at 1231-1232.
- [1433.](#) For “two-party” intimidation see above, para.1-174 and Clerk & Lindsell on Torts, 21st edn (2014) paras 24-59 et seq. especially at paras 24-69—24-70.
- [1434.](#) See, though, *OGB Ltd v Allan*, *Douglas v Hello! Ltd*, *Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 at [6]–[10] where the terminology of “tort of intimidation” was criticised.
- [1435.](#) [1964] A.C. 1129.
- [1436.](#) This position is consistent with the interpretation of “unlawful means” in *OGB Ltd v Allan*, *Douglas v Hello! Ltd*, *Mainstream Properties Ltd v Young* [2007] UKHL 21 at [49]–[51], [162], [266]–[270], [302], [320].
- [1437.](#) *Rookes v Barnard* [1963] 1 Q.B. 623, 695, per Pearson L.J.
- [1438.](#) *Rookes v Barnard* [1963] 1 Q.B. 623.
- [1439.](#) [1964] A.C. 1129, 1207, per Lord Devlin.
- [1440.](#) [1964] A.C. 1129, 1200–1201, per Lord Hodson and see also 1168, 1234-1235.
- [1441.](#) cf. *Wedderburn* (1964) 27 M.L.R. 257 at 263-267.

- [1442.](#) See below, paras 18-090 et seq.
- [1443.](#) Pollock, *The Law of Torts*, 1st edn (1887), pp.448-449.
- [1444.](#) Notably *Winterbottom v Wright* (1842) 10 M.W. 109 and see below, para.1-205.
- [1445.](#) Pollock at p.450.
- [1446.](#) See above, para.1-203.
- [1447.](#) cf. above, para.1-203. In either case, this tort is clearly restricted to situations where A has acted intentionally to injure C: *Rookes v Barnard* [1964] A.C. 1129, 1183; *OGB Ltd v Allan*, *Douglas v Hello! Ltd*, *Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 and see Clerk & Lindsell on Torts, 21st edn (2014) para.24-59.
- [1448.](#) Winfield and Jolowicz on Tort, 13th edn (1989), pp.404-405.
- [1449.](#) Winfield and Jolowicz at pp.404-405 and see *Russell v Shenton* (1842) 3 Q.B. 449, 457.
- [1450.](#) *Payne v Rogers* (1794) 2 H.Bl. 350, 351; *Wringe v Cohen* [1940] 1 K.B. 229.
- [1451.](#) *St. Anne's Well Brewery Co v Roberts* (1929) 140 L.T. 1, 8. cf. Defective Premises Act 1972 ss.1, 4; and see Spencer (1974) C.L.J. 307, (1975) C.L.J. 48 and *Andrews v Schooling* [1991] 1 W.L.R. 783.
- [1452.](#) It has been held to be a breach of contract for an agent to disclose a document which is libellous: *Weld-Blundell v Stephens* [1920] A.C. 956.
- [1453.](#) In *Weld-Blundell v Stephens* [1920] A.C. 956 the principal had been held liable in libel personally for publishing the defamatory statement, which had then been republished by the agent.
- [1454.](#) See also below, paras 18-024 et seq.
- [1455.](#) (1842) 10 M.W. 109.
- [1456.](#) (1842) 10 M.W. 109, 111, 114. See also *Tollit v Sherstone* (1839) 5 M.W. 283, 289 where Maule B. considered it: "[C]lear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action of tort arising out of a contract." Pollock, *Law of Torts*, p.449 supported the decision in *Winterbottom v Wright* (1842) 10 M.W. 109 on the ground that no bad faith or negligence in the defendant had been shown and cf. *Donoghue v Stevenson* [1932] A.C. 562, 589. cf. also Atiyah, *The Rise and Fall of Freedom of Contract* (1979), pp.501-505.
- [1457.](#) The approach was not universal: see *Payne v Rogers* (1794) 2 H.Bl. 350 (landlord liable to third party injured on highway owing to poor state of repair of premises as long as landlord had covenanted to repair) and *Gladwell v Steggall* (1839) 5 Bing. (N.C.) 733 (medical practitioner liable to patient where fees had been paid by patient's father).
- [1458.](#) [1932] A.C. 562. cf. the dissent of Lord Buckmaster on this ground at 568, 577-578 and see *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85, 101-102.
- [1459.](#) [1932] A.C. 562, 610.
- [1460.](#) (1842) 10 M.W. 109.
- [1461.](#) See *Greene v Chelsea BC* [1954] 2 Q.B. 127, 138 and as late as 1983, *Rimmer v Liverpool City Council* [1985] Q.B. 1, 11.
- [1462.](#) [1964] A.C. 465.

- [1463.](#) [1964] at 525-526, 529 and cf. at 538.
- [1464.](#) [1964] A.C. 465 at 529.
- [1465.](#) The statement in question had been made by A (the defendants) to B at the latter's request (who had in turn been asked to do so by C), A knowing that the statement would be passed on to B's customer, C (the plaintiff). In these circumstances, A could only be considered in privity with C if B were treated as C's agent for this purpose.
- [1466.](#) [1983] 1 A.C. 520 and see below, para.18-025.
- [1467.](#) As the case came to the House of Lords by way of a preliminary issue, it was not necessary to consider what damages would be recoverable nor whether the sub-contractor was negligent.
- [1468.](#) [1983] 1 A.C. 520, 533, per Lord Fraser of Tullybelton and cf. 542.
- [1469.](#) See *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210; *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785; *Candlewood Navigation Corp Ltd v Mitsui O.S.K. Lines Ltd* [1986] A.C. 1; *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507; *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177; *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758; *Yuen Kun Yeu v Att-Gen of Hong Kong* [1988] A.C. 175; *Business Computers International Ltd v Registrar of Companies and Alex Lawrie Factors* [1988] Ch. 229; *Pacific Associates v Baxter* [1990] 1 Q.B. 993; *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch. 12; *Murphy v Brentwood DC* [1991] 1 A.C. 398; *Department of Environment v Thomas Bates & Son Ltd* [1991] 1 A.C. 499; *Punjab National Bank v De Boinville* [1992] 3 All E.R. 104; *Saipem SpA v Dredging VO2 BV* [1993] 2 Lloyd's Rep. 315.
- [1470.](#) See Stapleton (1991) 107 L.Q.R. 249.
- [1471.](#) The relevant terms of neither this contract nor the subcontract were presented to the House of Lords: [1983] 1 A.C. 520, 538.
- [1472.](#) [1983] 1 A.C. 520 at 546.
- [1473.](#) [1983] 1 A.C. 520 at 533-534.
- [1474.](#) [1983] A.C. 520, 550–552 and see *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] Q.B. 71, 96 where Purchas L.J. noted that Lord Brandon's speech had subsequently achieved greater significance. This approach avoids the difficult question whether *liability* arising on breach of a recognised duty of care in respect of pure economic loss may be modified or excluded by either: (i) an exemption clause in A's contract with B restricting A's liability to C (*Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758, 782-783; 785-786); or (ii) an exemption clause in A's contract with B which attempts to exclude C's liability to A (*Southern Water Authority v Carey* [1985] 2 All E.R. 1077, 1093-1094) and see below, paras 1-217—1-218.
- [1475.](#) [1984] 1 W.L.R. 951 and see Whittaker (1985) 48 M.L.R. 86.
- [1476.](#) This is to be found in Lord Wilberforce's speech in *Anns v Merton London BC* [1978] A.C. 728, 751-752. This principle itself has been subject to considerable judicial reservation: see *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210 at 240–241; *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 618.
- [1477.](#) [1984] 1 W.L.R. 951, 959-960.
- [1478.](#) [1988] Q.B. 758. cf. *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507.
- [1479.](#) [1988] Q.B. 758, 782 and cf. *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] Q.B. 7, 99 and *Pacific Associates v Baxter* [1990] 1 Q.B. 993.

- [1480.](#) *Pacific Associates v Baxter* [1990] 1 Q.B. 993 at 1023. And see *Macmillan v AW Knott Becker Scott* [1990] 1 Lloyd's Rep. 98 at 110–111; *Parker-Tweedale v Dunbar Bank Plc (No.1)* [1991] Ch. 12 (no duty of care in tort owed by mortgagor to beneficiary under trust of property subject to mortgage); *Verderame v Commercial Union Assurance Co Plc*, *The Times*, April 2, 1992 (no duty of care owed by insurance brokers employed by a company to the directors of that company); *Hemmens v Wilson Browne* [1994] 2 W.L.R. 323, 334–335 (no duty of care owed by solicitor to beneficiary of ineffective inter vivos transaction where the situation was not irremediable).
- [1481.](#) *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560, 570–571, in which the court held that there is in normal conveyancing transactions no duty of care in the solicitor of a vendor of land to the buyer in respect of misstatements. On the facts, the court accepted that the duty owed by A, the vendor, to B, the buyer could be put equally in terms of contract or the tort of negligence: at 569, relying on *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801.
- [1482.](#) Joined with the decision in *Harris v Wyre Forest DC* [1990] 1 A.C. 831. cf. *Preston v Torfaen BC* [1993] N.P.C. 111; *Scullion v Bank of Scotland* [2011] EWCA Civ 693, [2011] 1 W.L.R. 3212 .
- [1483.](#) s.2(2) on which see below, paras 15-081 and 15-096 et seq.
- [1484.](#) [1990] 1 A.C. 831 at 862. cf. at 846, per Lord Templeman.
- [1485.](#) [1964] A.C. 465.
- [1486.](#) Some courts have chosen rather to treat the various approaches to the imposition of a duty of care as alternative routes, to be tried in turn in relation to the facts before them: see *Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse* [1998] P.N.L.R. 564, 583–586, per Sir Brian Neill; *Briscoe v Lubrizol* [2000] P.I.Q.R. P39. Moreover, where the defendant's liability arises in respect of a negligent misstatement (as in the case of a surveyor's certification of property), the Court of Appeal has held that no distinct duty of care based on any assumption of responsibility should be held to have existed in respect of the work of inspection preparatory to making the statement: *Hunt v Optima (Cambridge) Ltd* [2014] EWCA Civ 714, [2015] 1 W.L.R. 1346 at [90]–[92], [107]–[119] (distinguishing the contractual duty owed by the surveyor to the builder).
- [1487.](#) The doctrine of “assumption of responsibility” had been relied on by Lord Goff in *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 324 but it had not been argued before the House and his fellow judges chose to rely on other grounds for their decisions. For cases discussing “assumption of responsibility” between parties to a contract, see above, paras 1-166 et seq.
- [1488.](#) [1995] 2 A.C. 145 and see Whittaker (1996) 16 O.J.L.S. 191, especially 204–205, 219 et seq.
- [1489.](#) [1995] 2 A.C. 145 at 195.
- [1490.](#) [1995] 2 A.C. 145 at 196.
- [1491.](#) [1991] 1 A.C. 398.
- [1492.](#) [1995] 2 A.C. 207. For subsequent “disappointed beneficiary cases” see *Martin v Triggs Turner Burtons* [2009] EWHC 1920 (Ch), [2010] P.N.L.R. 3; cf. *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183 at [48] and [49].
- [1493.](#) [1995] 2 A.C. 207 at 266.
- [1494.](#) [1995] 2 A.C. 207 at 268.
- [1495.](#) [1995] 2 A.C. 207 at 294.
- [1496.](#) [1995] 2 A.C. 207 at 270, 275–276.

- [1497.](#) [1995] 2 A.C. 207 at 251.
- [1498.](#) See, notably, *Williams v Natural Life Health Foods Ltd and Mistlin* [1998] 1 W.L.R. 830, 837, per Lord Steyn.
- [1499.](#) cf. the approach of the High Court of Australia in *R.F. Hill & Associates v Van Erp* [1997] 14 A.L.R. 687.
- [1500.](#) [1998] 1 W.L.R. 830.
- [1501.](#) [1998] 1 W.L.R. 830 at 834.
- [1502.](#) [1998] 1 W.L.R. 830 at 836.
- [1503.](#) [1998] 1 W.L.R. 830 at 837-838.
- [1504.](#) [1998] 1 W.L.R. 830, 834.
- [1505.](#) See above, para.1-171.
- [1506.](#) [1996] 1 A.C. 211.
- [1507.](#) Lords Keith of Kinkel, Jauncey of Tullichettle and Browne-Wilkinson agreed; Lord Lloyd of Berwick dissented.
- [1508.](#) [1970] A.C. 1004.
- [1509.](#) [1996] 1 A.C. 211, 235.
- [1510.](#) [1996] 1 A.C. 211 at 237-238.
- [1511.](#) [1996] 1 A.C. 211, 239.
- [1512.](#) See similarly *Norwich City Council v Harvey* [1989] 1 W.L.R. 828, below para.1-218; *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All E.R. 180 at [38]–[42].
- [1513.](#) **!**These include *Siddell v Smith Cooper & Partners* [1999] P.N.L.R. 511; *Barex Brothers Ltd v Morris Dean & Co* [1999] P.N.L.R. 344, 349; *A.J. Fabrication (Batley) Ltd v Grant Thornton* [1999] B.C.C. 807; *Electra Private Equity Partners v KPMG Peat Marwick* [1999] 1 Lloyd's Rep. P.N. 670; *Connolly-Martin v Davis*, *The Times*, June 8, 1999; *Yorkshire Bank Plc v Lloyds Bank Plc* [1999] 2 All E.R. (Comm.) 153; *Hamble Fisheries Ltd v L. Gardner and Sons Ltd* [1999] 2 Lloyd's Rep. 1; *Gorham v British Telecommunications Plc* [2000] 1 W.L.R. 2129; *B.D.G. Roof-Bond v Douglas* [2000] 1 B.C.L.C. 401; *European Gas Turbines Ltd v MSAS Cargo International Inc* [2002] C.L.C. 880; *Killick v PricewaterhouseCoopers (A Firm)* [2001] 1 B.C.L.C. 65; *Merrett v Babb* [2001] 3 W.L.R. 1; *Weldon v GRE Linked Life Assurance Ltd* [2000] 2 All E.R. (Comm.) 914; *Dean v Allin and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep. 249; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC 1425 (Comm.), [2002] All E.R. (D) 206; *European International Reinsurance Co Ltd v Curzon Insurance Ltd* [2003] EWCA Civ 1074, [2003] Lloyd's Rep. I.R. 793; *BP Plc v Aon Ltd* [2006] EWHC 424 (Comm), [2006] 1 All E.R. (Comm.) 789; *Riyad Bank Plc v Ahli United Bank Plc* [2006] EWCA Civ 780, [2006] 2 Lloyd's Rep. 292; *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* [2008] EWHC 1570 (TCC), [2009] P.N.L.R. 9; *Scullion v Bank of Scotland* [2011] EWCA Civ 693, [2011] 1 W.L.R. 3212; *Argos Ltd v Leather Trade House Ltd* [2012] EWHC 1348 (QB), [2012] E.C.C. 34 at [42]; *Hunt v Optima (Cambridge) Ltd* [2014] EWCA Civ 714, [2015] 1 W.L.R. 1346; *Swynson Ltd v Lowick Rose LLP* [2014] EWHC 2085, [2014] P.N.L.R. 27; *Summit Advances Ltd v Bush* [2015] EWHC 665 (QB), [2015] P.N.L.R. 18.
- [1514.](#) [2000] P.I.Q.R. P39.

- [1515.](#) He accepted the description of the three approaches to the finding of a duty of care in the tort of negligence found in the judgment of Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse* [1998] P.N.L.R. 564, 583-586. The “incremental approach” was famously advocated by Brennan J. in *Sutherland Shire Council v Heyman* (1985) 157 C.L.R. 424 at 481.
- [1516.](#) [2000] P.I.Q.R. P39 at P44.
- [1517.](#) [2000] P.I.Q.R. P39 at P48.
- [1518.](#) [2000] P.I.Q.R. P39 at P50.
- [1519.](#) [1990] 2 A.C. 605 at 618.
- [1520.](#) [2006] UKHL 28, [2006] 3 W.L.R. 1.
- [1521.](#) [2006] UKHL 28 at [7] and [93].
- [1522.](#) [2006] UKHL 28 at [14], [65], [74].
- [1523.](#) [2006] UKHL 28 at [61]–[64].
- [1524.](#) [2006] UKHL 28 at [23], [61], [77] and [102].
- [1525.](#) [2010] EWHC 86 (TCC), [2010] B.L.R. 267.
- [1526.](#) [1990] 2 A.C. 605 at 618.
- [1527.](#)  [2010] EWHC 86 (TCC) at [536]–[543]. See also *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ 457, [2016] 1 W.L.R. 3169 (appeal pending to SC) (no assumption of responsibility in bank in giving a credit reference about one of its customers to a named company (A Co) where (unknown to the bank) the reference was to be used by another company (B Co, a casino) in the same group; nor was it “fair, just and reasonable” to impose liability on the bank in these circumstances).
- [1528.](#) Below, paras 15-042 et seq. Distinguish the case where A and B agreed that C will be protected from liability against A: see below, paras 15-045—15-061.
- [1529.](#) See *Haseldine v C.A. Daw & Son Ltd* [1941] 2 K.B. 343, 397 and see below, para.15-043.
- [1530.](#) *Pacific Associates v Baxter* [1990] 1 Q.B. 993, 1022-1023, 1033; *White v Jones* [1995] 2 A.C. 207, 268.
- [1531.](#) In *Smith v Eric S. Bush*, *Harris v Wyre Forest DC* [1990] 1 A.C. 831, the House of Lords considered the validity of such a clause under the Unfair Contract Terms Act 1977 s.2(2) which concerns the effect of contract terms and notices. Section 2 of the 1977 Act is amended on the coming into force of the Consumer Rights Act 2015 Pt 2 so as no longer to apply to terms of consumer contracts or to contractual notices, the 2015 Act providing rules to govern these cases: 2015 Act s.62 and 65-66 on which see below, paras 15-064, 15-081—15-083 and Vol.II, paras 38-356, 38-374—38-375 and 38-377.
- [1532.](#) *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716, 729 and see also *Johnson Matthey Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd’s Rep. 215; *The Pioneer Container* [1994] 2 A.C. 324 and below, para.15-057.
- [1533.](#) s.1(6) and see below, paras 15-046—15-047.
- [1534.](#) [1975] A.C. 154 and see below, paras 15-051—15-052.

[1535](#). Above, paras 1-208—1-209.

[1536](#). [1989] 1 W.L.R. 828 and see similarly *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All E.R. 180 at [38]–[42] and (in a different context) *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] 1 A.C. 211, above, para.1-214. But cf. *British Telecommunications Plc v James Thomson & Sons (Engineers) Ltd* [1999] 1 W.L.R. 9.

[1537](#). The phrase “just and reasonable” is a reference to the approach recommended to the finding of a duty of care by Lord Keith of Kinkel in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210, 240–241, which May L.J. had previously quoted.

[1538](#). [1989] 1 W.L.R. 828, 837, per May L.J. and cf. the approach of the House of Lords in *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] 1 A.C. 211, above, para.1-213.

[1539](#). s.1(1) and (6) and see below, paras 15-046—15-047.

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Volume I - General Principles

Part 1 - Introduction

Chapter 1 - Introductory

Section 8. - Contract and Other Legal Categories

Contract and trust

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⚠ It is sometimes important to distinguish a contract, which creates rights in personam, from a trust which creates equitable rights indistinguishable in practice from rights in rem. ¹⁵⁴⁰ ⚠ Until the Contracts (Rights of Third Parties) Act 1999, a crucial difference lay in the possibility or otherwise of creating rights in third parties to an agreement. So, it used to be the case that if A agreed with B to pay money to C in return for valuable consideration furnished by B, C could not in his own right sue A for failure to pay the money, owing to the application of privity of contract ¹⁵⁴¹; but he could do so if he established that a trust had been created in his favour. ¹⁵⁴² While this difference has been considerably eroded by the Contracts (Rights of Third Parties) Act 1999, which allows parties to a contract to make provision for the existence of a right of enforcement of a term of their contract in a third party, the third party's right so created is subject to the conditions of that Act and these differ from those applicable to the creation of a right under a trust. ¹⁵⁴³ Again, if A, the owner of a chattel, first agrees that B shall have the right to use it, and then, during the currency of the agreement, sells or charges it to C, who takes with notice of B's rights, B can sue A for breach of contract if C refuses to honour the agreement, and he may be able to recover damages from C for the tort of knowingly inducing a breach of contract. The question whether B is able to restrain C by injunction from using the chattel in such a way as to prevent A from performing his contractual obligations is more difficult. The better view appears to be that there are three bases on which to ground such an injunction. The first is found in the equitable doctrine in *De Mattos v Gibson*, ¹⁵⁴⁴ and the second in the tort of inducing breach of contract. ¹⁵⁴⁵ The third basis is for B to establish an equitable interest in or charge over the chattel or that C is in the position of constructive trustee. ¹⁵⁴⁶

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Moreover, in some cases the courts have found a trust relationship between the parties in parallel to their established contractual one. ¹⁵⁴⁷ Thus, for example, in *Barclays Bank Ltd v Quistclose Investments Ltd*, ¹⁵⁴⁸ A Ltd loaned a sum of money to B Ltd on condition that it would be used to pay the latter's share dividends. The money was paid into a separate account specially opened for this purpose with and to the knowledge of a bank, C Ltd. On B Ltd's voluntary liquidation, the House of Lords held A Ltd entitled to the money held by C Ltd and not paid out as dividend: the loan arrangements showed a clear intention:

“to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend could not be carried out.” ¹⁵⁴⁹

On the other hand, in *Lipkin Gorman v Karpnale Ltd* ¹⁵⁵⁰ the Court of Appeal accepted an approach to the relationship between contract and trust which echoes that already examined in relation to contract and tort. ¹⁵⁵¹ In that case a partner in a firm of solicitors drew cheques on a client account and then

gambled away the proceeds. The solicitors sued, inter alia, ¹⁵⁵² the bank, claiming that the latter was liable under a constructive trust. The Court of Appeal took the view that a bank would be subject to a constructive trust to its customer in respect of the running of an account only in circumstances where the bank would also be in breach of its contractual duty of care. ¹⁵⁵³ Moreover, the content of this duty had to be set in the context of the bank's primary contractual duty which was to honour its customer's cheques in accordance with its mandate ¹⁵⁵⁴ and so should be limited to cases where there is a "serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded". ¹⁵⁵⁵ *Lipkin Gorman v Karpnale Ltd* therefore concerned the requisite degree of knowledge for liability in a third party "accessory" to a breach of trust and is to be distinguished from *Barclays Bank Ltd v Quistclose Investments Ltd* where the bank (C Ltd) had received the money in respect of which the constructive trust was imposed and had actual notice of the purpose for which it was intended. ¹⁵⁵⁶

Contract and conveyance

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A contract, which creates rights in personam, must be distinguished from a conveyance of property, which creates rights in rem. Yet sometimes a contract operates, to some extent at any rate, as a conveyance of property. For instance, a specifically enforceable contract for the sale of land constitutes the vendor a trustee of the property for the purchaser, and thus conveys equitable rights which are scarcely distinguishable in practice from rights in rem. Again, a contract for the sale of goods passes the property in the goods to the buyer under s.18 of the Sale of Goods Act 1979. But in both cases the vendor has a lien on the property for unpaid purchase money; and in the case of goods, as the rubric to the group of sections containing s.18 indicates, the property passes only as between the seller and the buyer: as regards third parties the seller in possession has powers of disposition which may defeat the buyer's title, notwithstanding the maxim *nemo dat quod non habet*. ¹⁵⁵⁷

Contractual rights as property

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Although contracts create only rights in personam, these rights are treated by the law as themselves items of property, an example of things in action or choses in action. ¹⁵⁵⁸ So, a right under a contract may be assigned, subject to the conditions which are explained in Ch.19. And a person may constitute himself trustee of a contractual promise, giving rise to a trust of the right under the contract: the conditions for such a constitution (in particular relating to the person's intention) are explained in Ch.18 in the context of privity of contract. ¹⁵⁵⁹ More generally, it has earlier been explained that a party to a contract may invoke the Human Rights Act 1998 so as to claim the protection of property rights under art.1 of the First Protocol to the European Convention on Human Rights. ¹⁵⁶⁰ However, while not rejecting the proprietary character of contractual rights, a majority of the House of Lords recently refused to assimilate them to chattels (things or choses in possession) for the purpose of the tort of conversion ¹⁵⁶¹; for the minority, by contrast, "once the law recognises something [here, a contractual right] as property, the law should extend a proprietary remedy to protect it". ¹⁵⁶²

Contract and unjust enrichment

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"The highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance." ¹⁵⁶³

Claims based on unjust enrichment are not dependent upon the existence of any contract, express or implied, between the person enriched and the person at whose expense the enrichment has occurred. From the seventeenth century, the same form of action, *indebitatus assumpsit*, was used to remedy breaches of contract and to enforce claims which we would nowadays consider to be claims in restitution, e.g. for money had and received, for money paid to the use of another, and on a quantum meruit. In these cases the obligation to make restitution was deemed to arise on an implied promise or implied contract (*quasi ex contractu*) in order to render them enforceable by a court in *indebitatus assumpsit*. This fiction has long been discredited. The nature of restitutionary recovery and its significance for contracts will be discussed in Ch.29.

Contract and public law

1-224

Contracts have often been seen as the expression of individual and private autonomy and therefore to be contrasted with the expressions of public powers. ¹⁵⁶⁴ Since the rise in prominence of the distinction between public and private law since the early 1980s, spurred on first by the House of Lords in its separation of the procedures for judicial review under RSC Ord.53 and for ordinary claims based on private rights, ¹⁵⁶⁵ the presence of a contract has often been seen as a significant element in, if not the touchstone of, the private nature of a person's activity. At the same time, though, there has been an increasing awareness of the importance of contract as a basis for governmental action, leading to calls for the development of the adaptation of the ordinary and private law principles of the law of contract so as to take into account public law considerations ¹⁵⁶⁶: a need for a public law of contract, rather than a law of public contracts. In the following paragraphs, some of the issues arising from these significances of contract for the borderline between public and private law will be identified.

RSC Ord.53 and CPR Pt 54

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In 1982 in *O'Reilly v Mackman* the House of Lords held that the procedure for judicial review under RSC Ord.53 was an exclusive one. ¹⁵⁶⁷ Thus, if a plaintiff's case was a matter of "private right" he could not proceed by way of judicial review, ¹⁵⁶⁸ whereas if it was a matter of "public right" this was the only appropriate way of commencing proceedings. ¹⁵⁶⁹ While there were good reasons for the protection of the special features of the public law procedure, this led to a good deal of waste of time and of money in purely procedural disputes. In the words of Wade and Forsyth, the decision in *O'Reilly v Mackman*:

"turned the law in the wrong direction, away from flexibility of procedure and towards the rigidity reminiscent of the bad old days." ¹⁵⁷⁰

However, since the early 1990s, judges made clear that a more flexible approach should be taken to the line between proceeding by way of an application for judicial review and an action in private law. This process was given support by the replacement of Ord.53 by Pt 54 of the Civil Procedure Rules, which are to be interpreted according to their "overriding objective" of dealing with cases justly, as part of which a court is to consider in its duties of case management considerations of time and cost. ¹⁵⁷¹

Earlier case law under RSC Ord.53

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It was clear that the mere existence of a contractual relationship between an applicant for judicial review and the respondent does not make the case a matter of private law, nor conversely are all

issues arising from a public authority's contracts matters of public law, ¹⁵⁷² and the courts used a range of criteria to determine where to draw the line between private and public law for the purposes of Ord.53. ¹⁵⁷³ However, in the employment context, the source of the power or duty challenged was for some time prominent. Thus, in *Ex p. Walsh* the applicant was a nurse who had been dismissed on grounds of misconduct. ¹⁵⁷⁴ His claim under Ord.53 argued that his dismissal was ultra vires and decided upon in breach of natural justice. To support this, he alleged a breach of particular conditions of his employment which had been incorporated into his contract in compliance with regulations made under statute. However, this statutory background was not enough to give him "public law rights". According to the Court of Appeal, these would only arise if Parliament had directly restricted his employer's freedom to dismiss him, rather than requiring his employer to contract on particular terms, otherwise his claim was purely contractual. ¹⁵⁷⁵ The applicant was therefore left to his private law remedies for unfair dismissal and breach of contract. ¹⁵⁷⁶ By contrast, in *Ex p. Benwell* the applicant, who had been a prison officer, based his application for the judicial review of his dismissal on the failure to observe a code of discipline of prison officers in the Prison Rules, themselves made under a statutory power. ¹⁵⁷⁷ The court held that this basis gave his claim "sufficient statutory underpinning" for it to be properly a matter of public law, ¹⁵⁷⁸ although the lack of any other remedy in the context appeared to weigh in the applicant's favour. ¹⁵⁷⁹ The courts also refused to allow the use of the public law procedure to challenge the decisions of certain types of domestic tribunal, in part on the ground that the relationship between the association and its members was "wholly contractual". ¹⁵⁸⁰ However, a decision of the Take-Over and Mergers Panel has been held susceptible to judicial review despite the self-regulatory and private form of its control, because inter alia it operated as an integral part of a governmental framework for the regulation of financial activity. ¹⁵⁸¹

A more flexible approach

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On the other hand, by 1992 a more flexible approach was taken to the resolution of this type of procedural dispute by the House of Lords in *Roy v Kensington & Chelsea and Westminster Family Practitioner Committee*. ¹⁵⁸² In that case, a doctor who worked for the defendant committee as a general practitioner under a statutory scheme claimed by writ sums allegedly owing to him which had been denied him because the Committee had come to the view that he had not devoted a "substantial amount of time to general practice" within the meaning of the relevant regulations. The Committee claimed that his action should be struck out as an abuse of the process of the court, arguing that his proper recourse was by judicial review alone. The House of Lords rejected this argument, holding that, whether or not the doctor worked under a contract for the committee, his claim for payment was a matter of "private right". According to Lord Bridge:

"... where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, ¹⁵⁸³ the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private right in proceedings brought against him." ¹⁵⁸⁴

Moreover, Lord Lowry noticed that Lord Diplock in *O'Reilly v Mackman* ¹⁵⁸⁵ had acknowledged that there may be exceptions to the principle that cases involving public law issues should proceed only by way of judicial review:

"particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law." ¹⁵⁸⁶

Lord Lowry recommended that a "liberal attitude" be taken to the ambit of such exceptions, ¹⁵⁸⁷ and approved a broad approach according to which judicial review would be reserved for cases where private rights were not at stake. ¹⁵⁸⁸ Clearly, the House of Lords intended to mould the distinction

between private and public law according to the appropriateness of the different procedures in a particular case (for example, whether the case required oral evidence and discovery ¹⁵⁸⁹), rather than according to the formal source of the plaintiff's claim. ¹⁵⁹⁰

CPR Pt 54

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⚠ In 2000, Ord.53 was revoked and replaced by Pt 54 of the CPR. ¹⁵⁹¹ Under Pt 54, a claim for judicial review is defined as a claim to:

“... review the lawfulness of: (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function.” ¹⁵⁹²

It is provided that the judicial review procedure must be used for applications for certain types of order (mandatory orders, prohibiting orders, quashing orders, and injunctions under s.30 of the Supreme Court Act 1981), ¹⁵⁹³ and may be used in certain other cases, though not as regards claims solely for damages. ¹⁵⁹⁴ The court has power to order a claim to continue as if it had not been started by way of judicial review and, where it does so, to give directions about the future management of the claim. ¹⁵⁹⁵ In common with applications under RSC Ord.53, the court's permission to proceed is required in a claim for judicial review ¹⁵⁹⁶ and applications for leave must be made promptly and in any event within three months of when the grounds arose. ¹⁵⁹⁷ These features of claims for judicial review remain distinctive and this means that the courts still need to resolve whether a claim is sufficiently public to be appropriately dealt with under Pt 54 or whether it is private and to be dealt with by ordinary action. ¹⁵⁹⁸ In deciding this, the courts sometimes still see claims based on the contract as being appropriate for ordinary action. So, for example, as regards disputes between students and their universities it has been said that the normal procedure will be judicial review, but where claims are based on the contract between them, then ordinary action is appropriate. ¹⁵⁹⁹ ⚠ But the courts have made clear that their approach to the differences in procedure and the exercise of their power to transfer claims between the two routes will be flexible and subject to the overriding objective of the CPR. ¹⁶⁰⁰ As Lord Woolf C.J. has observed, Pt 54 was intended to avoid wholly unproductive disputes as to when judicial review is or is not appropriate. ¹⁶⁰¹ So:

“... in a case ... where a bona fide contention is being advanced (although incorrect) that [a private sector provider of services for a local authority] was performing a public function, that is an appropriate issue to be brought to the court by way of judicial review.” ¹⁶⁰²

The Court of Appeal wished:

“... to make clear that the CPR provide a framework which is sufficiently flexible to enable all the issues between the parties to be determined.” ¹⁶⁰³

Contracts made by public bodies: capacity

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The nature and limits of the capacity of the Crown and of public authorities is treated at length in Ch.11. ¹⁶⁰⁴

Contracts made by “public authorities” and the Human Rights Acts 1998

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The Human Rights Act 1998 has had important effects on the law of contract itself as well as on the law governing contracts made by “public authorities”. These effects have been discussed together earlier. ¹⁶⁰⁵

Public contractors and the Human Rights Act 1998

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The question has been discussed earlier whether a commercial company providing a service to a person under a contract was acting as someone “certain of whose functions are functions of a public nature” within the meaning of s.6 of the 1998 Act where it did so under a contract with a public authority made by it in furtherance of its statutory duties. ¹⁶⁰⁶

The law of public procurement

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Important consequences attach to the categorisation of a contracting-party or would-be contracting-party as a “contracting authority” within the meaning of the EU law of public procurement. ¹⁶⁰⁷

Contracts made by public bodies: other differences in rule

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There are also circumstances in which the public nature of a party’s contractual capacity (or contract-making power) affects the substantive rules applicable. ¹⁶⁰⁸ For example, the general rule, based on the principle of freedom of contract, is that a person can choose with whom to contract and with whom not to contract. ¹⁶⁰⁹ However, a local authority’s decision not to contract with a company which had indirect trading links with South Africa was successfully challenged by way of judicial review: although the policy was not itself unreasonable, it had been adopted partly in order to penalise the company in question and not solely in order to further racial harmony within the borough. ¹⁶¹⁰ Another example of difference in substantive rule may be found in *Swain v The Law Society* ¹⁶¹¹ in which the rules as to accountability of an agent were held inapplicable to the Society’s arrangement of liability insurance on behalf of its members. The insurance scheme was made under statutory powers and the Society and its Council acted thereby “in a public capacity and what they do in that capacity is governed by public law”. ¹⁶¹²


^{1540.}

⚠ This is the generally accepted view, despite Maitland’s opinion to the contrary: *Equity* (1909), Lect. IX. See Scott (1917) 17 Col. L.R. 269; Winfield, *Province of the Law of Tort* (1931), pp.108-112. See also *Binions v Evans* [1972] Ch. 359; *Re Sharpe* [1980] 1 W.L.R. 219; *Tinsley v Milligan* [1993] 3 W.L.R. 126, 147-148 (though *Tinsley v Milligan* was disapproved on other grounds by *Patel v Mirza* [2016] UKSC 42, [2016] 3 W.L.R. 399, see below, para.16-198). See also the cases cited in para.14-033 n.204, below.

^{1541.} *Tweddle v Atkinson* (1861) 1 B. & S. 393; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847 (although B can obtain an order for specific performance in favour of C: *Beswick v Beswick* [1968] A.C. 58); and see below, Ch.19.

- [1542.](#) See below, paras 18-080 et seq.
- [1543.](#) For example, the power of the parties to a contract to vary or rescind the contract so as to extinguish or alter the third party's rights are subject to the conditions provided the Contracts (Rights of Third Parties) Act 1999 by s.2; the variation of a trust is governed by different rules: Martin, *Hanbury and Martin's, Modern Equity*, 19th edn (2012), Ch.22.
- [1544.](#) (1858) 4 De G. & J. 276, 282; and see *Lord Strathcona S.S. Co Ltd v Dominion Coal Co Ltd* [1926] A.C. 108; *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 Q.B. 146; *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch. 548; [1982] A.C. 584. See also below, paras 18-042—18-043.
- [1545.](#) Gardner (1982) 98 L.Q.R. 279; Tettenborn (1982) 41 C.L.J. 58, 82. cf. *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch. 548, 573 where the court considered that the law in *De Mattos v Gibson* (1858) 4 De G. & J. is to be understood merely as the “equitable counterpart of the tort of interference with contract”.
- [1546.](#) *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch. 548.
- [1547.](#) For example, where a solicitor is employed by a mortgagee lending a sum to a mortgagor for the purchase of property and pays the mortgage money which he has received before his authority to do so, he is liable for breach of trust in respect of that money unless he can justify this action: *Target Holdings Ltd v Redfems* [1996] 1 A.C. 421; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2014] 3 W.L.R. 1367 and see generally McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992); Burrows, *Commercial Remedies* (2003) Ch.4.
- [1548.](#) [1970] A.C. 567. cf. *Re E. Dibbens & Sons Ltd* [1990] B.C.L.C. 577.
- [1549.](#) [1970] A.C. 567, 582. See also *Re Kayford* [1975] 1 W.L.R. 279; Goodhart and Jones (1980) 43 M.L.R. 489; *Swiss Bank Corp v Lloyds Bank Ltd* [1974] Ch. 548; *Twinsectra v Yardley* [2002] 2 A.C. 164; *Charity Commission v Framjee* [2014] EWHC 2507 (Ch), [2015] 1 W.L.R. 16 (contract between donors and trustees of charitable trust) and cf. *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111, 120 and *Swain v The Law Society* [1983] 1 A.C. 598.
- [1550.](#) [1989] 1 W.L.R. 1340. The claim against the bank was not pursued in the House of Lords: [1991] 2 A.C. 548.
- [1551.](#) See above, paras 1-154 et seq.
- [1552.](#) The solicitors also claimed against the casino where the money was lost: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548.
- [1553.](#) [1989] 1 W.L.R. 1340, 1373. This point had been conceded by the solicitors early in argument: at 1349.
- [1554.](#) [1989] 1 W.L.R. 1340 at 1356.
- [1555.](#) [1989] 1 W.L.R. 1340 at 1378, per Parker L.J. and cf. at [1356] and see Birks (1989) 105 L.Q.R. 352, 355.
- [1556.](#) On this distinction see Hanbury and Martin's *Modern Equity*, 19th edn (2012), paras 12-10—12-23.
- [1557.](#) See Vol.II, paras 44-291 et seq.
- [1558.](#) See also Insolvency Act 1986 s.436 including thing in action within its definition of “property”.
- [1559.](#) Below, paras 18-080—18-089.
- [1560.](#) Above, paras 1-067—1-068.

- [1561.](#) *OGB Ltd v Allan, Douglas v Hello! Ltd, Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 especially at [95]–[106].
- [1562.](#) [2007] UKHL 21 at [310], per Baroness Hale of Richmond, and see also [220]–[240] (Lord Nicholls of Birkenhead).
- [1563.](#) Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2011), para.105.
- [1564.](#) Whittaker (2001) 21 O.J.L.S. 103, 193.
- [1565.](#) *O'Reilly v Mackman* [1983] 2 A.C. 237; *Cocks v Thanet DC* [1983] 2 A.C. 286.
- [1566.](#) Leyland and Woods, *Textbook on Administrative Law*, 5th edn (2005), p.499; A. Davies, *The Public Law of Government Contracts* (2008).
- [1567.](#) [1983] 2 A.C. 237; *Cocks v Thanet DC* [1983] 2 A.C. 286.
- [1568.](#) *R. v East Berkshire Health Authority, Ex p. Walsh* [1985] Q.B. 152. In *Council of Civil Service Trade Unions v Minister for the Civil Service* [1985] A.C. 374, Crown service was held susceptible to judicial review, although the contractual issues involved were not argued before the House of Lords: see Wade (1985) 101 L.Q.R. 180, 194-197 and cf. Fredman and Morris (1988) P.L. 58.
- [1569.](#) *O'Reilly v Mackman* [1983] 2 A.C. 237.
- [1570.](#) Wade and Forsyth, *Administrative Law*, 9th edn (2004), p.676.
- [1571.](#) CPR Pt 1.
- [1572.](#) cf. Wade and Forsyth at pp.668–70; Beatson (1987) 103 L.Q.R. 34, 48.
- [1573.](#) Beatson (1987) 103 L.Q.R. 34.
- [1574.](#) *R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152.
- [1575.](#) [1985] Q.B. 152 at 165. cf. *R. v Crown Prosecution Service Ex p. Hogg* (1994) 6 Admin. L.R. 778.
- [1576.](#) Employment Rights Act 1996 Pt X, as amended. In some employment cases the courts have considered issues typical of public law, such as the reasonableness of the exercise of a discretion and relating to observance of natural justice, as a matter of contract law and in the course of private law proceedings: *R. v British Broadcasting Corp Ex p. Lavelle* [1983] 1 W.L.R. 23; *Dietman v Brent LBC* [1987] I.C.R. 737, 752; *Hughes v Southwark LBC* [1988] I.R.L.R. 55.
- [1577.](#) *R. v Secretary of State for the Home Department Ex p. Benwell* [1984] 3 All E.R. 854.
- [1578.](#) [1984] 3 All E.R. 854, 867.
- [1579.](#) [1984] 3 All E.R. 854, 866, 868.
- [1580.](#) *Law v National Greyhound Racing Club Ltd* [1983] 1 W.L.R. 1302, following *R. v Criminal Injuries Compensation Board Ex p. Lain* [1967] 2 Q.B. 864; *R. v BBC Ex p. Lavelle* [1983] 1 W.L.R. 23; *R. v Fernhill Manor School Ex p. A.* [1993] 1 F.L.R. 620; *R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan* [1993] 2 All E.R. 853; *R. v Insurance Ombudsman Bureau Ex p. Aegon Life Assurance Ltd* [1995] L.R.L.R. 101. cf. *Modahl v British Athletic Federation* [2001] EWCA 1447, [2002] 1 W.L.R. 1192.
- [1581.](#) *R. v Panel of Take-Overs and Mergers Ex p Datafin Plc* [1987] 1 Q.B. 815 and see *R. v East Berkshire Authority Ex p. Walsh* [1985] Q.B. 152 and *Wandsworth LBC v Winder* [1985] A.C. 461.

- [1582.](#) [1992] 1 A.C. 624 and see Cane (1992) P.L. 193.
- [1583.](#) See *Wandsworth LBC v Winder* [1985] A.C. 461.
- [1584.](#) [1992] 1 A.C. 624, 628-629.
- [1585.](#) [1983] 2 A.C. 237.
- [1586.](#) [1983] 2 A.C. 237, 285, quoted in *Roy* [1992] 1 A.C. 624, 642.
- [1587.](#) [1992] 1 A.C. 624, 654.
- [1588.](#) [1992] 1 A.C. 624, 653.
- [1589.](#) [1992] 1 A.C. 624, 647, per Lord Lowry, approving the approach of Woolf L.J. in *R. v Derbyshire CC Ex p. Noble* [1990] I.C.R. 808, 813.
- [1590.](#) This approach was followed by the Court of Appeal in *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All E.R. 747. The need for flexibility in approach to the distinction between the public and private procedures was noted by the HL in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48 and by the Court of Appeal in *Clark v The University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988.
- [1591.](#) Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) rr.54.1, 54.22 came into force on October 2, 2000.
- [1592.](#) CPR r.54.1(2).
- [1593.](#) CPR r.54.2(2). The Supreme Court Act 1981 is renamed the Senior Courts Act 1981.
- [1594.](#) CPR r.54.3.
- [1595.](#) CPR r.54.20.
- [1596.](#) CPR r.54.4.
- [1597.](#) CPR r.54.5, which also provides that these time limits may not be extended by agreement between the parties.
- [1598.](#) It has been noticed that under the CPR delay is also relevant to claims by ordinary action: *Clark v The University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988, 1997.
- [1599.](#)  [2000] 1 W.L.R. 1988, 1996 and see Feldman, *English Public Law*, 2nd edn (2009), paras 17.72–17.90 (P. Craig). cf. *R. (Holmcraft Properties Ltd) v KPMG LLP* [2016] EWHC 323 (Admin), [2017] Bus. L.R. 932 esp. at [23] et seq. applying *R. v Panel on Takeovers and Mergers, Ex p. Datafin Plc* [1987] Q.B. 815 (the mere fact that the source of a body's powers is contract does not necessarily mean that public law principles do not apply, though it remains important: [2016] EWHC 323 (Admin) at [43]). See also the cases discussed above at paras 1-074–1-075 on the distinction between public and private acts for the purposes of the Human Rights Act 1998 s.6. These cases were considered relevant to the context of the availability of judicial review in *R. (Bevan and Clarke LLP) v Neath Port Talbot CBC* [2012] EWHC 236 (Admin), [2012] B.L.G.R. 728 at [47]–[48] and *R. (Davis) v West Sussex CC* [2012] EWHC 2152 (Admin), [2013] P.T.S.R. 494, especially at [76]–[89] (the latter applying the approach of the CA in *R. (Supportways Community Services Ltd) v Hampshire CC* [2006] EWCA Civ 1035, [2006] B.L.G.R. 836 at [42]–[43], [56], [61]).
- [1600.](#) [2000] 1 W.L.R. 1988, 1997.