

- [1601.](#) *R. (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All E.R. 936 at [38].
- [1602.](#) [2002] 2 All E.R. 936 at [38].
- [1603.](#) [2002] 2 All E.R. 936 at [39].
- [1604.](#) Paras 11-004, 11-016 et seq.
- [1605.](#) See above, paras 1-061 et seq.
- [1606.](#) See above, paras 1-073—1-075 concerning *YL v Birmingham City Council* [2007] UKHL 27, [2007] 3 W.L.R. 112.
- [1607.](#) See below, paras 11-051—11-052.
- [1608.](#) And see Freedland (1994) P.L. 86.
- [1609.](#) See above, paras 1-032, 1-033.
- [1610.](#) *R. v Lewisham London Borough Council Ex p. Shell UK Ltd* [1988] 1 All E.R. 938, applying *Wheeler v Leicester City Council* [1985] A.C. 1054 and see Local Government Act 1988 ss.17–23.
- [1611.](#) [1983] 1 A.C. 598.
- [1612.](#) [1983] 1 A.C. 598 at 608.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 1. - Preliminary



Introduction

2-001

The first requirement for the formation of a contract is that the parties should have reached agreement. Generally speaking, ¹ the law regards an agreement as having been reached when an offer made by one of the parties (the offeror) is accepted by the other to whom the offer is addressed (the offeree or acceptor). However, such an agreement may still lack contractual force because it is incomplete, ² because its terms are not sufficiently certain, ³ because its operation is subject to a condition which fails to occur ⁴ or because it was made without any intention to create legal relations. ⁵ An agreement may also lack contractual force for want of consideration. The requirement of consideration is discussed in Ch.3.

The objective test


2-002

 In deciding whether the parties have reached agreement, the courts normally apply the objective test, ⁶ which is further discussed at para.2-003 below. Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject-matter, ⁷ then neither can, generally, ⁸ rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract. ⁹ .

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- ^{1.} The analysis of the process of reaching agreement in terms of the steps of offer and acceptance gives rise to difficulties in a number of situations to be discussed in paras 2-117—2-118 below.
 - ^{2.} Below, paras 2-119—2-145.
 - ^{3.} Below, paras 2-147—2-155.
 - ^{4.} Below, paras 2-156—2-166.
 - ^{5.} Below, paras 2-167—2-199.
 - ^{6.} Howarth (1984) 100 L.Q.R. 265; Vorster (1987) 103 L.Q.R. 247; Howarth (1987) 103 L.Q.R. 527; De Moor (1990) 106 L.Q.R. 632; *Smith v Hughes* (1871) L.R. 6 Q.B. 597, 607.
 - ^{7.} See *Falck v Williams* [1900] A.C. 176; *Pagnan SpA v Fenal Products Ltd* [1987] 2 Lloyd's Rep.

601 at 610; *Guernsey v Jacob UK Ltd* [2011] EWHC 918 (TCC), [2001] 1 All E.R. (Comm) 175 at [41]; *Global 5000 Ltd v Wadhawan* [2011] EWHC 853 (Comm), [2011] 2 All E.R. (Comm) 190 at [45]; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 1 All E.R. 1296 at [140]. The objective test can apply, not only for the purpose of establishing the existence of a contract, but also to determine the contents of an admitted contract: see *Thake v Maurice* [1986] Q.B. 644; *Eyre v Measday* [1986] 1 All E.R. 488 and *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 at [15], [25], and [30]; and to determine whether a contract had been affirmed by agreement between the parties after the occurrence of an event which had discharged both or one of them: *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm) at [55], [56].

8. The rule stated in the text does not apply in favour of a party who knows that the other does not assent to the terms proposed in a notice displayed by the former party: e.g. where an offer is expressed in a language which the offeree, to the offeror's knowledge, does not understand, in *Geier v Kujawa, Weston and Warne Bros (Transport) Ltd* [1970] 1 Lloyd's Rep. 364; or where the course of dealing shows that the offeree must have known that the offer was mistaken, in *Hartog v Shields* [1939] 3 All E.R. 566. See also below, para.2-004 at n.18. cf. in cases of mistake, below, para.3-022. But a party who completes and signs a contractual document "cannot avoid its consequences by saying that they did not read it or did not understand it": *Coys of Kensington Automobiles Ltd v Pugliese* [2011] EWHC 655 (QB), [2011] 2 All E.R. (Comm) 664 at [40] (where the reason for the signer's inability to understand the document was alleged to be that "she was an Italian speaker and the form was in English" (at [38])).

9.  See, e.g. *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd's Rep. 614; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 at [10]; *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [5]; *Newbury v Sun Microsystems Ltd* [2013] EWHC 2180 (QB) where Lewis J. held that it is neither legitimate nor helpful to take into account subsequent communications to determine whether documents gave rise to a binding agreement.

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Section 2. - The Offer

Offer defined

2-003

An offer is an expression of willingness to contract on specified terms made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. ¹⁰ Under the objective test of agreement, ¹¹ an apparent intention to be bound may suffice, i.e. the alleged offeror (A) may be bound if his words or conduct ¹² are such as to induce a reasonable offeree to believe that he intends to be bound, even though in fact he has no such intention. This was, for example, held to be the case where a university had made an offer of a place to an intending student as a result of a clerical error ¹³; and where a solicitor, who had been instructed by his client to settle a claim for \$155,000, by mistake offered to settle it for the higher sum of £150,000. ¹⁴ Similarly, if A offers to sell a book to B for £10 and B accepts the offer, A cannot escape liability merely by showing that his actual intention was to offer the book to B for £20, or that he intended the offer to relate to a book other than that specified in the offer. ¹⁵

State of mind of alleged offeree

2-004

Whether A is actually bound by an acceptance of his apparent offer depends on the state of mind of the alleged offeree (B); to this extent, the test of agreement is not purely objective. ¹⁶ If B actually and reasonably believes that A has the requisite intention, the objective test is satisfied so that B can hold A to his apparent offer even though A did not, subjectively, have the requisite intention. ¹⁷ However, if B knows that, in spite of the objective appearance, A does not have the requisite intention, A is not bound; the objective test does not apply in favour of B as he knows the truth about A's actual intention. ¹⁸ There are other permutations. If B does not know, but ought to have known that A does not have the requisite intention, English law gives no clear answer. ¹⁹ However, there are suggestions that B will not be able to hold A to his apparent offer. ²⁰ It is also possible, although highly unlikely, that A and B, unknown to each other, both have the same requisite intention but a reasonable third party would not have thought they did, or would have thought that they had the requisite intention in respect of a different term. There is no authority on such a case, but it is submitted that where A and B reach agreement on term X but the unexpressed intention of both is that this means Y, the parties should be held to a valid contract for Y although a third party's objective interpretation is that the agreement is for X. ²¹ Lastly, B may have simply formed no view on the question of A's intention, so that B neither believes that A has the requisite intention nor knows that A does not have this intention. This situation has given rise to a conflict of judicial opinion. One view is that A is not bound: in other words, the objective test is satisfied only if A's conduct is such as to induce a reasonable person to believe that A had the requisite intention *and* if B actually held that belief. ²² The opposing view is that A is bound: in other words, the objective test is satisfied if A's words or conduct would induce a reasonable person to believe that A had the requisite intention, so long as B does not actually know that A does *not* have any such intention. ²³ However, it is hard to see why B should be protected in this situation. Where B has no positive belief in A's (apparent) intention to be bound, he cannot be prejudiced by acting in reliance on it. It is therefore submitted that the objective test should not apply to the last situation. For this purpose, it should make no difference whether B's state of mind amounts

to ignorance of, or merely to indifference to, the truth.

Conduct as offer

2-005

An offer may be addressed either to a specified person or to a specified group of persons or to the world at large; and it may be made expressly (by words) or by conduct. At common law, a person who had contracted to sell goods and tendered different goods (or a different quantity) might be considered to make an offer by conduct to sell the goods which he had tendered.²⁴ It seems that an offer to sell can still be made in this way, though by legislation against “inertia selling” the dispatch of goods “without any prior request” may amount to a gift to the recipient, rather than to an offer to sell.²⁵

Inactivity as an offer

2-006

⚠ A number of cases raise the further question whether the “conduct” from which an offer may be inferred can take the form of inactivity. The issue in these cases was whether an agreement to submit a dispute to arbitration could be said to have been “abandoned” by long delay, where, over a long period of time, neither party had taken any steps in the arbitration proceedings. In cases of “inordinate and inexcusable delay” of this kind, arbitrators now have a statutory power to dismiss the claim for want of prosecution²⁶ and it is also open to the parties expressly to provide for “lapse” of the claim if steps in the proceedings are not taken within a specified period.²⁷ Conversely, however, the statutory power to dismiss the claim for want of prosecution may be excluded by agreement,²⁸ and where it is so excluded the question of abandonment can still arise in the present context. Such a question could also arise in the context of the alleged abandonment of some other type of right or remedy,²⁹ to which no similar legislative provision extends. Mere inactivity by one party is unlikely,³⁰ when standing alone, to amount to an offer of abandonment, for it is equivocal and generally explicable on other grounds, such as inertia or forgetfulness, or the tactical consideration that the party alleged to have made the offer does not wish to reactivate his opponent’s counterclaims.³¹ Consequently, it will not normally suffice to induce a reasonable person in the position of the other party to believe that an offer is being made³²; and the mere fact that the other party nevertheless had this belief cannot suffice to turn the former party’s inactivity into such an offer.³³ However, the arbitration cases indicate that, on the objective test,³⁴ inactivity may amount to an offer of abandonment when combined with other circumstances (such as the destruction of relevant files).³⁵ ⚠

Offer and invitation to treat

2-007

When parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. One party may simply ask, or respond to, a request for information, or he may invite the other to make an offer. For example, in *Harvey v Facey*³⁶ the claimants telegraphed to the defendants, “Will you sell us Bumper Hall Pen? Telegraph lowest cash price”. The defendants replied, “Lowest cash price for Bumper Hall Pen £900”. The claimants then telegraphed, “We agree to buy Bumper Hall Pen for £900 asked for by you”. The Judicial Committee of the Privy Council held that the defendants’ telegram was not an offer but merely a statement as to the price for which they might be prepared to sell; that the claimants’ second telegram was an offer to buy but that, as this had never been accepted by the defendants, there was no contract. Similarly, in *Gibson v Manchester City Council*³⁷ it was held that a letter in which a local authority stated (in reply to an enquiry from the tenant of a council house) that it “may be prepared to sell” the house to him at a specified price was not an offer to sell the house: its purpose was simply to invite the making of a “formal application”, amounting to an offer, from the tenant. Moreover, the letter did not contain sufficient detail to constitute an offer; it made: “no mention at all of the special conditions which were

undoubtedly in due course going to be included in the formal contract and the conveyance".³⁸ On the same principle, it has been held that a draft document, sent in the course of contractual negotiations with the clear intention of eliciting further comment from the recipient, was not an offer³⁹; that, where a letter sent in the course of negotiations for the settlement of a dispute was "insufficiently certain to be capable of amounting to an offer ..." it was "at best an invitation to treat"⁴⁰; and that a telephoned request for the supply of goods suitable for a prospective customer's purpose was only a "preliminary enquiry",⁴¹ the offer being made by conduct when the supplier subsequently despatched the goods. The last of these possibilities may be illustrated by *Photolibrary Group Ltd v Burda Senator Verlag GmbH*,⁴² where the claimants had for some years supplied photographs to D1 and D2 for publication in their magazines. The course of business was for D3 (acting as agent for D1 and D2) to fax requests for photographs to the claimants, who would then send transparencies to D3 to be forwarded to D1 and D2. A substantial number of transparencies having been lost in transmission, the questions arose whether any contracts had come into existence; and, if so, on what terms. In answering the former question, in the affirmative, Jack J. said that the situation could be analysed in two ways. The "most straightforward" analysis was that "the delivery of the transparencies accompanied by a delivery note is to be treated as an offer which was accepted by the acceptance of the transparencies and their onward transmission."⁴³ On this view, the faxed requests are no more than invitations to treat, presumably because of their lack of certainty as to the terms of the contract. The second, and "equally viable" analysis was that "the faxed requests for transparencies to be submitted were offers to submit them on the usual terms of the delivery notes, which offers were accepted by the submission of the transparencies accompanied by the notes".⁴⁴

On this view, the required degree of certainty was supplied by "an established course of dealing on the terms of the delivery notes".⁴⁵

2-008

A communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily because it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms. A statement is clearly not an offer if it expressly provides that the person who makes it is *not* to be bound merely by the other party's notification of assent but only when he himself has signed the document in which the statement is contained.⁴⁶

Wording not conclusive

2-009

Apart from cases of the kind just described, the wording of a statement does not conclusively determine the distinction between an offer and an invitation to treat. Thus a statement may be an invitation to treat although it contains the word "offer"⁴⁷; while a statement may be an offer although it is expressed as an "acceptance,"⁴⁸ or although it requests the person to whom it is addressed to make an "offer".⁴⁹ The point that use of the word "offer" in a document does not conclusively determine its legal nature is illustrated by *Datec Electronic Holdings Ltd v United Parcels Ltd*⁵⁰ where carriers of goods had issued standard terms, clause 3 of which stated that the carriers did not "offer carriage of goods" except subject to specified restrictions, one of which was that the value of any package was not to exceed \$50,000. After the shippers had indicated their acceptance of these terms, they "booked" a number of packages; these were then collected from their premises by an employee of the carriers who was unaware that the value of each package exceeded \$50,000. The House of Lords rejected the argument that there was no contract because the carriers' "offer" to carry could not be accepted by tendering packages which were not in conformity with that offer.⁵¹ Both the Court of Appeal⁵² and the House of Lords⁵³ approved the view at first instance that, the phrase "offer" from clause 3 had not been used in its technical legal sense.⁵⁴ The fact that the packages were not in conformity with clause 3 did not prevent the conclusion of a contract.⁵⁵ In the words of Lord Mance, "the more natural inference" was that "the whole of clause 3 provides a contractual regime governing the carriage of non-conforming goods".⁵⁶ One analysis⁵⁷ is that the restrictions in clause 3 could, in spite of the use of the word "offer", be regarded as part of an invitation to treat, while the shippers' tender of non-conforming goods could be regarded as an offer to enter into a contract for the carriage of those goods which was then accepted by the carriers' conduct of collecting

the goods. This interpretation is also supported by other provisions of clause 3: in particular, those entitling the carrier to “suspend” the carriage of non-confirming goods and making the shippers liable for charges in respect of such goods. There would, on the other hand, have been no such acceptance by the carriers’ conduct if, knowing of the non-conformity of the goods, they had refused to collect them; there would have been “no contract”. ⁵⁸

Distinction between offer and invitation to treat

2-010

As the discussion in para.2-009 above shows, the distinction between offer and invitation to treat is often hard to draw, as it depends primarily on the elusive criterion of the intention of the person making the statement in question. But, in certain stereotyped situations, the distinction is determined, at least prima facie, by rules of law. Such rules can be displaced by evidence of contrary intention; but in the absence of such evidence they will determine the distinction between offer and invitation to treat, and they will do so without reference to the intention of the maker of the statement. This is true, for example, in the cases of auction sales and shop window displays. These and other illustrations of the distinction are discussed in paras 2-011—2-024 below.

Display of goods for sale: general rule

2-011

As a general rule, a display of goods at a fixed price in a shop window ⁵⁹ or on a shelf in a self-service store ⁶⁰ is an invitation to treat and not an offer. The display is an invitation to the customer to make an offer, which the retailer may then accept or reject. There is judicial support for the view that an indication of the price at which petrol is to be sold at a filling station is likewise only an invitation to treat, ⁶¹ the offer to buy being made by the customer and accepted by the seller’s conduct in putting the petrol into the tank. ⁶² But this analysis hardly fits the now more common situation in which the station operates a self-service system ⁶³; for once the customer has put petrol into his tank, the seller has no effective choice of refusing to deal with him.

Display of goods for sale: exceptional cases

2-012

The general rule stated in para.2-011 above relating to shop and similar displays is well established; but it can be excluded by special circumstances: e.g. if the retailer has stated unequivocally that he will sell to the first customer who tenders the specified price. The distinction between an offer and an invitation to treat depends, in the last resort, on the intention of the maker of the statement ⁶⁴; and where his intention to be bound immediately on acceptance is sufficiently clear a shop window or shelf display may be an offer. For example, a notice in a shop window stating that “We will beat any TV price by £20 on the spot” has been described as “a continuing offer”. ⁶⁵ The customer may, indeed, still lose his bargain since the offer can be withdrawn at any time before it is accepted ⁶⁶; but if it is so withdrawn the person displaying the notice may incur criminal liability under legislation passed for the protection of consumers. ⁶⁷ In the case of a self-service shop, acceptance of any offer that might be made by the terms of the display would normally take place, not when the customer took the goods off the shelf, but only when he did some less equivocal act, such as presenting them for payment. ⁶⁸

Other displays

2-013

The principles stated in paras 2-011 and 2-012 above can also apply to other displays. Thus, where a menu is displayed outside a restaurant, or handed to a customer, it seems that the proprietor only

makes an invitation to treat,⁶⁹ the offer coming from the customer. On the other hand, a notice at the entrance to an automatic car park may be an offer which can be accepted by driving in⁷⁰; and a display of deck-chairs for *hire* has been held to be an offer.⁷¹ There is no perfectly general answer to the question whether such displays are offers or invitations to treat; the answer depends in each case on the intention with which the display was made.⁷² In *University of Edinburgh v Onifade*⁷³ a notice displayed by a landowner on its land stated that any persons parking their cars there without permit would be liable to a “fine” of £30 per day. A motorist who had so parked his car was held liable for the specified amount as his conduct amounted to an acceptance⁷⁴; so that it must have been assumed that the notice was an offer. However, with respect, it is open to question whether the landowner had any objective intention to enter into a contract with persons parking without permit. Rather, the landowner's intention seems to have been to deter unauthorised parking. The point could be significant if an action had been brought against the landowner, e.g. in respect of loss of or damage to the car.

Advertisements: bilateral contracts

2-014

Advertisements intended to lead to the making of bilateral contracts tend to be regarded as invitations to treat. Thus a newspaper advertisement that goods are for sale is not generally an offer⁷⁵; an advertisement that a scholarship examination will be held is not an offer to a candidate⁷⁶; and the circulation of a price list by a wine merchant has been held only to be an invitation to treat.⁷⁷ It has been said that, if such statements were offers, a merchant could be liable to everyone who purported to accept his offer even though his stocks were insufficient to meet the requirements of all the “acceptors”.⁷⁸ But this result would not necessarily follow; for it can be construed as an offer that is “subject to availability”, and so expires as soon as the merchant's stock is exhausted. There is, again, no absolute rule determining the character of advertisements of bilateral contracts: they are normally invitations to treat, but they may be offers if the advertiser's intention to be bound immediately on acceptance is sufficiently clear.⁷⁹

Advertisements: unilateral contracts

2-015

Two reasons support the position that advertisements intended to lead to the making of bilateral contracts are commonly regarded as invitations to treat. First, such advertisements often lead to further bargaining, e.g. where a house is advertised for sale. Secondly, the advertiser may legitimately wish, before becoming bound, to assure himself that the other party is able (financially or otherwise) to perform his obligations under any contract which may result. Neither of these reasons applies in the case of a unilateral contract⁸⁰; and advertisements of such contracts are therefore commonly held to be offers. In the leading case of *Carlill v Carbolic Smoke Ball Co Ltd*,⁸¹ for example, the defendants issued an advertisement promising to pay £100 to any person who, in accordance with certain directions, used a carbolic smoke ball made by them and then caught influenza. This was held to be an offer, the defendants' intention to be bound⁸² being made particularly clear by their statement that they had deposited £1,000 with their bankers “showing our sincerity in the matter”. A case nearer the borderline was *Bowerman v Association of British Travel Agents Ltd*⁸³ where a package holiday had been booked with a tour operator who was a member of the defendant association (ABTA). A notice displayed on the tour operator's premises stated, *inter alia*, that in the event of the financial failure of an ABTA member before commencement of the holiday, “ABTA arranges for you to be reimbursed the money you have paid for your holiday”. A majority of the Court of Appeal held that these words constituted an offer since, on the objective test,⁸⁴ they would reasonably be regarded as such by a member of the public booking a holiday with an ABTA member.

Rewards

2-016

Advertisements of rewards for the return of lost or stolen property, or for information leading to the capture or conviction of a criminal, are commonly regarded as offers.⁸⁵ Some difficulty arises if, in cases of this kind, the information is given by several persons in succession. In one case it was held that the first person to give the information was alone entitled to the reward⁸⁶ as the offeror did not intend to pay more than once. This is no doubt the most likely construction; but an advertisement could be so worded as to impose a more extensive liability. The defendants' liability in *Carlill's*⁸⁷ case would not have been limited to 10 persons merely because the advertisement stated that they had deposited only £1,000.

Other liability in connection with advertisements

2-017

A statement about goods made by the manufacturer in response to a direct enquiry from the ultimate purchaser has sometimes been held to amount to a collateral contract⁸⁸; but not a general advertisement by the manufacturer.⁸⁹ However, a person who issues an advertisement may be under some form of liability even though the advertisement does not amount to an offer. For example, a person who indicates by such an advertisement that he intends to sell goods when he in fact has no such intention might be liable in deceit to someone who suffered loss by acting in reliance on the statement; and he might incur criminal liability under legislation passed for the protection of consumers,⁹⁰ or even of traders who are misled by statements made by their suppliers in the course of marketing.⁹¹ He may also be liable for false statements in advertisements relating to the characteristics of the subject-matter, or to the terms on which it is to be supplied.⁹² Two further possibilities arise where the advertisement leads to the making of a contract for the sale or supply of goods to a consumer. First, the advertisement may amount to a "consumer guarantee" and so take effect as a "contractual obligation" owed by the guarantor by virtue of the Sale and Supply of Goods to Consumers Regulations 2002.⁹³ The Consumer Rights Act 2015 revokes the 2002 Regulations⁹⁴, but stipulates that when a trader supplies goods to a consumer⁹⁵:

"the guarantee takes effect, at the time the goods are delivered, as a contractual obligation owed by the *guarantor* under the conditions set out in the guarantee statement and in any *associated advertising*"(italics added).⁹⁶

Liability in connection with advertisements can also arise under a "commercial guarantee" within the Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013.⁹⁷ Regulation 5 defines such a guarantee as:

"an undertaking given by the trader *or producer* to the consumer ... to reimburse the price paid or to replace, repair or service goods ... if they do not meet the specifications or any other requirements ... set out in the guarantee statement or in the relevant *advertising* available at the time of the contract or before it is entered into"(italics added).

When such an undertaking is given by the "trader" to the "consumer", then the undertaking (i.e. the guarantee) will take effect as a term⁹⁸ in the "sales contract", defined in reg.5 as a contract between these parties. But this reasoning cannot apply where the undertaking is given by the *producer* in *advertising* where there is no "sales contract" between the producer and the consumer. While reg.15 of the 2002 Regulations and s.30(3) of the 2015 Act provide that a "consumer guarantee" takes effect as a "contractual obligation" owed by the guarantor, the 2013 Regulations do not attempt to provide any such (or any other) legal basis for the producer's liability to the consumer in respect of statements made in advertising by or on behalf of the "producer" when that person is not a party to the contract of sale.⁹⁹ Secondly, public statements on the specific characteristics of the goods made "in advertising" may be a "relevant circumstance" for the purpose of determining whether the goods are of satisfactory quality and so whether the seller is in breach of the statutorily implied term that the goods are of such quality.¹⁰⁰ The Consumer Rights Act 2015 also replaces this regime,¹⁰¹ and stipulates

that where goods are supplied by a trader to a consumer, ¹⁰² “any public statement made in advertising” will be a relevant circumstance for determining whether the goods are of satisfactory quality ¹⁰³; the position is the same where “digital content” is supplied by a trader to a consumer. ¹⁰⁴

Timetables and passenger tickets

2-018

There is a remarkable diversity of views on the question just when a contract of carriage is concluded between a carrier and an intending passenger. It has been said that railway carriers made offers by issuing advertisements stating the times and conditions under which trains would run ¹⁰⁵; and that a road carrier made offers to intending passengers by the act of running buses. ¹⁰⁶ Such offers could be accepted by an indication on the part of the passenger that he wished to travel: e.g. by applying for a ticket or getting on the bus. Another view is that the carrier makes the offer at a later stage, by issuing the ticket; and that this offer is accepted by the passenger's retention of the ticket without objection, ¹⁰⁷ or even later, when he claims the accommodation offered in the ticket. ¹⁰⁸ On this view, the passenger makes no more than an invitation to treat when he asks for a ticket to be issued to him; and the offer contained in the ticket may be made to, and accepted by, the passenger even though the fare is paid by a third party (e.g. the passenger's employer). ¹⁰⁹ Where the booking is made in advance, e.g. through a travel agent, yet a third view has been expressed: that the contract is concluded when the carrier indicates, even before issuing the ticket, that he “accepts” the booking, ¹¹⁰ or when he issues the ticket ¹¹¹: on this view, it is the passenger who makes the offer. The authorities yield no single rule; one can only say that the exact time of contracting depends in each case on the wording of the relevant document and on the circumstances in which it was issued.

Auctions

2-019

At an auction sale the general rule is that the auctioneer's request for bids is not an offer that can be accepted by the highest bidder. ¹¹² Instead, it is a bid that constitutes an offer, which the auctioneer may, but generally ¹¹³ is not bound to, accept. Accordingly s.57(2) of the Sale of Goods Act 1979 provides that a sale by auction is completed ¹¹⁴ when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and that until then the bidder may retract his bid. Similarly, the auctioneer can generally ¹¹⁵ withdraw the lot before he accepts the bid. It seems, moreover, that the offer made by each bidder lapses ¹¹⁶ as soon as a higher bid is made. Thus, if a higher bid is made and then withdrawn, the auctioneer can no longer accept the next highest. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 defines “public auction” as “a method of sale where goods or services are offered by a trader to consumers through a transparent ... bidding procedure ...”. ¹¹⁷ The word “offered” is here used in what is presumably regarded as a popular sense, rather than in the legal sense stated. ¹¹⁸ The definition concludes with the words “(c) the successful bidder is bound to purchase the goods or services”. The word “successful” shows that the mere making of a bid does not conclude the contract since, if a higher bid were then made, the former bid would not be “successful”. However, it is unclear whether the contract is concluded by the highest bid being made or whether some further act of the auctioneer is required, as is the case under the Sale of Goods Act 1979. ¹¹⁹ Section 30(4)(c) of the Consumer Rights Act 2015 refers to the situation “where the goods are offered within the United Kingdom” ¹²⁰, and it seems that “offered” is here again used in its popular, rather than its legal, sense.

Auctions with and without reserve

2-020

When property is put up for auction subject to a reserve price, there is no contract if the auctioneer by mistake purports to accept a bid lower than the reserve price. ¹²¹ Where the auction is without reserve, there is no contract of sale between the highest bidder and the owner of the property if the auctioneer refuses to accept the highest bid. But it has been held that the *auctioneer* is liable on a

separate or collateral contract between him and the highest bidder that the sale will be without reserve. ¹²² Although a mere advertisement of an auction is not an offer to hold it, ¹²³ the actual request for bids at the auction itself seems to be an offer by the auctioneer that he will (on the owner's behalf) accept the highest bid; and this offer is accepted by bidding. The question whether there is any consideration for the auctioneer's promise to the highest bidder is discussed in Ch.4. ¹²⁴

Provision for resale in case of dispute

2-021

An auction sale may be conducted subject to the express stipulation that, "if any dispute ¹²⁵ arises between two or more bidders, the lot in dispute shall be immediately put up again and resold". If the dispute arises after the lot has been knocked down to one bidder, it seems that there is a contract ¹²⁶ with him, subject to the condition subsequent that the sale may be annulled if a dispute immediately breaks out between two or more bidders.

Tenders

2-022

At common law, a statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender ¹²⁷; it merely indicates a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer, ¹²⁸ even though the preparation of the tender may involve very considerable expense. The person who submits the tender makes the offer and there is no contract until the person asking for the tenders accepts one of them. These rules may, however, be excluded by evidence of contrary intention: e.g. where the person who invites the tenders states in the invitation that he binds himself to accept the highest offer to buy ¹²⁹ (or, as the case may be, the lowest offer to sell or to provide the specified services). ¹³⁰ In such cases, the invitation for tenders may be regarded *either* as itself an offer *or* as an invitation to submit offers coupled with an undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the highest offer to buy (or lowest offer to sell, etc.) is communicated. ¹³¹ There is also an intermediate possibility. This is illustrated by *Blackpool and Fylde Aero Club Ltd v Blackpool BC* ¹³² in which an invitation to submit tenders was sent by a local authority to seven selected parties; the invitation stated that tenders submitted after a specified deadline would not be considered. It was held that the authority was contractually bound to consider (though not to accept) a tender submitted before the deadline. The unilateral offer to consider conforming tenders was accepted when a conforming tender was submitted.

Public procurement

2-023

The common law position stated in para.2-022 above is modified by legislation, for example, by Regulations ¹³³ which give effect to European Community Directives, the object of which is to prevent discrimination in the award of major contracts for public works, supplies and services in one member state against nationals of another member state. These Regulations restrict the freedom of the body seeking tenders to decide which tender it will accept and they provide a remedy in damages for a person who has made a tender and is prejudiced by breach of the Regulations. A fuller account of the topic is given in Ch.11. ¹³⁴

Share offers

2-024

A company which, in commercial language, ¹³⁵ makes an "offer to the public" of new shares does not in law "offer" to allot the shares. It invites members of the public to apply for them, reserving the right

to decide how many, if any, to allot to any particular applicant.¹³⁶ On the other hand a letter informing an existing shareholder of his entitlement under a “rights” issue of new shares is regarded as an offer.¹³⁷ This type of communication will set out the precise rights of the persons to whom it is addressed, so that it may be inferred that the company intends to be bound in relation to any shareholder who takes up his rights.

Place of making an offer


2-025

It may be important to know exactly *where* an offer has been made: for example, in order to determine whether a contract can be sued on in a particular court.¹³⁸ For this purpose it has been held that an offer sent through the post had been made where it was posted.¹³⁹ Since requirements of this kind are generally imposed by legislation, it is unsafe to lay down any general rule. The question where an offer was made must, in the last resort, turn on the construction of the relevant legislation.

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10. *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [75]; e.g. *Storer v Manchester City Council* [1974] 1 W.L.R. 1403; *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 195, 201; *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 1 All E.R. (Comm) 513, where a communication was held to be an offer as it was “intended to be capable of acceptance with a binding contract being thereby concluded” ([at 59]; cf. at [67]); contrast *André & Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep. 463; *Schuldenfrei v Hilton (Inspector of Taxes)* [1998] S.T.C. 404 (statement that something *had* been done, not an offer). For other illustrations of statements held not to amount to offers, see *Destiny 1 Ltd v Lloyd's TSB Bank Plc* [2010] EWHC 1233 (proposal forming part of a negotiating “package”); *Global 5000 Ltd v Wadhawan* [2011] EWHC 853 (Comm), [2011] 2 All E.R. (Comm) at [55] (applying the objective test: at [46]); [2012] EWCA Civ 13, [2012] 2 All E.R. (Comm) 18 at [65], appeal dismissed on the different ground that there was “no serious issue to be tried as to the existence of [the alleged] contract ...”.
 11. Above, para.2-002; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 571; *Bowerman v ABTA Ltd* [1995] N.L.J. 1815; *Covington Marine Corporation v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748 at [43].
 12. For offers made by conduct, see below, para.2-005; *The Aramis* [1989] 1 Lloyd's Rep. 213 (where the objective test was not satisfied); *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25, 27.
 13. *Moran v University College Salford (No.2)*, *The Times*, November 23, 1993.
 14. *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700.
 15. cf. *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com.L.R. 158; cited with approval in *Whittaker v Campbell* [1984] Q.B. 318, 327, in *Food Corp of India v Antclizo Shipping Corp (The Antclizo)* [1987] 2 Lloyd's Rep. 130, 146, affirmed [1988] 1 W.L.R. 603 and in *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700, 702.
 16. *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 A.C. 854, 924.
 17. *André & Cie SA v Marine Transocean Ltd (The Splendid Sun)* [1981] 1 Q.B. 694, as explained in *The Hannah Blumenthal*, above; *Challoner v Bower* (1984) 269 E.G. 725; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multibank Holsatia)* 2 Lloyd's Rep. 486, 493 (“subjective understanding”).

18. *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 571; *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700, 703; *Covington Marine Corporation v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748 at [45] ("Subject only to actual knowledge on the part of the buyer [the offeree] that no offer was intended"); *HSBC Bank Plc v 5th Avenue Partners Ltd* [2007] EWHC 2819 (Comm) at [117] (objective principle "not engaged" where absence of any intention to vary an existing contract was known to both parties, affirmed on other issues [2009] EWCA Civ 296); and see the authorities cited in n.23, below. The passage of the text ending with n.18 is evidently that in the 30th edition of this book to which approving reference is made in *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (QB) at [130], [154], affirmed: [2013] EWCA Civ 394, [86]. See further on the mistake of term known to the other party at paras 3-018, 3-022, 3-035, and rectification for unilateral mistake as to terms at paras 3-069—3-076.
19. In *Merrill Lynch International v Amorim Partners Ltd* [2014] EWHC 74 (QB) at [54] Hamblen J. said that a mistake will only give rise to relief if it was known to the other party, but the point does not appear to have been argued and the mistake was in any event not as to the terms of the contract, see below, para.3-023.
20. See *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com. L.R. 158; *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700 at 703, where Mance J. said that the objective principle would be displaced if a party knew or ought to have known of the mistake.
21. See below, para.4-068.
22. *The Hannah Blumenthal*, above, as interpreted in *Allied Marine Transport v Vale de Rio Doce Navegacao SA (The Leonidas D.)* [1985] 1 W.L.R. 925; Beatson (1986) 102 L.Q.R. 1; Atiyah (1986) 102 L.Q.R. 363; *Gebr. van Weelde Scheepvaart Kantoor BV v Homeric Marine Services (The Agrabele)* [1987] 2 Lloyd's Rep. 223, especially at 235; cf. *Cie Française d'Importation, etc., SA v Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592, 597; *Amherst v James Walker Goldsmith and Silversmith Ltd* [1983] Ch. 305. The view that, in the third of the situations described in the text above, there is no contract is referred to with approval by Andrew Smith J. in *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [228], affirmed [2009] EWCA Civ 1134, [2010] 2 All E.R. (Comm) 788 where Longmore L.J. at [22] paid "tribute to the careful and thorough judgment of Andrew Smith J".
23. *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear)* [1987] 1 Lloyd's Rep. 330, 341 (doubted on another point in para.2-069, n.351 below, and see para.2-006, n.32); this view was approved in *The Antclizo* [1987] 2 Lloyd's Rep. 130, 143 but doubted at 147 (affirmed [1988] 1 W.L.R. 603 without reference to the point); and semble in *Floating Dock Ltd v Hong Kong and Shanghai Bank Ltd* [1986] 1 Lloyd's Rep. 65, 77; *The Multibank Holsatia* [1988] 2 Lloyd's Rep. 486, 492 ("at least did not conflict with [B's] subjective understanding"); *Thai-Europe Tapioca Service Ltd v Seine Navigation Inc (The Maritime Winner)* [1989] 2 Lloyd's Rep. 506, 515 (using similar language). A dictum in *Furness Withy (Australia) Pty Ltd v Metal Distribution (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep. 236, 242 goes even further in suggesting that there may be a contract even though "neither [party] intended to make a contract".
24. *Hart v Mills* (1846) 15 L.J. Ex. 200; cf. *Steven v Bromley & Son* [1919] 2 K.B. 722; *Greenmast Shipping Co SA v Jean Lion et Cie. SA (The Saronikos)* [1986] 2 Lloyd's Rep. 277; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch), [2003] E.M.L.R. 35.
25. Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) (implementing Directive 97/7/EC) regs 22 (amending Unsolicited Goods and Services Act 1971) and 24 (as amended by Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) regs 2–4), 30(1) and Sch.2, para.96) see also reg.3(4)(d) and Sch.1 para.29 of the 2008 Regulations, above. For a further amendment of the 2008 Regulations (SI 2008/1277), see Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.39. On these Regulations see generally below, Vol.II, paras 38-153—38-191. For further

amendments of the 1971 Act, see Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demand for Payment) Order 2005 (SI 2005/55) and Unsolicited Goods and Services Act 1971 (Electronic Commerce) (Amendment) Regulations 2005 (SI 2005/148). Normally, these provisions against “inertia selling” would not apply where goods were dispatched in response to the buyer’s order, even if they were not in accordance with the order; but they might apply where the qualitative or quantitative difference between what was ordered and what was sent was extreme.

26. Arbitration Act 1996 s.41(3), replacing Arbitration Act 1950 s.13A. Under s.13A, it had been held that the court could take into account delay occurring before the section came into force: *Yamashita-Shinnihon S.S. Co Ltd v L’Office Cherifien des Phosphate (The Boucraa)* [1994] 1 A.C. 486, and that the court would (mutatis mutandis) apply the same principles to the power to dismiss arbitration proceedings as those which govern the dismissal of an action for want of prosecution: *James Lazenby & Co v McNicholas Construction Co Ltd* [1995] 1 W.L.R. 615.
27. See the GAFTA arbitration rules referred to in *Cargill SpA v Kadinopoulos SA* [1992] 1 Lloyd’s Rep. 1.
28. Arbitration Act 1996 s.41(2) so provides.
29. cf. *Amherst Ltd v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305; *Collin v Duke of Westminster* [1985] Q.B. 581; *M.S.C. Mediterranean Shipping SA v B.R.E. Metro Ltd* [1985] 2 Lloyd’s Rep. 239; *Fenton Ins. Ltd v Gothaer Versicherungsbank VVaG* [1991] 1 Lloyd’s Rep. 172, 180; *Indescon Ltd v Ogden* [2004] EWHC 2326 (TCC), [2005] 1 Lloyd’s Rep. 31 (right to appoint arbitrator not lost by lapse of time); *Blindley Health Investments Ltd v Bass* [2014] EWHC 1366 (Ch) at [117]–[125] (rejecting the argument that there had been an “abandonment” of a right of preemption).
30. *Unisys International Services Ltd v Eastern Counties Newspaper Group Ltd* [1991] 1 Lloyd’s Rep. 538, 553 suggests that the possibility cannot be wholly ruled out; cf. *The Boucraa* [1994] 1 A.C. 486, 521 (describing the “abandonment” approach as “largely useless in practice”).
31. *Unisys* case, above, n.30 at 553.
32. *The Leonidas D.* [1985] 1 W.L.R. 925; *Cie Française d’Importation, etc., SA v Deutsche Conti Handelsgesellschaft* [1985] 2 Lloyd’s Rep. 592; *The Antclizo* [1988] 1 W.L.R. 603; *The Agrabele* [1987] 2 Lloyd’s Rep. 223; *The Maritime Winner* [1989] 2 Lloyd’s Rep. 506; contra, *The Golden Bear* [1987] 1 Lloyd’s Rep. 330 (sed quaere: the decision was in part based on the decision at first instance in *The Agrabele* [1985] 2 Lloyd’s Rep. 496, but this was reversed on appeal: [1987] 2 Lloyd’s Rep. 223); *Ulysses Compania Naviera SA v Huntington Petroleum Services (The Ermoupolis)* [1990] 1 Lloyd’s Rep. 161, 166 see also below, para.2-069, n.351; *Unisys* case, above, n.30.
33. *The Antclizo*, above; Davenport (1988) 104 L.Q.R. 493.
34. Above, paras 2-003 and 2-004.
35.  *The Splendid Sun* [1981] Q.B. 694, as explained in *The Hannah Blumenthal* [1983] 1 A.C. 854 (though this explanation was doubted in *Cie Française d’Importation, etc., SA v Deutsche Conti Handelsgesellschaft* [1985] 2 Lloyd’s Rep. 592, 599); *Tracom SA v Anton C. Nielsen* [1984] 2 Lloyd’s Rep. 195 (as to which see below, para.2-074, n.389); *The Multibank Holsatia* [1988] 2 Lloyd’s Rep. 486; for the question whether such an offer can be accepted by inactivity, see below, para.2-068. In *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd, Costi Righi SpA* [2015] NICA 68, the Court of Appeal held that the parties had not abandoned the contract, as there was no evidence by way of conduct or correspondence, or of inactivity, to support such a finding; both parties were incontrovertibly actively engaged in the arbitration process until an impasse was created by the costs issue; and the respondent who contributed to the situation whereby the costs of the reference were increased, could not benefit from this action. Although the reference to arbitration had been terminated this was distinct from the underlying arbitration agreement.

- [36.](#) [1893] A.C. 552. See also *Clifton v Palumbo* [1944] 2 All E.R. 497; *Scancarriers A/S v Aotearoa International Ltd (The Barranduna)* [1985] 2 Lloyd's Rep. 419 (quotation of freight rates not an offer). But see *Philip & Co v Knoblauch*, 1907 S.C. 994 (*Harvey v Facey* distinguished).
- [37.](#) [1979] 1 W.L.R. 294; cf. *Michael Gerson (Leasing) Ltd v Wilkinson* [2000] Q.B. 514 at 540 ("I am willing to make an outright sale [of specified machinery] for £319,000 ...") not an offer and, even if it was, it had not been accepted: below, para.2-026.
- [38.](#) Such as "a restrictive covenant that the house shall be used as a private dwelling house only, that there shall be no advertising, that the purchaser shall not obstruct accesses, and so on". The quote is from Geoffrey-Lane L.J. dissenting in the Court of Appeal, [1978] 1 W.L.R. 520 at 530. It was approved by Lord Edmund-Davies in the House of Lords, [1979] 1 W.L.R. 294 at 302; Lord Diplock makes the same point at 299.
- [39.](#) *McNicolas Construction Holdings v Endemol UK Plc* [2003] EWHC 2472, [2003] E.G.C.S. 136.
- [40.](#) *Cooper v National Westminster Bank Plc* [2009] EWHC 3035 (QB), [2010] 1 Lloyd's Rep. 490 at [56].
- [41.](#) *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433, 436.
- [42.](#) [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 811.
- [43.](#) At [63].
- [44.](#) At [64].
- [45.](#) At [64].
- [46.](#) *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184.
- [47.](#) *Spencer v Harding* (1870) L.R. 5 C.P. 561; *Clifton v Palumbo*, above, para.2-007, n.36; *iSoft Group Plc v Misys Holdings Ltd* [2003] EWCA Civ 229, [2003] All E.R. (D) 438 (Feb).
- [48.](#) *Bigg v Boyd Gibbins Ltd* [1971] 1 W.L.R. 913, (1987) 87 L.Q.R. 307.
- [49.](#) *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd* [1986] A.C. 207.
- [50.](#) [2007] UKHL 23, [2007] 1 W.L.R. 1325.
- [51.](#) See below, para.2-031.
- [52.](#) [2005] EWCA Civ 1418, [2006] 1 Lloyd's Rep. 279 at [15].
- [53.](#) [2007] UKHL 23, [2007] 1 W.L.R. 1325 at [24].
- [54.](#) [2005] EWHC 239, [2005] 1 Lloyd's Rep. 470 at [118].
- [55.](#) [2007] UKHL 23 at [23].
- [56.](#) [2007] UKHL 23 at [25]; cf. [2005] EWCA Civ 1481, [2006] 1 Lloyd's Rep. 279 at [16].
- [57.](#) [2007] UKHL 23 at [23].
- [58.](#) [2007] UKHL 23 at [9].
- [59.](#) *Timothy v Simpson* (1834) 6 C. & P. 499, 500; *Fisher v Bell* [1961] 1 Q.B. 394 (actual decision reversed by Restriction of Offensive Weapons Act 1961 s.1; contrast Criminal Justice Act 1988 s.14A(1), as inserted by Offensive Weapons Act 1996 s.6: this refers only to selling). Dicta in *Wiles v Maddison* [1943] 1 All E.R. 315, 317 may perhaps suggest that a shop window display

is an offer. See also Winfield (1939) 55 L.Q.R. 499, 516–518.

- [60.](#) *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 Q.B. 410; cf. *Lacis v Cashmarts Ltd* [1969] 2 Q.B. 400; *Davies v Leighton* [1978] Crim. L.R. 575. For the contrary view, see Ellison Kahn (1955) 72 S.A.L.J. 246, 250–253; *Lasky v Economic Grocery Stores*, 319 Mass. 224; 65 N.E. 2d 305 (1946).
- [61.](#) *Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 W.L.R. 1, 5, 6, 11; *Richardson v Worrall* [1985] S.T.C. 693, 717.
- [62.](#) *Re Charge Card Services* [1989] Ch. 417, 512; for acceptance by conduct, see below, para.2-029.
- [63.](#) cf. below, para.2-013 at n.70.
- [64.](#) Above, para.2-008.
- [65.](#) *R. v Warwickshire CC, Ex p. Johnson* [1993] A.C. 583, 588.
- [66.](#) Below, para.2-093.
- [67.](#) Under the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.3(4)(d) and Sch.1 para.6, a trader (as defined in reg.2, as amended by reg.2 the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) commits an offence if he “makes an invitation to purchase products at a specified price” and then refuses to show the advertised item to consumers or refuses to take orders for it, though only if he does so “with the intention of promoting a different product (bait and switch)”. A misleading price indication could also conceivably amount to deceit. And see below, para.2-017.
- [68.](#) See *Lasky v Economic Grocery Stores*, above, n.60. An alternative possibility is that the acceptance may take place before such presentation of the goods but be subject until then to the customer’s power to cancel: see *Gillespie v Great Atlantic & Pacific Stores*, 187 S.E. 3d 441 (1972); *Sheeskin v Giant Food Inc*, 318 A 2d 874 (1974). cf. *R. v Morris* [1984] A.C. 320 where taking goods off the shelf of a self-service store and changing the price labels was held to be an “appropriation” within Theft Act 1968 s.3(1); but it does not follow that at this stage there would for the purpose of the law of contract be an acceptance even if the shelf-display amounted to an offer: see *R. v Morris* [1984] A.C. 320, 334.
- [69.](#) cf. *Guildford v Lockyer* [1975] Crim. L.R. 235.
- [70.](#) *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163, 169.
- [71.](#) *Chapelton v Barry UDC* [1940] 1 K.B. 532.
- [72.](#) cf. the cases discussed below, para.2-018.
- [73.](#) 2005 S.L.T. (Sh Ct) 63.
- [74.](#) See below, paras 2-026, 2-029.
- [75.](#) *Partridge v Crittenden* [1968] 1 W.L.R. 1204; contrast *Lefkowitz v Great Minneapolis Surplus Stores*, 86 N.W. 2d 689 (1957).
- [76.](#) *Rooke v Dawson* [1895] 1 Ch. 480.
- [77.](#) *Grainger & Son v Gough* [1896] A.C. 325.
- [78.](#) *Grainger & Son v Gough* [1896] A.C. 325 at 334.
- [79.](#) cf. the cases discussed below, para.2-018.

80. For the distinction between unilateral and bilateral contracts, see below, para.2-082.
81. [1893] 1 Q.B. 256.
82. Contrast *Lambert v Lewis* [1982] A.C. 225, 262, per Stephenson L.J., affirmed without reference to the point [1982] A.C. 271, below, para.2-173.
83. [1995] N.L.J. 1815.
84. Above, paras 2-002 and 2-003.
85. e.g. *Gibbons v Proctor* (1891) 64 L.T. 594; *Williams v Carwardine* (1833) 5 C. & P. 566; 4 B. & Ad. 621.
86. *Lancaster v Walsh* (1838) 4 M. & W. 16. Where two persons together supply the information, they may share a single reward: *Lockhart v Barnard* (1845) 14 M. & W. 674.
87. Above, para.2-015.
88. *Shanklin Pier LD. v Detel Products LD* [1951] 2 K.B. 854, [1951] 2 All E.R. 471; *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd* [1965] 2 Q.B. 170.
89. *Lambert v Lewis*, also known as: *Lexmead (Basingstoke) Ltd v Lewis* [1982] A.C. 225, [1981] 2 W.L.R. 713 at 262: “the difficulty is to show that what the manufacturers stated in the literature advertising and accompanying their products as to their safety and suitability was intended to be a contractual warranty or binding promise. It is one thing to express or imply it in a contract of sale, another to treat it as expressed or implied as a contract, or a term of a contract, collateral to a contract of sale.”
90. e.g. under Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) regs 2–4, reg.3(4)(d) and Sch.1 para.6, above, para.2-012 n.67. See also Consumer Credit Act 1974 s.45.
91. Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276).
92. Below, Ch.7.
93. SI 2002/3045 reg.15 (as amended by Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 para.97); for definition of “consumer” and “consumer guarantee”, see reg.2.
94. See s.60 and Sch.1 para.53 of the Consumer Rights Act 2015. The Act will apply to contracts made on or after October 1, 2015.
95. See s.3(1) of the Consumer Rights Act 2015.
96. See s.30(3) of the Consumer Rights Act 2015. And see below, para.2-176.
97. SI 2013/3134.
98. regs 9(3), 10(5) and 13(6) of SI 2013/134.
99. For such liability under the 2013 Regulations, see para.2-176.
100. Sale of Goods Act 1979 s.14(2D), as inserted by SI 2002/3045 reg.3. See also Supply of Goods and Services Act 1982 s.11D(3A) and Supply of Goods (Implied Terms) Act 1973 s.10(2D), as inserted by regs 8 and 13 of SI 2002/3045.
101. With respect to contracts made on or after October 1, 2015. The Sale of Goods Act 1979

s.14(2D) is repealed by s.60 and Sch.1 para.13(2) of the Consumer Rights Act 2015; the Supply of Goods (Implied Terms) Act 1973 s.10(2D) is omitted by virtue of s.60 and Sch.1 paras 3(1) and (2) of the 2015 Act; and the Supply of Goods and Services Act 1982 s.11D(3A) is omitted by virtue of s.60 and Sch.1 para.46 of the 2015 Act. See further below, Vol.II, paras 38-436 et seq.

- [102.](#) Consumer Rights Act 2015 s.3(1).
- [103.](#) Consumer Rights Act 2015 ss.9(1), (2), (5) and (6).
- [104.](#) Consumer Rights Act 2015 ss.33(1), 34(6).
- [105.](#) *Denton v G.N. Ry* (1856) 5 E. & B. 860; *Thompson v L.M.S. Ry* [1930] 1 K.B. 41, 47; perhaps because such companies could not refuse to carry? See now Railways Act 1993 s.123.
- [106.](#) *Wilkie v L.P.T.B.* [1947] 1 All E.R. 258, 259.
- [107.](#) *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450; the acceptance in such cases would be by conduct rather than by "silence": cf. below, para.2-074.
- [108.](#) *MacRobertson-Miller Airline Services v Commissioner of State Taxation* [1975] A.L.R. 131; the principle resembles that stated in *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1037 in relation to the time of formation of a contract for the carriage of goods by sea; Carver on Bills of Lading, 3rd edn (2011), para.3-001 n.7.
- [109.](#) *Hobbs v L. & S.W. Ry* (1875) L.R. 10 Q.B. 111, 119, as explained in the *MacRobertson-Miller* case, above, n.108, at 147; consideration for the promises of both parties would be provided on the principle of *Gore v Van der Lann* [1967] 2 Q.B. 31, below, para.4-202.
- [110.](#) *Hollingworth v Southern Ferries Ltd (The Eagle)* [1977] 2 Lloyd's Rep. 70; *Daly v Gen. Steam Navigation Co Ltd (The Dragon)* [1980] 2 Lloyd's Rep. 415; affirming [1979] 1 Lloyd's Rep. 257; *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 C.L.R. 97; cf. (in cases of carriage of goods by sea) *Gulf Steel Co Ltd v Al Khalifa Shipping Co (The Anwar al Sabar)* [1980] 2 Lloyd's Rep. 261, 263. See also *British Airways Board v Taylor* [1976] 1 W.L.R. 13.
- [111.](#) *Dillon v Baltic Shipping Co (The Mikhail Lermontov)* [1991] 2 Lloyd's Rep. 155, 159; reversed on other grounds (1993) 176 C.L.R. 344.
- [112.](#) *Payne v Cave* (1789) 3 T.R. 148; *British Car Auctions v Wright* [1972] 1 W.L.R. 1519, (1973) 89 L.Q.R. 7.
- [113.](#) For the position where the auction is "without reserve", see below, para.2-020.
- [114.](#) i.e. concluded: *Coys of Kensington Automobiles Ltd v Pugliese* [2011] EWHC 655 (QB), [2011] 2 All E.R. (Comm) 664 at [15] (where no reference was made to s.57(2)).
- [115.](#) Subject to the qualification stated in n.113 above.
- [116.](#) Below, para.2-101.
- [117.](#) SI 2013/3134 reg.5.
- [118.](#) cf. also para.2-024 n.135.
- [119.](#) s.57(2). No attempt is made in SI 2013/3134 to resolve the possible conflict between the definition "public auction" in reg.5 and s.57(2) of the 1979 Act (there is no reference to this Act in the List of Consequential Amendments in Sch.4 to the 2013 Regulations; neither is there reference to s.57 of the 1979 Act in the list of amendments detailed in Sch.1 of the Consumer Rights Act 2015).

- [120.](#) Consumer Rights Act 2015 s.31(4)(c).
- [121.](#) *McManus v Fortescue* [1907] 2 K.B. 1; on a sale of land, it must be expressly stated whether the sale is with reserve or not: Sale of Land by Auction Act 1867 s.5.
- [122.](#) *Warlow v Harrison* (1859) 1 E. & E. 309; cf. *Johnston v Boyes* [1899] 2 Ch. 73, 77; *Barry v Davies* [2000] 1 W.L.R. 1962, 1967, citing a previous edition of this book with approval. Contra, *Fenwick v Macdonald, Fraser & Co Ltd* (1904) 6 F. (Ct. of Sess.) 850; Slade (1952) 68 L.Q.R. 238; Gower, (1952) 68 L.Q.R. 457; Slade (1953) 69 L.Q.R. 21. Under the American Uniform Commercial Code (hereinafter referred to as UCC) the goods may not be withdrawn once they have been put up, if the auction is without reserve: s.2–328(3). This position is restated, though in different terminology, in s.2–328(3) of the American Law Institute's proposed revisions of art.2 of the UCC (2003; at present it seems to be unlikely that this proposal will be implemented).
- [123.](#) *Harris v Nickerson* (1873) L.R. 8 Q.B. 286.
- [124.](#) Below, para.4-195.
- [125.](#) See *Richards v Phillips* [1969] 1 Ch. 39.
- [126.](#) This seems to follow from use of the word “resold” in the stipulation quoted above at n.125.
- [127.](#) *Spencer v Harding* (1870) L.R. 5 C.P. 561.
- [128.](#) *Spencer v Harding* (1870) L.R. 5 C.P. 561, 564.
- [129.](#) *Spencer v Harding* (1870) L.R. 5 C.P. 561, 563.
- [130.](#) See *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932, 939. See also *MJB Enterprises Ltd v Defence Construction Ltd* (1999) 15 Const. L.J. 455: promise to accept lowest compliant tender broken by accepting lowest non-compliant one (Supreme Court of Canada).
- [131.](#) *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] A.C. 207, 224–225.
- [132.](#) [1990] 1 W.L.R. 25. No decision was reached on the quantum of damages. See also *Fairclough Building v Port Talbot BC* (1992) 62 B.L.R. 82.
- [133.](#) See below, para.11-051; Craig in (ed. Rose) *Consensus ad Idem*, Essays in the Law of Contract in Honour of Guenter Treitel, 148–151; and Environmental Protection Act 1990 Sch.2 Pt II, applied in *R. v Avon C., Ex p. Terry Adams Ltd*, *The Times*, January 20, 1994.
- [134.](#) Below, para.11-051.
- [135.](#) And indeed in the language of Financial Services and Markets Act 2000 s.103(4) and of Companies Act 2006 ss.551(17), 578 and 756.
- [136.](#) e.g. *Hebb's Case* (1867) L.R. 4 Eq. 9; *Harris' Case* (1872) L.R. 7 Ch. App. 587; *Wall's Case* (1872) 42 L.J.Ch. 372; cf. *Wallace's Case* [1900] 2 Ch. 671; *National Westminster Bank Plc v IRC* [1995] 1 A.C. 119, 126; cf. *Rust v Abbey Life Ins. Co* [1979] 2 Lloyd's Rep. 335 (property bonds).
- [137.](#) *Jackson v Turquand* (1869) L.R. 4 H.L. 305.
- [138.](#) *Taylor v Jones* (1875) 1 C.P.D. 87; cf. in criminal law, *Treacy v D.P.P.* [1971] A.C. 537 (blackmail); contrast *R. v Baxter* [1972] 1 Q.B. 1 (attempt to obtain by deception).
- [139.](#) *Taylor v Jones*, above n.138.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 3. - The Acceptance

(a) - Definition

Acceptance defined

2-026

! An acceptance is a final and unqualified expression of assent to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. ¹⁴⁰ On this test, a mere acknowledgement of the receipt of an offer does not amount to an acceptance; nor is there acceptance if a person, to whom an offer to sell goods had been made, merely replies that it was his "intention to place an order" ¹⁴¹ or asks for an invoice. ¹⁴² Where a prospective buyer of a home wanted to know what would happen if there were snagging defect, and the builder replied that he had an obligation under the NHBC scheme to remedy defects, there was no contract to repair any defects.

¹⁴³ **!** The mere acknowledgement of an offer, in the sense of a communication stating simply that the offer had been received, would likewise not be an acceptance. But an "acknowledgement" may by its express terms or, in a particular context by implication, contain a statement that the sender had agreed to the terms of the offer and that he was therefore accepting it. Where an offer makes alternative proposals, the acceptance must make it clear to which set of terms the assent is directed. In *Peter Lind & Co Ltd v Mersey Docks & Harbour Board* ¹⁴⁴ an offer to build a freight terminal was made by a tender quoting in the alternative a fixed, and a "cost-plus" price. The offeree purported to accept "your tender" and it was held that there was no contract.

Continuing negotiations ¹⁴⁵

2-027

When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. ¹⁴⁶ If so, there is a contract even though both parties, or one of them, had reservations not expressed in the correspondence. ¹⁴⁷ The court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject-matter of the negotiations has actually been rendered. In one such case a building sub-contract was held to have come into existence (even though agreement had not yet been reached when the contractor began work) as during its progress outstanding matters were resolved by further negotiations. ¹⁴⁸ The contract may then be given retrospective effect, so as to cover work done before the final agreement was reached. ¹⁴⁹

Negotiation after apparent agreement

2-028

⚠ Businessmen do not, any more than the courts, find it easy to say precisely when they have reached agreement, and may continue to negotiate after they appear to have agreed to the same terms. The court will then look at the entire course of negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement. ¹⁵⁰ If it did, the fact that the parties

continued negotiations after this point does not affect the existence of the contract between them ¹⁵¹

⚠: for example, in one such case the subsequent negotiations showed “only that the parties wished to discuss the *implementation* of the agreement ¹⁵² and that [one of them] wished to improve the terms that *had been agreed*”. The position would, of course, be different if the continued negotiations could be construed ¹⁵³ as an agreement to rescind the contract. A fortiori, the binding force of an oral contract is not affected or altered merely by the fact that, after its conclusion, one party sends to the other a document containing terms significantly different from those which had been orally agreed. ¹⁵⁴

Acceptance by conduct ¹⁵⁵

2-029

⚠ An offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them ¹⁵⁶; an offer to sell goods made by sending them to the offeree, can be accepted by using them, ¹⁵⁷ and an offer contained in a request for services can be accepted by beginning to render them, ¹⁵⁸ where a customer of a bank draws a cheque which will, if honoured, cause his account to be overdrawn, the bank, by deciding to honour the cheque, impliedly accepts the customer's implied request for an overdraft on the bank's usual terms. ¹⁵⁹ But conduct will only amount to acceptance if it is clear that the offeree's alleged act of acceptance was done with the intention (ascertained in accordance with the objective principle ¹⁶⁰) of accepting the offer. Thus a buyer's taking delivery of goods after the conclusion of an oral contract of sale will not amount to his acceptance of written terms which differ significantly from those orally agreed, and which are sent to him by the seller after the oral contract was made but before taking delivery. ¹⁶¹ That conduct is then referable to the oral contract rather than to the later attempted variation. Nor is a company's offer to insure a car accepted by taking the car out on the road, if there is evidence that the driver intended to insure with another company. ¹⁶² Nor is a managing director's proposal of an employment contract accepted by the company paying him at the stated rate, if there is doubt over whether the company

accepted the other terms. ¹⁶³ ⚠ A fortiori, there is no acceptance where the offeree's conduct clearly indicates an intention to reject the offer. This was the position in a Scottish case where a notice on a package containing computer software stated that opening the package would indicate acceptance of the terms on which the supply was made, and the customer returned the package unopened. ¹⁶⁴

Establishing the terms of contracts made by conduct

2-030

Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement may be more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all. ¹⁶⁵ But sometimes the court can resolve the uncertainty by applying the standard of reasonableness ¹⁶⁶ or by reference to another contract (whether between the same parties or between one of them and a third party ¹⁶⁷), or even to a draft agreement between them, which had never matured into a contract. For example, in *Brogden v Metropolitan Ry* ¹⁶⁸ a railway company submitted to a merchant a draft agreement for the supply of coal. The merchant returned it marked “approved” but also made a number of alterations to it, to which the railway company did not expressly assent; but the company accepted deliveries of coal under the draft agreement for two years. It was held that once the company began to accept these deliveries there was a contract on the terms of the draft agreement. ¹⁶⁹

Correspondence between acceptance and offer

2-031

A communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer. Thus an offer to sell 1,200 tons of iron is not accepted by a reply asking for 800 tons ¹⁷⁰; an offer to pay a *fixed* price for building work cannot be accepted by a promise to do the work for a *variable* price ¹⁷¹; and an offer to *supply* goods cannot be accepted by an “order” for their “*supply and installation*”. ¹⁷² Nor, generally, can an offer be accepted by a reply which varies one of its other terms (e.g. that specifying the time of performance), ¹⁷³ or by a reply which introduces an entirely new term. ¹⁷⁴ Such a reply is not an acceptance; but it may, rather, be a counter-offer, ¹⁷⁵ which the original offeror can then accept or reject and the new offeror can revoke prior to its acceptance. On the other hand, statements that are not intended to vary the terms of the offer, or to add new terms, do not disqualify the acceptance, even where they do not precisely match the words of the offer. ¹⁷⁶ It is, moreover, submitted that, if the introduced term merely makes express what would otherwise be implied, it does not destroy the effectiveness of the acceptance. ¹⁷⁷ Nor will the introduced term have this effect if it is merely a declaration by the acceptor that he is prepared to grant some indulgence to the offeror, e.g. to condone late payment in return for specified interest. ¹⁷⁸ Similarly, it is submitted that an acceptance which asks for some indulgence to the offeree is, nevertheless, effective, so long as it is clear that the offeree is prepared to perform even if the indulgence is not granted: e.g. to buy for cash if his request for credit is refused. The test in each case is whether the offeror reasonably regarded the purported acceptance “as introducing a new term into the bargain and not as a clear acceptance of the offer”. ¹⁷⁹ In the case of continuing negotiations, the court must look at the whole correspondence between the parties. ¹⁸⁰ It is also possible for a communication which contains new terms to amount at the same time: (1) to a firm acceptance of the offer; and (2) to a new offer to enter into a further contract. ¹⁸¹ In such a case, there will be a contract on the terms of the original offer, but none on the terms of the new offer, unless that, in turn, is accepted. ¹⁸²

Subsequent formal document inaccurate

2-032

After parties have reached agreement, the offer and acceptance may be set out in formal documents. The purpose of such documents may be merely to record the agreed terms ¹⁸³; and where one of the documents performs this function accurately while the other fails to do so, the discrepancy between them will not prevent the formation of a contract. In such a case, the court can rectify the document which fails to record the agreed terms, and the contract will be on those agreed terms. ¹⁸⁴

The “battle of forms”

2-033

The rule that offer and acceptance must correspond gives rise to problems where one or both of the parties wish to contract by reference to a “standard form” contractual document. Two situations (described in paras 2-034 and 2-035 below) call for discussion.

One party’s “usual conditions”

2-034

First, A may make an offer to B by asking for a supply of goods or services. B may reply that he is willing to supply the goods or services on his “usual conditions”. Prima facie, B’s statement is a counter-offer which A is free to accept or reject, and he may accept it by accepting the goods or services. If he does so, there is a contract between A and B, though the question whether B’s “usual conditions” actually form part of it may depend on a number of further factors which are discussed in Ch.13. ¹⁸⁵

Each party refers to own conditions

2-035

Secondly, *each* party may purport to contract with reference to his own set of standard terms and these terms may conflict. In *B.R.S. v Arthur V. Crutchley Ltd* ¹⁸⁶ the claimants delivered a consignment of whisky to the defendants for storage. Their driver handed the defendants a delivery note purporting to incorporate the claimants' "conditions of carriage". The note was stamped by the defendants: "Received under [the defendants'] conditions". It was held that this amounted to a counter-offer which the claimants had accepted by conduct ¹⁸⁷ in handing over the goods, and that the contract therefore incorporated the defendants' and not the claimants' conditions.

"Last shot" doctrine

2-036

This case gave some support to the so-called "last shot" doctrine: i.e. to the view that, where conflicting communications are exchanged, each is a counter-offer, so that if a contract results at all (e.g. from an acceptance by conduct) it must be on the terms of the final document in the series leading to the conclusion of the contract. ¹⁸⁸ This view was, for example, applied in *Tekdata Interconnections Ltd v Amphenol Ltd*, ¹⁸⁹ where a contract for the sale of goods was made by (1) the buyer's sending a purchase order on its own terms and conditions to the seller (2) the seller's sending an acknowledgement on its own terms to the buyer and (3) receipt of the goods by the buyer. ¹⁹⁰ It was held, applying the "traditional offer and acceptance analysis" ¹⁹¹ that the contract was on the seller's terms, which excluded or limited the seller's liability. But it was recognised that this analysis, and hence the "last shot" doctrine, might be ¹⁹² (though here it was not) ¹⁹³ displaced by evidence of the parties' "objective intention" that the "last shot" should not prevail. In one case, ¹⁹⁴ for example, a buyer placed a purchase order subject to its own conditions, and the seller acknowledged the order by a fax containing the words "Delivery based on our general conditions of sale". These were not attached and, mainly for this reason, it was held that the seller's acknowledgement was not a counter-offer but an acceptance, so that the resulting contract was on the buyer's conditions even though the seller's acknowledgement was the last shot in the exchange of messages. It has been emphasised that a party's standard terms and conditions will not be incorporated unless that party has given reasonable notice of them to the other party. In one case, ¹⁹⁵ the buyer's purchase order sent by email or fax, did not, on its face, refer to the terms and conditions on the back; neither were the terms and conditions sent separately. The seller's acknowledgement *did* refer to its terms but these were neither included nor were in common use in the industry. Neither party's terms and conditions were incorporated in the contract. However, where both parties *had* attached its terms and conditions but there had been no acceptance of either set of terms, there may be a contract, but on neither party's terms. ¹⁹⁶

A more complex situation arose in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd*, ¹⁹⁷ where sellers had offered to supply a machine for a specified sum. The offer was expressed to be subject to certain terms and conditions, including a "price escalation clause" by which the amount actually payable by the buyers was to depend on "prices ruling upon date of delivery". In reply the buyers placed an order for the machinery on a form setting out their own terms and conditions, which differed from those of the sellers in containing no price-escalation clause and also in various other respects. ¹⁹⁸ It also contained a tear-off slip to be signed by the sellers and returned to the buyers, stating that the sellers accepted the buyers' order "on the terms and conditions stated therein". The sellers did sign the slip and returned it with a letter saying that they were "entering" the order "in accordance with" their offer. This communication from the sellers was held to be an acceptance of the buyers' counter-offer ¹⁹⁹ so that the resulting contract was on the buyers' terms, and the sellers were not entitled to the benefit of the price escalation clause. It was held that the sellers' reply to the buyers' order did not prevail (though it was the "last shot" in the series) because the reference in it to the sellers' original offer was made, not for the purpose of reiterating all its terms, but only for the purpose of identifying the subject-matter. It would, however, have been possible for the sellers to have turned their final communication into a counter-offer by explicitly referring in it not only to the subject-matter of the original offer, but also to all its other terms. In that case no contract would have been concluded, since the buyers had made it clear before the machine was delivered that they did

not agree to the “price escalation” clause.²⁰⁰ Thus, it is possible by careful draftsmanship to avoid losing the battle of forms, but not (if the other party is equally careful) to win it. In the *Butler Machine Tool* case, for example, the sellers’ conditions included one by which their terms were to “prevail over any terms and conditions in Buyer’s order”; but this failed (in consequence of the terms of the buyers’ counter-offer) to produce the effect desired by the sellers.²⁰¹ The most that the draftsman can be certain of achieving is the stalemate situation in which there is no contract at all. Such a conclusion will often be inconvenient,²⁰² though where the goods are nevertheless delivered it may lead to a liability on the part of the buyers to pay a reasonable price.²⁰³

Documents sent after contract made

2-037

The discussion in para.2-036 above is concerned with the effect of the transmission of a document or documents containing terms *before* the alleged contract is made. The transmission of such a document by one party *after* the making of the contract will not affect the existence of the contract²⁰⁴, nor will the terms of the document form part of the contract unless they are, in turn, accepted as variations of the contract, either expressly or by conduct.

Acceptance of tenders

2-038

The submission of a tender normally amounts to an offer²⁰⁵, and the effect of an “acceptance” of such a tender turns on the construction of the acceptance and the tender in each case. Where a tender is submitted, e.g. for the erection of a building, a binding contract will normally arise from acceptance of the tender, unless it is expressly stipulated that there is to be no contract until certain formal documents have been executed.²⁰⁶ But greater difficulty arises in construing an “acceptance” of a tender for an indefinite amount for example, of one to supply “such quantities (not exceeding a specified amount) as you may order”. The person to whom such a tender is submitted does not incur any liability merely by “accepting” it: he becomes liable only when he places an order for goods,²⁰⁷ and he would not be bound to place any order at all²⁰⁸ unless he had (expressly or by necessary implication²⁰⁹) indicated in his invitation for tenders that he would do so.²¹⁰ The party submitting the tender also becomes bound, once a definite order has been placed, to fulfil it.²¹¹ Whether he can withdraw before this point, or avoid liability with respect to future orders, depends on the interpretation of the tender. He can do so if the tender means: “I will supply such quantities as you may order.”²¹² But he will not be entitled to withdraw if the tender means “I hereby bind myself to execute orders which you may place”, and if this promise is supported by some consideration.²¹³

Acceptance by tender

2-039

An invitation for tenders may, exceptionally, amount to an offer, e.g. where the person issuing the invitation binds himself to accept the highest or, as the case may be, the lowest tender.²¹⁴ The acceptance then takes the form of the submission of a tender; but difficulties can arise where several tenders are made and one (or more) of them takes the form of a so-called “referential bid”. In *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd*²¹⁵ an invitation for the submission of “offers” to buy shares was addressed to two persons, it stated that the prospective sellers bound themselves to accept the “highest offer”. One of the persons to whom the invitation was addressed made a bid of a fixed sum while the other submitted a “referential bid” undertaking to pay either a particular fixed sum or a specified amount in excess of the bid made by the other, whichever was the higher amount. It was held that the “referential bid” was ineffective and that the submission of the other person’s bid had concluded the contract for the sale of the shares. In reaching this conclusion, the House of Lords stressed that the bids were, by the terms of the invitation, to be confidential, so that neither bidder would know the amount bid by the other. In these circumstances the object of the invitation, which was to ascertain the highest amount that each of the persons to whom it was addressed was willing to

pay, would have been defeated by allowing it to be accepted by a “referential bid”.

Acceptance in ignorance of offer: unilateral contracts

2-040

In some jurisdictions it has been held that a person who gives information for which a reward has been offered cannot claim the reward if he did not know of the offer at the time of giving the information ²¹⁶; and the position has been said to be the same where that person once knew of the offer but had, at the time of the alleged acceptance, forgotten it. ²¹⁷ The English case of *Gibbons v Proctor* ²¹⁸ is sometimes thought to support the contrary view, but the actual decision can probably be explained on the ground that the claimant did know of the offer of reward by the time the information was given on his behalf to the recipient named in the advertisement. ²¹⁹ To allow recovery where the claimant did *not* know of the offer when he gave the information may raise the doctrinal difficulty that, in such cases, the parties have not *reached* any agreement; the position is simply that their wishes coincide. But in the case of a unilateral contract it is hard to see what legitimate interest of the promisor is prejudiced by holding him liable to a party who has in fact complied with the terms of his offer, though without being aware of it. ²²⁰ The suggestion that, in the case of a unilateral contract, the promisor might therefore be liable to a party who had complied with the terms of the offer, though without being aware of it, was considered in *Great Eastern Shipping Company Ltd v Far East Chartering Ltd (The Jag Ravi)*, ²²¹ where a shipowner sought at first instance to rely on this suggestion so as to enforce a letter of indemnity, even though when he did the act subjecting him to a liability which was covered by the letter of indemnity, he was unaware of the existence of that letter; but the point was left open. ²²²

Acceptance in ignorance of offer: bilateral contracts

2-041

Different considerations may apply where a person who does acts alleged to amount to acceptance of an offer of a bilateral contract does those acts in ignorance of the offer. For, if those acts are construed to amount to an acceptance, the actor may not only acquire rights but also incur liabilities under the contract. It may be unfair to subject him to these if at the time of the alleged acceptance he was not aware of the fact that an offer had been made to him, and thus had no intention of entering into a contract. In *Upton RDC v Powell* ²²³ the defendant, whose house was on fire, telephoned the Upton police and asked for “the fire brigade”. He was entitled to the services of the Pershore fire brigade free of charge as he lived in its district; but the police called the Upton fire brigade, in the belief that the defendant lived in that district. The Upton fire brigade for a time shared this belief and thought “that they were rendering gratuitous services in their own area”. ²²⁴ It was held that the defendant was contractually bound to pay for these services. But even if the defendant’s telephone call was an offer, it is hard to see how the Upton fire brigade’s services, given with no thought of reward, could be an acceptance. It would have been better to have given the claimants a restitutionary remedy than to hold that there was a contract. ²²⁵ The case was concerned only with the rights of the fire brigade, but, if there was a contract, the fire brigade would also have owed more extensive duties than they would have owed, had they been volunteers. It may well be unfair to subject a person who thinks he is a volunteer to the more stringent duties of a contractor. ²²⁶ Similar reasoning applies where the effect of an alleged bilateral contract is not to impose liabilities on a party but simply to deprive him of rights. It has accordingly been held that an alleged offer to abandon arbitration proceedings cannot be accepted unless the persons claiming to have accepted it understood or believed at the time of the alleged acceptance that such an offer was being made. ²²⁷

Motive for the acceptance

2-042

A person who knows of the offer may perform the act required for acceptance with some motive other than that of accepting the offer. In *Williams v Carwardine* ²²⁸ the defendant offered a reward of £20 to

anyone who gave information leading to the conviction of the murderers of Walter Carwardine. The plaintiff knew of the offer, but gave a “voluntary statement to ease my conscience, and in hopes of forgiveness hereafter” because she thought she had not long to live. This statement resulted in the conviction of the murderers. It was held that the plaintiff had brought herself within the terms of the offer and was entitled to the reward. Patteson J. added: “We cannot go into the plaintiff’s motives.” ²²⁹ Similarly, in *Carlill v Carbolic Smoke Ball Co*, ²³⁰ the claimant recovered the £100, although her predominant motive in using the smoke ball was (presumably) to avoid catching influenza. But in the Australian case of *R. v Clarke* ²³¹ a reward had been offered for information leading to the arrest and conviction of the murderers of two police officers. Clarke was suspected of the crime and gave information leading to the conviction of the culprits in order to clear himself of the charge; he admitted that he gave the information with no thought of claiming the reward. Although he knew of the offer, his claim for the reward failed as he had not given the information “in exchange for the offer”. ²³² It seems that an act which is *wholly* motivated by factors other than the existence of the offer cannot amount to an acceptance ²³³; but if the existence of the offer plays some part, however small, in inducing a person to do the required act, there is a valid acceptance of the offer.

Cross-offers

2-043

It seems that there is generally no contract if two persons make identical cross-offers, neither knowing of the other’s offer when he made his own: e.g. if A writes to B offering to sell B his car for £5,000 and B simultaneously writes to A offering to buy the car for £5,000. The most natural reaction to letters which cross in this way would be for one of the parties to communicate with the other to make sure that there was indeed an agreement between them. To hold that there was a contract without some such further communication might cause considerable surprise to one of the parties, or possibly to both. The view that “cross-offers are not an acceptance of each other” ²³⁴ can therefore be supported not only on the theoretical ground that the requirements of offer and acceptance are not satisfied, but also on the practical grounds that it accords with normal commercial expectations and that it promotes certainty.

^{140.} Above, para.2-003; *Inland Revenue Commissioners v Fry* [2001] S.T.C. 1715 at [6], [7]; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd’s Rep. 349 at [79]. For an application of the objective test to an acceptance, see *University of Edinburgh v Onifade* 2005 S.L.T. (Sh Ct) 63, above para.2-013. The motorist was there held to have accepted the landowner’s offer by parking his car on the owner’s land and it was “nothing to the purpose that he did not intend to pay” (at 6) the “fine” specified in the offer.

^{141.} *O.T.M. Ltd v Hydranautics* [1981] 2 Lloyd’s Rep. 211, 214.


^{142.} *Michael Gerson (Leasing) Ltd v Wilkinson* [2000] Q.B. 514 at 530 (where there was probably no offer: see above, para.2-007 n.37).


^{143.}  *Secker v Fairhill Property Services Ltd* [2017] EWHC 69 (QB).

^{144.} [1972] 2 Lloyd’s Rep. 234.

^{145.} Paras 2-027 and 2-028 are referred to with apparent approval by Males J. in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd’s Rep. 63 at [5].

^{146.} See *Glencore Energy Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] All E.R. (Comm) 513, where a communication forming part of continuing email exchanges was held on its true construction to be a “clear acceptance” (at [60], [62]) of the offer contained in the communication referred to in n.10.

- [147.](#) *Kennedy v Lee* (1817) 3 Mer. 441; cf. *Cie de Commerce, etc. v Parkinson Stove Co* [1953] 2 Lloyd's Rep. 487, B.S.E., 17 M.L.R. 476; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5; *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd's Rep. 614; *O.T.M. Ltd v Hydranautics* [1981] 2 Lloyd's Rep. 211, 215; *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306; *David de Jongh Weill v Mean Fiddler Holdings* [2003] EWCA Civ 1058; *Allianz Insurance Co of Egypt v Agaion Insurance Co SA* [2008] EWCA Civ 1455, [2009] 2 All E.R. (Comm) 745.
- [148.](#) *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25. Peter Lind's case (above, para.2-026) shows that the factor of performance of work is not decisive, though it may (as in that case) give the performing party a restitutionary claim.
- [149.](#) *G. Percy Trentham Ltd v Archital Luxfer Ltd*, above at n.147; and see below, para.2-131.
- [150.](#) *Hussey v Horne-Payne* (1878) 4 App. Cas. 311; *Bristol, Cardiff & Swansea Aerated Bread Co v Maggs* (1890) 44 Ch. D. 616; *British Guiana Credit Corp v Da Silva* [1965] 1 W.L.R. 248; *Container Transport International Inc v Oceanus Mutual, etc., Association* [1984] 1 Lloyd's Rep. 476; *Asty Maritime Co Ltd v Rocco Guiseppe & Figli (The Astyanax)* [1985] 2 Lloyd's Rep. 109, 112; *Hofflinghouse & Co Ltd v C. Trade SA (The Intra Transporter)* [1986] 2 Lloyd's Rep. 132; *Pagnan SpA v Granaria BV* [1986] 1 Lloyd's Rep. 547; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601, 619; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566 (no contract); *Frota Oceanica Brasileira SA v Steamship Mutual Underwriting Association (The Frota Norte)* [1996] 2 Lloyd's Rep. 461 (no contract as matters of substance remained unresolved). The same principle has been applied in the context of the question whether a contract had been rescinded: *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] Q.B. 601 at [100]. See also *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA (The Athena)* [2011] EWHC 589 (Admlty) at [44], citing the above text with apparent approval.
- [151.](#)  *Perry v Suffields Ltd* [1916] 2 Ch. 187; *Davies v Sweet* [1962] 2 Q.B. 300; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293; *Harmony Shipping Co SA v Saudi-Europe Line Ltd (The Good Helmsman)* [1981] 1 Lloyd's Rep. 377, 409, 416. Contrast *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37, where no contract was found because acceptance of an offer letter that was "subject to contract" would not remove the subject to contract condition, and subsequent communications by both parties were materially inconsistent with the existence of a contract.
- [152.](#) cf. para.2-122 below.
- [153.](#) *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [230], affirmed [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 786 without reference to this point, but see above, para.2-004 n.22.
- [154.](#) *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437.
- [155.](#) This paragraph and para.2-031 of the 31st edition were cited with approval in *Iliffe v Feltham Construction Ltd* [2014] EWHC 2125 at [80] (decision to grant summary judgment overturned on appeal on other grounds, [2015] EWCA Civ 715).
- [156.](#) *Harvey v Johnson* (1848) 6 C.B. 305; cf. *Steven v Bromley & Son* [1919] 2 K.B. 722, 728; *Greenmast Shipping Co SA v Jean Lion et Cie (The Saronikos)* [1986] 2 Lloyd's Rep. 277; cf. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 436; *Re Charge Card Services* [1989] Ch. 417 (above, para.2-011); *Carlisle Finance Ltd v Pallas Industrial Finance Ltd* [1999] 1 All E.R. (Comm) 659 at 670; and see below, para.2-074; *Photolibrary Group Ltd v Burda Senator Verlag GmbH* [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 811; *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep. 388, where para.2-030 of the 30th edition of the Main Work is cited at [22] with apparent approval; contrast *Capital Finance Co Ltd v Bray* [1964] 1 W.L.R. 323. As to counter-offers, see below, paras 2-097, 2-099.

- [157.](#) *Weatherby v Banham* (1832) 5 C. & P. 228; *Brogden v Metropolitan Ry* (1877) 2 App. Cas. 666, below, para.2-030 at n.166; cf. *Hart v Mills* (1846) 15 L.J. Ex. 200; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274, *The Times*, June 12, 2003. It is assumed that the goods are not “unsolicited” within the legislation against “inertia selling” (above, para.2-005).
- [158.](#) *Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 Lloyd’s Rep. 553; cf. *Datec Electronics Holdings Ltd v United Parcels Ltd* [2007] UKHL 23, [2007] 1 W.L.R. 1325 at [23], discussed in para.2-009 above.
- [159.](#) *Lloyds Bank v Voller* [2000] 2 All E.R. (Comm) 978.
- [160.](#) Above, paras 2-002, 2-003. For the application of the objective principle to an acceptance by conduct, see *University of Edinburgh v Onifade* 2005 S.L.T. (Sh Ct) 63, above para.2-026 n.140.
- [161.](#) *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd’s Rep. 437.
- [162.](#) *Taylor v Allon* [1966] 1 Q.B. 304. The objective principle (above, paras 2-002, 2-003) could not apply in this case, as the conduct alleged to constitute the acceptance had never come to the notice of the offeror. cf. *Picardi v Cuniberti* [2002] EWHC 2933, (2003) 19 Const. L.J. 350: payments made under another contract held not to amount to acceptance of an offer to enter into the alleged new contract; and see, in another context, *Re Leyland Daf Ltd* [1994] 4 All E.R. 300, affirmed sub nom. *Powdrill v Watson* [1995] 2 A.C. 394.
- [163.](#)  *Arley Homes North West Ltd v Cosgrave* Unreported April 14, 2016 EAT.
- [164.](#) *Beta Computers (Europe) v Adobe Systems (Europe)* 1996 S.L.T. 604; even opening the package would not necessarily be an acceptance so as to incorporate the printed terms: see Tapper in (ed. Rose) *Consensus ad Idem*, *Essays in the Law of Contract in Honour of Guenter Treitel*, 287–288.
- [165.](#) *Capital Finance Co Ltd v Bray* [1964] 1 W.L.R. 323.
- [166.](#) Sale of Goods Act 1979 s.8(2); Supply of Goods and Services Act 1982 s.15(1); below, para.2-120; cf. *Steven v Bromley & Son* [1919] 2 K.B. 722.
- [167.](#) e.g. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402.
- [168.](#) (1877) 2 App. Cas. 666; see also *Jones v Daniel* [1894] 2 Ch. 332; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd’s Rep. 5; cf. *D. & M. Trailers (Halifax) Ltd v Stirling* [1978] R.T.R. 468; *UK Safety Group Ltd v Heane* [1998] 2 B.C.L.C. 208.
- [169.](#) Contrast *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd’s Rep. 437, where the conduct of the buyer was referable, not to the draft sent by the seller, but to the earlier oral agreement (above at n.160) between the parties; and *UK Safety Group Ltd v Heane* [1998] 2 B.C.L.C. 208 (company director not bound by terms of a draft agreement which was under the company’s Articles required to be, but had not been, authorised by the board).
- [170.](#) *Tinn v Hoffman & Co* (1873) 29 L.T. 271; cf. *Holland v Eyre* (1825) 2 Sim. & St. 194; *Jordan v Norton* (1838) 4 M. & W. 155; *Harrison v Battye* [1975] 1 W.L.R. 58.
- [171.](#) *North West Leicestershire DC v East Midlands Housing Association* [1981] 1 W.L.R. 1396.
- [172.](#) *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401.
- [173.](#) *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401; *North West Leicestershire DC v East Midlands Housing Association* [1981] 1 W.L.R. 1396; cf. *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 A.C. 34.
- [174.](#) *Jackson v Turquand* (1869) L.R. 4 H.L. 305; *Jones v Daniel* [1894] 2 Ch. 332; *Von*

- Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284; *Love & Stewart Ltd v S. Instone & Co Ltd* (1917) 33 T.L.R. 475; *Northland Airlines v Dennis Ferranti Meters Ltd* (1970) 114 S.J. 845; *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 139; *Bircham & Co Nominees (No.2) v Worrell Holdings Ltd* [2001] EWCA Civ 775, (2001) 82 P. & C.R. 427 at [11], *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [73].
175. Below, para.2-097; *Guernsey v Jacobs UK Ltd* [2011] EWHC 918 (TCC), [2011] 2 All E.R. (Comm) 175 at [45] and see *Bonner Properties Ltd v McGurran Construction Ltd* [2009] NICA 49, [2010] N.I. 97, where, to the extent that the relevant communication amounted to a counter-offer, that counter-offer had, in turn, been rejected: see below, para.2-097. *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [184].
176. *Clive v Beaumont* (1847) 1 De G. & Sm. 397; *Simpson v Hughes* (1897) 66 L.J.Ch. 334; *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep. 543, where the above text (para.2-032 at n.153 in the 30th edition of this book) was cited with approval (at [43]) and a communication was accordingly held to be an acceptance even though there was no precise verbal correspondence between it and the offer.
177. *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 139. For another qualification of the requirement of exact correspondence between offer and acceptance, see Vienna Convention on Contracts for the International Sale of Goods (below, para.2-061) art.19(2).
178. *Harris's Case* (1872) L.R. 7 Ch. App. 587.
179. *Global Tankers Inc v Amercoat Europa NV* [1975] 1 Lloyd's Rep. 666, 671; cf. *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25, 28; *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [247] and [245], referring to the above text with apparent approval; affirmed without reference to this point [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 and see above, para.2-004 n.22.
180. For example in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63, a prospective seller of goods, to whom an offer to buy them had been sent, sent two communications to the offeror: the first stating that "[i]f you are successful in your bid", the selling process would be "conducted by the issuing of an invoice on our standard terms" and the second expressed to be a "confirmation that your bid has been successful" (at [40]). It was held that the first communication was "not a counter offer and did not change the basis on which the parties were negotiating" (at [70]).
181. This sentence was cited with approval and applied by Edwards-Stuart J. in *AB v CD Ltd* [2013] EWHC 1376 (TCC), [2013] B.L.R. 435 at [28], so that the communication in question was held not to amount to a counter-offer.
182. *Monrovia Motorship Corp v Keppel Shipyard (Private) Ltd (The Master Stelios)* [1983] 1 Lloyd's Rep. 356; *Society of Lloyd's v Twinn*, *The Times*, April 4, 2000; *Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd* [2010] EWCA Civ 1331 at [27] (in the reference at [24] to para.2-003 of the "Thirteenth Edition" of this book—"Thirteenth" is an evident misprint for "Thirtieth").
183. e.g. *O.T.M. Ltd v Hydranautics* [1981] 2 Lloyd's Rep. 211, 215; cf. below, para.2-123.
184. *Domb v Isoz* [1980] Ch. 548, 559
185. Below, paras 13-008—13-018. If the test of reasonable notice or signature is satisfied, the contract will be on B's conditions.
186. [1968] 1 All E.R. 811; cf. *A. Davies & Co (Shopfitters) v William Old* (1969) 113 S.J. 262; *O.T.M. Ltd v Hydranautics* [1981] 2 Lloyd's Rep. 211; *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507, 530; *Souter Automation v Goodman Mechanical Services* (1984) 34 Build.L.R. 81.

- [187.](#) *A E Yates Trenchless Solutions v Black & Veatch Ltd* [2008] EWHC 3183 (TCC), 124 Con. L.R. 188 at [60]; cf. *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2010] EWHC 2567 (Comm), [2011] 2 All E.R. 38, where general conditions in an order form sent by the buyer to the seller contained a Hungarian arbitration and choice of law clause, while the seller in an email message to the buyer proposed a variation containing an English choice of law and exclusion jurisdiction clause. This message was held to be a counter-offer (at 49(v)), which the buyer had accepted by “performance”, i.e. presumably by taking delivery of the goods. For further proceedings in this case, see [2011] EWHC 345, [2011] 2 All E.R. (Comm) 128.
- [188.](#) As in *Zambia Steel & Building Supplies v James Clark & Eaton Ltd* [1986] 2 Lloyd’s Rep. 225.
- [189.](#) [2009] EWCA Civ 1209, [2010] 1 Lloyd’s Rep. 357, where Dyson L.J. at [23] referred with apparent approval to the “last shot” doctrine as stated in the text above; the case was followed on this point in *Trebor Bassett Holdings Ltd v ADT Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661 at [173].
- [190.](#) [2009] EWCA Civ 1209 at [7]; cf. at [25].
- [191.](#) [2009] EWCA Civ 1209 at [9], [25].
- [192.](#) [2009] EWCA Civ 1209 at [9], [25], [39].
- [193.](#) [2009] EWCA Civ 1209 at [15], applying the test of the parties’ “objective intention”.
- [194.](#) *Sterling Hydraulics Ltd v Dictomatic Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd’s Rep. 8.
- [195.](#) *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC) at [42]–[55].
- [196.](#) *John Graham Construction Ltd v FK Lowry Piling Ltd* [2015] NIQB 40.
- [197.](#) [1979] 1 W.L.R. 401, especially at 405; Adams (1979) 94 L.Q.R. 481; Rawlings (1979) 42 M.L.R. 715.
- [198.](#) Above, para.2-031 at nn.170 and 171.
- [199.](#) Per Lawton and Buckley L.JJ.; Lord Denning, M.R. also uses this analysis, but prefers the alternative approach of considering “the documents ... as a whole”: see 405 and cf. above, para.2-027. In the *Tekdata* case [2009] EWCA Civ 1209 (above, n.187) it was “not contended on behalf of [the seller] that there was no contract between it and [the buyer]”; the issue was as to the terms of an admitted contract.
- [200.](#) At 406, per Lawton L.J.
- [201.](#) cf. *Matter of Doughboy Industries Inc*, 233 N.Y.S. 2d 488, 490 (1962): “The buyer and seller accomplished a legal equivalent to the irresistible force colliding with the immovable object.”
- [202.](#) It seems to have been rejected for this reason in *Johnson Matthey Bankers Ltd v State Trading Corp of India* [1984] 1 Lloyd’s Rep. 427.
- [203.](#) cf. *Peter Lind & Co Ltd v Mersey Docks & Harbour Board* [1972] 2 Lloyd’s Rep. 234, above, para.2-026; McKendrick (1988) 8 O.J.L.S. 197. See below para.2-196.
- [204.](#) *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd’s Rep. 437; cf. below, para.2-123.
- [205.](#) Above, para.2-022.
- [206.](#) Below, para.2-123.
- [207.](#) *Percival Ltd v L.C.C. Asylums, etc., Committee* (1918) 87 L.J.K.B. 677.

- [208.](#) cf. *Churchward v R.* (1865) L.R. 1 Q.B. 173; *R. v Demers* [1900] A.C. 103.
- [209.](#) e.g. *Sylvan Crest Sand & Gravel Co v US*, 150 F.2d 642 (1945).
- [210.](#) cf. *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd* [1986] A.C. 207.
- [211.](#) *Great Northern Ry v Witham* (1873) L.R. 9 C.P. 16; cf. the similar rule applied to “declarations” under an “open cover” insurance in *Citadel Insurance Co v Atlantic Union Insurance Co* [1982] 2 Lloyd’s Rep. 543.
- [212.](#) *G.N. Ry v Witham* (1873) L.R. C.P. 16, 19.
- [213.](#) *Percival Ltd v L.C.C. Asylums, etc., Committee* (1918) 87 L.J.K.B. 677, 678; *Miller v F. A. Sadd & Son Ltd* [1981] 3 All E.R. 265. For an exception to the requirement of consideration in the law of insurance, see the *Citadel* case, above, n.207 at 546; below, para.4-194.
- [214.](#) Above, para.2-022.
- [215.](#) [1986] A.C. 207.
- [216.](#) *Bloom v American Swiss Watch Co* (1915) App.Div. 100 (S. Afr.); American authorities are divided: see Corbin, *Contracts*, para.59.
- [217.](#) *R. v Clarke* (1927) 40 C.L.R. 277, 241.
- [218.](#) (1891) 64 L.T. 594; 55 J.P. 616; cf. *Neville v Kelly* (1862) 12 C.B.(N.S.) 740.
- [219.](#) “The information ultimately reached Penn at a time when the plaintiff knew that the reward had been offered”: 55 J.P. 616.
- [220.](#) The view that, in the case of a unilateral contract, may be “constituted” by the relevant advertisement “whether or not it is read by anyone” derives some (at least hesitant) support from *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243, [2012] 1 Lloyd’s Rep. 349 at [75].
- [221.](#) [2011] EWHC 1372 (Comm), [2011] 2 Lloyd’s Rep. 309.
- [222.](#) [2011] EWHC 1372 (Comm) at [47]. The decision was affirmed on appeal, [2012] EWCA Civ 180, without further discussion of this issue.
- [223.](#) [1942] 1 All E.R. 220; Mitchell, (1997) 12 J.C.L. 78; for the extent of the fire brigade’s duty apart from contract, see *John Monroe (Acrylics) Ltd v London Fire & Civil Defence Authority* [1997] 2 Lloyd’s Rep. 161.
- [224.](#) At 221.
- [225.](#) Substantially the same point is made in *TTMI SARL v Statoil SA (The Sibohelle)* [2011] EWHC 1150 (Comm), [2011] 2 Lloyd’s Rep. 220 at [44]. But on the facts of *The Sibohelle* there was no need to invoke any restitutionary remedy since both parties there believed that they were “performing under a contract” (at [44]) and their conduct, coupled with that belief, gave rise to the inference that a contract had indeed been concluded between them (see below, para.2-148 n.786). In the *Upton* case (above, n.219) there was no such shared belief.
- [226.](#) cf. *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504, 510; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243, [2012] 1 Lloyd’s Rep. 349 at [75]. The position where one party thinks that he is giving or getting a gratuitous service while the other thinks that he is contracting (i.e. if the fire brigade had intended from the beginning to charge for their services) will depend on the objective test and the law on mistake as to terms, see below at paras 3-014, 3-022—3-035.
- [227.](#) *Tracom SA v Anton C. Nielsen* [1984] 2 Lloyd’s Rep. 195, 203; and see above, para.2-006,

below, para.2-069.

- [228.](#) (1833) 5 C. & P. 566; 4 B. & Ad. 621; it must be assumed that the claimant knew of the offer; *Carlill v Carbolic Smoke Ball Co Ltd* [1892] 2 Q.B. 484, 489, n.2. See also *England v Davidson* (1840) 11 A. & E. 856; *Smith v Moore* (1845) 1 C.B. 438; and cf. *Bent v Wakefield Bank* (1878) 4 C.P.D. 1; *Fallick v Barber* (1813) 1 M. & S. 108. See also the Theft Act 1968 s.23, penalising advertisements of rewards for stolen goods which state that no questions will be asked, etc.
- [229.](#) (1833) 4 B. & Ad. at 623.
- [230.](#) [1893] 1 Q.B. 256; above, para.2-015.
- [231.](#) (1927) 40 C.L.R. 227; contrast *Simonds v US*, 308 F. 2d 160 (1962).
- [232.](#) (1927) 40 C.L.R. 227, 233; *Tracom SA v Anton C. Nielsen* [1984] 2 Lloyd's Rep. 195, 203.
- [233.](#) *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 140.
- [234.](#) *Tinn v Hoffman & Co* (1873) 29 L.T. 271, 278.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 3. - The Acceptance

(b) - Communication of Acceptance

General requirement of communication

2-044

The general rule is that an acceptance has no legal effect until it is communicated to the offeror. ²³⁵ Accordingly, no contract is concluded by: a person who writes an acceptance on a piece of paper which he simply keeps ²³⁶; a company that resolves to accept an application for shares but does not communicate the resolution to the applicant ²³⁷; a person who decides to accept an offer to sell goods to him and instructs his bank to pay the offeror but neither he nor the bank gives notice of this fact to the offeror ²³⁸; and a person who communicates the acceptance only to his own agent. ²³⁹ The main reason for the rule is that it would be unfair to bind the offeror before he knows that his offer had been accepted. So long as the offeror knows of the acceptance, a contract may be concluded even though the acceptance was not brought to his notice *by the offeree*. ²⁴⁰ However, there will be no contract if the communication is made by a third party without the offeree's authority in circumstances indicating that the offeree's decision to accept was not yet regarded by him as irrevocable. ²⁴¹

What amounts to communication

2-045

For an acceptance to be "communicated" it must normally be brought to the notice of the offeror. Thus there is no contract if the words of acceptance are "drowned by an aircraft flying overhead"; or if they are spoken into a telephone after the line has gone dead or become so indistinct that the offeror does not hear them. ²⁴² However, in some circumstances, the requirement of "communication" may be satisfied even though the acceptance has not actually come to the notice of the offeror: e.g. where a written notice of acceptance is left by the offeree at the offeror's address. ²⁴³

Exceptions to requirement of communication of acceptance

2-046

In the following situations an acceptance is, or may be, effective although it is not communicated to the offeror.

(1) Terms of the offer

The offer may expressly or impliedly ²⁴⁴ waive the requirement of communication of acceptance. ²⁴⁵ This may arise when an offer invites acceptance by conduct. For example, where an offer to supply goods is made by sending them to the offeree it may be accepted by simply using them ²⁴⁶; and where an offer to buy goods is made by ordering them, it may sometimes be accepted by simply

despatching them. ²⁴⁷ Similarly a tenant can accept an offer of a new tenancy by simply staying on the premises ²⁴⁸, and an employer's offer to pay an employee a bonus may be accepted simply by the employee's staying in the employment. ²⁴⁹

(2) Unilateral contracts

In the case of a unilateral contract, ²⁵⁰ the requirement of communication of acceptance is almost always waived. For this reason, performance of the required act or abstention normally suffices, without any previous intimation of acceptance. ²⁵¹ Thus in *Carlill v Carbolic Smoke Ball Co* ²⁵² the court rejected the argument that the claimant should have notified the defendants of her acceptance of their offer. The contract which arises ²⁵³ between a bank which has issued a credit card to one of its customers and the retailer to whom the customer presents the card has also been described as unilateral, ²⁵⁴ so that the bank's offer can be accepted by the retailer's dealing with the customer without any need for the retailer's acceptance to be communicated to the bank. ²⁵⁵ Another situation in which notification of acceptance was said to be unnecessary in the case of a unilateral contract arose in *Argo Fund Ltd v Esser Steel Ltd* ²⁵⁶ where an arrangement between a debtor and its creditor banks empowered each creditor to transfer its rights by delivery of a transfer certificate to an "agent", this arrangement was said to be a unilateral contract ²⁵⁷ by which the debtor made a standing offer (a) to the creditor, to terminate the original contract and (b) to the transferee to enter into a new one. ²⁵⁸ The former offer was accepted by the creditor's delivery of the transfer certificate to the agent ²⁵⁹ and the latter by the transferee's agreeing to the transfer with the transferor on the terms of the agreement, as set out in the certificate. ²⁶⁰ Notification of these acts of acceptance was not necessary since no such requirement was stated in the original loan agreement and this fact was apparently regarded as a waiver of the requirement of communication of acceptance. ²⁶¹

(3) "Fault" of offeror

The offeror may be precluded from denying that the acceptance was communicated if it was "his own fault that he did not get it"; e.g. "if the listener on the telephone does not catch the words of acceptance but nevertheless does not ... ask for them to be repeated". ²⁶² If an acceptance is sent and duly received during business hours by telex or fax but is simply not read by anyone in the offeror's office when it is there transcribed or printed out on his machine, it is probably taken to have been communicated at that time ²⁶³; if such a message is received out of business hours, it probably takes effect at the beginning of the next business day. ²⁶⁴

(4) Email acceptance

While the issue has received no judicial determination, it is submitted that the time of acceptance by email should be when the email is received by the offeror, ²⁶⁵ and an email acceptance should be treated as having been received when it arrives on the offeror's email server, ²⁶⁶ even if the offeror has not, or perhaps cannot, access it.

(5) Communication to offeror's agent

The acceptance may be communicated, not to the offeror personally, but to his agent. The effect of such a communication depends on the agent's authority. ²⁶⁷ The communication concludes a contract if the agent is authorised to *receive* the acceptance, but not if he is authorised only to *transmit* it to the offeror: e.g. if a written acceptance is handed to a messenger sent to the offeree by the offeror. In the latter case the acceptance takes effect only when it is communicated to the offeror (unless the case falls within one of the other exceptions to the general rule requiring the acceptance to be communicated to the offeror).

(6) Acceptance sent by post

An acceptance sent by post often takes effect before it is communicated. The exact effects of such an

acceptance are discussed in paras 2-047—2-059 below.

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- [235.](#) *Mclver v Richardson* (1813) 1 M. & S. 557; *Mozley v Tinkler* (1835) 1 C.M. & R. 692; *Ex p. Stark* [1897] 1 Ch. 575; *Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 155, 157; *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 W.L.R. 925, 937. *In Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep 349 Cooke J. said at [81], that "[t]here is an act of total unreality ... in considering offer and acceptance in the abstract, as national concepts divorced from communication". This statement should, it is submitted, be read in the statutory context in which it was made, that is, in the context of the meaning to be given to the expression "the acts constituting the offer and acceptance" in s.26(4)(b) of the Unfair Contract Terms Act 1977, and not in the wider common law contexts discussed in sections 2 and 3 of this chapter.
- [236.](#) *Kennedy v Thomassen* [1929] 1 Ch. 426; *Brogden v Metropolitan Ry* (1877) 2 App. Cas. 666, 692.
- [237.](#) *Best's Case* (1865) 2 D.J. & S. 650; cf. *Gunn's Case* (1867) L.R. 3 Ch. App. 40.
- [238.](#) *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 A.C. 34.
- [239.](#) *Hebb's Case* (1867) L.R. 4 Eq. 9; *Kennedy v Thomassen* [1929] 1 Ch. 426.
- [240.](#) *Bloxham's Case* (1864) 33 Beav. 529; (1864) 4 D.J. & S. 447; *Levita's Case* (1867) L.R. 3 Ch. App. 36.
- [241.](#) This appears to be the best explanation of *Powell v Lee* (1908) 99 L.T. 284.
- [242.](#) *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327, 332.
- [243.](#) cf. below, para.2-096.
- [244.](#) See the first analysis of the situation in *Photolibary Group Ltd v Burda Senator Verlag GmbH* [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 811 at [63], discussed in para.2-007 above. There is no reference to any communication of the acceptance; presumably the conduct of the parties gave rise to an inference that this requirement had been waived.
- [245.](#) *Attrill v Kleinwort Benson Ltd* [2012] EWHC 1189 (QB) at [164].
- [246.](#) *Weatherby v Banham* (1832) 5 C. & P. 228; cf. *Minorities Finance Ltd v Afriland Bank Nigeria Ltd* [1995] 1 Lloyd's Rep. 134, 140; it is assumed that the goods are not "unsolicited" within the legislation against "inertia selling" (above, para.2-005).
- [247.](#) *Port Huron Machinery Co v Wohlers*, 207 Iowa 826, 221 N.W. 843 (1928); cf. UCC, s.2-206(1)(b); *Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 Lloyd's Rep. 553, 559; and see the second analysis of the situation in the *Photolibary case* [2008] EWHC 1343 (QB) at [64], where there was (as at [63], above n.240) no reference to any communication of the acceptance.
- [248.](#) *Roberts v Hayward* (1828) 3 C. & P. 432; but not if the tenant disclaims the intention to accept: *Glossop v Ashley* [1921] 2 K.B. 451.
- [249.](#) *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 118 (QB) at [177].
- [250.](#) See above, para.1-107; below para.2-082.
- [251.](#) *Shipton v Cardiff Corp* (1917) 87 L.J.K.B. 51; *Davies v Rhondda UDC* (1917) 87 L.J.K.B. 166; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243, [2012] 1 Lloyd's Rep. 349 at [79]; *Attrill*

v Dresdner Kleinwort Ltd [2012] EWHC 1189 (QB) was affirmed by the Court of Appeal [2013] EWCA Civ 394 where the contract was described as a unilateral one, so that the requirement of communication of acceptance was waived (at [94]).

[252.](#) [1893] 1 Q.B. 256, above, para.2-015.

[253.](#) Below, paras 4-040, 18-008.

[254.](#) *First Sport Ltd v Barclays Bank Plc* [1993] 1 W.L.R. 1228, 1234 (where the card had been stolen and been presented to the retailer by the thief).

[255.](#) *First Sport Ltd v Barclays Bank Plc* [1993] 1 W.L.R. 1228 at 1234-1235.

[256.](#) [2005] EWHC 600 (Comm), [2006] 1 All E.R. (Comm) 56; affirmed on other grounds [2006] EWCA Civ 241, [2006] 2 All E.R. (Comm) 104.

[257.](#) *Argo Fund Ltd v Esser Steel Ltd* [2005] EWHC 600 (Comm), [2006] 1 All E.R. (Comm) 56 at [51]; affirmed on other grounds [2006] EWCA Civ 241, [2006] 2 All E.R. (Comm) 104.

[258.](#) *Argo Fund Ltd v Esser Steel Ltd* [2005] EWHC 600 (Comm); the effect of the new contract was said at [50], [51] to be to novate the original one.

[259.](#) *Argo Fund Ltd v Esser Steel Ltd* [2005] EWHC 600 (Comm) at [50], [51].

[260.](#) *Argo Fund Ltd v Esser Steel Ltd* [2005] EWHC 600 (Comm) at [52].

[261.](#) *Argo Fund Ltd v Esser Steel Ltd* [2005] EWHC 600 (Comm) at [53] ("perhaps this is the right analysis").

[262.](#) *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327, 333.

[263.](#) cf. *Tenax Steamship Co Ltd v The Brimnes (Owners) (The Brimnes)* [1975] Q.B. 929; and see below, para.2-096.

[264.](#) *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep. 249, 252; *Galaxy Energy International Ltd v Novorossiysk Shipping Co (The Peter Schmidt)* [1998] 2 Lloyd's Rep. 1.

[265.](#) See below, para.2-079.

[266.](#) See below, para.2-080.

[267.](#) *Henthorn v Fraser* [1892] 2 Ch. 27, 33.

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Part 2 - Formation of Contract

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(c) - Posted Acceptance

The posting rule [268](#)

2-047

An acceptance sent by post could take effect when it is posted, when it would in the ordinary course of post have reached the offeror, when it arrives at his address, or when it is actually communicated to the offeror. Each of these solutions could cause inconvenience or injustice to one of the parties, especially when the acceptance is lost or delayed in the post. In English law, the general rule [269](#) is that a postal acceptance takes effect when [270](#) and where [271](#) the letter of acceptance is posted. A letter is “posted” for this purpose when it is put in the control of the Post Office [272](#) or of one of its employees authorised to *receive* letters. Handing letters to a postman authorised to *deliver* letters is not posting. [273](#) The same principle applies to the case of an acceptance by telegram: such an acceptance takes effect when the telegram is communicated to a person authorised to receive it for transmission to the addressee [274](#); and it seems that this rule would apply to telemessages, which have replaced inland telegrams. The “posting” rule, which generally favours the offeree, has been explained as one of convenience for the reasons stated in paras 2-052—2-056 below.

Conditions of applicability

2-048

The posting rule applies only if it is reasonable to use the post. This will normally be the case if the offer itself is made by post. It may also be reasonable to use the post even though the offer was made orally if immediate acceptance was not contemplated and the parties lived at a distance. [275](#) On the other hand it would not normally be reasonable to attempt to reply by a posted letter of acceptance to an offer made by telex [276](#) or by telephone, fax or email. Nor would it be reasonable to accept by post if the postal service was, to the acceptor’s knowledge, disrupted. [277](#)

Instantaneous communications

2-049

The posting rule does not apply to acceptances made by some “instantaneous” mode of communication, e.g. by telephone or by telex. [278](#) The reason is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that he has the opportunity of making a proper communication. [279](#) On the other hand, a person who accepts by a letter that goes astray, may not know of the loss or delay until it is too late to make another communication. Such instantaneous communications are therefore governed by the general rule [280](#) that an acceptance must be actually communicated, subject to the other exceptions to that rule stated in para.2-046 above.

Dictated telegrams and faxes

2-050

It is now uncommon for acceptances to be made by telegram or telemessage dictated over the telephone and there is no authority on the question whether such an acceptance takes effect when the message is dictated by the sender or when it is communicated to the addressee. It is submitted that such an acceptance should, in accordance with the above reasoning,²⁸¹ take effect as soon as it is dictated²⁸²; for if it later goes astray, the acceptor is unlikely to have any means of knowing this fact until it is too late to make a further communication. Fax messages seem to occupy an intermediate position between postal and instantaneous communications. The sender will know at once if his message has not been received at all, or if it has been received only in part, and in such situations the mere sending of the message should not amount to an effective acceptance.²⁸³ However, it is also possible for the entire message to have been received, but in such a form as to be wholly or partly illegible.²⁸⁴ Since the sender is unlikely to know, or to have means of knowing, this at once, the above reasoning would suggest that an acceptance sent by fax might well be effective in such circumstances.

Excluding the posting rule

2-051

The posting rule can be excluded by the terms of the offer. For this purpose, it is not necessary to say expressly that the acceptance will take effect only when it has been actually communicated. In *Holwell Securities Ltd v Hughes*²⁸⁵ an offer to sell a house was made in the form of an option “to be exercisable by notice in writing to the Intending Vendor”. Such a notice was posted but did not arrive. It was held that there was no contract of sale as the offer, on its true construction, required actual communication of acceptance.

Operation of the posting rule

2-052

The posting rule is essentially one of convenience.²⁸⁶ The English authorities support its application in three situations discussed in paras 2-053—2-056 below. It should not, however, be thought that the rule will be mechanically applied to all situations which it might, by a process of apparently logical deduction, be thought to govern. It has been said that the rule will not be applied where it would lead to “manifest inconvenience and absurdity”²⁸⁷; so that the question of its application to a further group of situations discussed in paras 2-057—2-060 below depends on practical considerations and on the balance of convenience.

Posted acceptance preceded by uncommunicated withdrawal

2-053

A posted acceptance prevails over a withdrawal of an offer which was posted before the acceptance but which had not yet reached the offeree when the acceptance was posted.²⁸⁸ It also operates as a restriction on the otherwise unfettered power²⁸⁹ of the offeror to withdraw his offer. These are the logical consequences of the general rule that postal acceptance takes effect when it is posted, while the revocation of an offer only takes effect when it actually reaches the offeree.²⁹⁰ In practice, these are the most important applications of the rule.

Acceptance lost or delayed in the post

2-054

A posted acceptance takes effect even though it never reaches the offeror because it is lost through an accident in the post ²⁹¹; and the same rule probably applies where the acceptance is merely delayed through an accident in the post, ²⁹² i.e. the contract is concluded at the time of posting of the acceptance. In *Household Fire Insurance Co Ltd v Grant*, ²⁹³ for example, the defendant had applied for shares in a company: this application amounted to an offer by him to subscribe for the shares. ²⁹⁴ An acceptance, in the form of a letter of allotment, was posted to him but never received. Some three years later, the company went into liquidation, and it was held that the defendant was a shareholder and so liable for calls on the shares. The case has certain unusual features: namely that the initial deposit on application for the shares was not actually paid, the defendant being instead credited with an equivalent sum due to him from the company; and that dividends declared by the company were not actually paid out to the defendant but simply credited to his account with the company. But for these features the defendant would necessarily have become aware (long before the end of the three years) of the fact that he was regarded by the company as a shareholder.

2-055

The decision in *Household Fire Insurance Co Ltd v Grant* was reached only by a majority and involved the overruling of a previous contrary decision. ²⁹⁵ This indicates that the arguments of convenience for and against applying the posting rule to such a situation are finely balanced. On the one hand, it may be hard to hold an offeror liable on an acceptance which, through no fault of his own, was never received by him; on the other it may be equally hard to deprive the offeree of the benefit of an acceptance if he had taken all reasonable steps to communicate it. Moreover, each party may act in reliance on his (perfectly reasonable) view of the situation: the offeror may enter into other contracts, believing that his offer had not been accepted, while the offeree may refrain from doing so, believing that he had effectively accepted the offer. In this situation, English law favours the offeree on the grounds that it is the offeror who “trusts to the post” ²⁹⁶ and that the offeror can safeguard himself by stipulating in the offer that the acceptance must be actually communicated to him. ²⁹⁷ These arguments are not wholly convincing. The offer may be a counter-offer, in which case it will be the ultimate offeree who originally “trust[ed] to the post”. Or the offer may be made on a form prepared by the offeree, ²⁹⁸ in which case he and not the offeror will, for practical purposes, be in control of its terms. It may be that there are no really convincing reasons to support the weight of the postal acceptance rule. However, since the law cannot avoid preferring either the offeror or the offeree, it must simply choose one in the interest of certainty.

Priorities

2-056

A contract is taken to be made at the time when the acceptance was posted, so as to take priority over another contract affecting the same subjectmatter made after the posting of the first acceptance. ²⁹⁹

Fault and misdirected letter of acceptance

2-057

A letter of acceptance may be lost or delayed because it bears a wrong or an incomplete address, or because it is not properly stamped. Normally such defects will be due to the carelessness of the offeree; and, although there is no English authority precisely in point, ³⁰⁰ it is submitted that the posting rule should not apply to such cases. Although an offeror may have to take the risk of accidents in the post, it would be unreasonable to impose on him the further risk of the acceptor's carelessness. These arguments do not apply where the misdirection is due to the fault of the offeror —e.g. where his own address is incompletely or illegibly given in the offer itself. ³⁰¹ In such a case, the offeror should not be allowed to rely on the fact that the acceptance was misdirected (except perhaps where his error in stating his own address was obvious to the offeree; for in such a case the offeror's fault would not be the effective cause of the misdirection of the acceptance). It is submitted that a misdirected acceptance should take effect (if at all) at the time that is least favourable to the party responsible for the misdirection.

In *L.J. Korbetis v Transgrain Shipping BV* Toulson J. said that he agreed with the above “general approach” to the problem of misdirected acceptances “because it seems to me to correspond with principle and justice”.³⁰² The question in that case was whether shipowners and charterers had agreed on the nomination of a sole arbitrator to whom a dispute, which had arisen under a charterparty between them, was to be referred. The charterers sent a fax inviting the shipowners to choose one of three names; in reply, the shipowners sent a fax from their office in Piraeus, agreeing to one of those names. This fax was intended for the charterers in the Netherlands, but it never reached them because the appropriate international dialling code had not been entered. It was held that the misdirected acceptance was not effective to conclude an agreement for the appointment of the arbitrator.

Garbled messages

2-058

A message may be garbled as a result of some inaccuracy in transmission for which neither the sender nor the recipient are responsible or aware. In *Henkel v Pape*³⁰³ the claimant invited the defendant to make an offer to buy 50 rifles; and the defendant, not wanting this number, telegraphed “send *three* rifles”. The telegram reached the claimant in the form “send *the* rifles” and the claimant despatched 50. It was held that the defendant was not bound to accept more than three. Here the garbled telegram was an offer, but such a communication could also be an acceptance: for example where, in response to an offer to sell 50, the buyer sent a telegraphed message in the form “send *the* rifles”. It is submitted that this would be a valid acceptance (so long as it was reasonable for the buyer to accept by this medium) even if the message arrived in the form “send *three* rifles”. If the offeror has to take the risk of loss or delay in the post, there seems to be no good reason why he should not also take the risk of errors in the transmission of a telegraphed message; for in each case the offeree will have no means of knowing that something has gone wrong until it is too late to make another, proper, communication.³⁰⁴

Revocation of posted acceptance

2-059

There is no English authority on the question whether a posted acceptance can be revoked by a later communication (such as a telex or an email message), which reaches the offeror before, or at the same time as, the acceptance. One view is that the offeree's revocation has no effect since, once a contract has been concluded by the posting of the acceptance, it cannot be dissolved by the act of one party.³⁰⁵ But this apparently “logical” deduction from the “posting rule” overlooks the fundamental point that that rule is only one of convenience.³⁰⁶ Hence the issue is whether the offeror could be unjustly prejudiced by allowing the offeree to rely on the subsequent revocation which nevertheless comes to his actual notice at the same time as, or before, the acceptance. On the one hand, it can be argued that the offeror cannot be prejudiced since he was not entitled to have his offer accepted and cannot have relied on its having been accepted if he did not yet know of the acceptance. On the other hand it can be argued that, since the offeror can no longer withdraw his offer after the acceptance has been posted by the offeree,³⁰⁷ reciprocity demands that the offeree should likewise not be allowed to withdraw his acceptance.³⁰⁸ Otherwise, the offeree could speculate, without risk to himself, at the offeror's expense. He could post an acceptance and hold the offeror bound if the market moved in his own favour, but retract the acceptance by an overtaking communication if the market moved against him, while the offeror had no similar freedom of action. While the offeror may take the risks of accidents in the post, it is submitted that he should not have to bear the risk of the offeree's revocation.³⁰⁹

2-060

In para.2-059 above, it is assumed that the offeror wants to hold the offeree to the contract notwithstanding the revocation of the acceptance. But to hold an acceptance binding as soon as it was posted, in spite of an overtaking communication purporting to revoke it, might also cause

hardship to the offeror, particularly where he had acted in reliance on the revocation; e.g. by selling the subject-matter of the original offer to a third party. In such a case it is submitted that the offeree should not be entitled to change his mind yet again and rely on his letter of acceptance with the object of claiming damages from the offeror. The offeree's subsequent purported revocation could in such a case be regarded as an offer to rescind the contract, accepted by the offeror's conduct in relation to subject-matter; communication of such acceptance could be deemed to have been waived. Alternatively, the purported revocation could be regarded as a repudiation in breach of contract, giving the offeror the power to put an end to his obligations under the contract by "accepting" the breach.³¹⁰ On the latter view, the offeror who sells to the third party for less than was to be paid by the original offeree, would be able to claim the difference from the offeree as damages.³¹¹

International sales

2-061

The Vienna Convention on Contracts for the International Sale of Goods³¹² (which has not been ratified by the United Kingdom) governs not only the rights and duties of the parties to, but also the formation of, such contracts. Under the Convention an offer takes effect when it "reaches" the offeree³¹³ and an acceptance when it "reaches" the offeror,³¹⁴ i.e. (in both cases) when it is communicated to the addressee or delivered to his address.³¹⁵ Thus there is no contract if the acceptance is lost in the post; but if the acceptance is delayed in transmission, an intermediary position has been adopted; the delayed acceptance is effective, unless the offeror informs the offeree promptly on its receipt that he regards the offer as having lapsed.³¹⁶ Once an offer has become effective, it cannot be revoked after the offeree has dispatched his acceptance³¹⁷: this preserves the English position that a posted acceptance prevails over a previously posted withdrawal (referred to in the Convention as a revocation). An acceptance may be withdrawn by a communication that reaches the offeror before (or at the same time as) the acceptance would have become effective³¹⁸ if there had been no such withdrawal.

Consumer's right to cancel distance and off-premises contracts

2-062

Part 3 of the Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013³¹⁹ applies to "distance and off-premises contracts between a trader and a consumer"³²⁰ and in the circumstances specified in that Part gives the consumer a "right to cancel" such contracts.³²¹ A contract made by, for example, exchange of letters, faxes or email message, or in website trading, falls within the definition of a "distance contract" within the 2013 Regulations if it is one for the supply of goods or services by a "trader" to a "consumer" and the contract is made:

"without the simultaneous 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."³²²

The Regulations do not specify when such a contract is made,³²³ but if it has been made, they give the consumer the right to cancel it³²⁴ by notice within a cancellation period specified in the Regulations (e.g. a period beginning when the contract is made³²⁵ and ending 14 days after the day on which the goods which are the subject-matter of the contract come into the physical possession of the consumer³²⁶). In relation to the argument put forward in para.2-059 above (that, if the revocation were effective, the offeree could speculate without risk to himself at the offeror's expense), it is significant that the "right to cancel" given to the consumer by Pt 3 of Regulations "does not apply as regards" the supply of goods or certain services "for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur during the cancellation period."³²⁷ Under the 2013 Regulations, this "right to cancel" extends also to "off-premises contracts" such as contracts made in the simultaneous presence of the trader and the

consumer in a place that is not the business premises of the trader.³²⁸ Cancellation of the contract “ends the obligations of the parties to perform the contract”³²⁹ and gives rise to obligations that are designed, broadly speaking, to restore the parties to their pre-contract position.³³⁰ The effect of the exercise of the right to cancel is therefore not the same as the effect of saying that no contract has been concluded by (e.g.) exchange of letters under the common law rules of offer and acceptance discussed in paras 2-047—2-060 above³³¹; on the contrary, the very concept of the consumer’s “right to cancel” is based on the assumption that, as a matter of common law, a contract has come into the existence. Moreover, *the supplier* has no right to cancel under the Regulations, so that the question whether he has entered into the contract continues to be governed by the common law rules.

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- ^{268.} Winfield (1939) 55 L.Q.R. 499; Nussbaum (1926) 36 Col.L.Rev. 920; Ellison Kahn (1955) 72 S.A.L.J. 246; Evans (1966) 15 I.C.L.Q. 553; Gardner (1992) 12 O.J.L.S. 170.
- ^{269.} But see below, paras 2-052 et seq.
- ^{270.} *Henthorn v Fraser* [1892] 2 Ch. 27, 33; *Adams v Lindsell* (1818) 1 B. & Ald. 681; *Potter v Sanders* (1846) 6 Hare 1; *Harris’ Case* (1872) L.R. 7 Ch. App. 587.
- ^{271.} *Brinkibon Ltd v Stahag Stahl and Stahlwarenhandels-gesellschaft mbH* [1983] 2 A.C. 34, 41. It is also possible for a contract to be made in more than one place. In *Conductive Interjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch), [2014] 1 All E.R. (Comm) 655, contractual negotiations were conducted between parties in different countries. One copy of the agreed terms was signed by A in the first country; another was sent by A as an email attachment to B in the second country who there signed that copy. In these circumstances Roth J. said at [73] that it would “be wholly artificial to determine the place of the making of the contract by applying the traditional posting rule, dependent upon which party happened to send the fully executed document”; and that there was “a good arguable case that the contract was made in” both countries.
- ^{272.} *Brinkibon Ltd v Stahag Stahl and Stahlwarenhandels-gesellschaft mbH* [1983] 2 A.C. 34, 41; the “Post Office” here refers to the provider of the universal postal service under the Postal Services Act 2011, by whatever name that provider may from time to time be known.
- ^{273.} *Re London & Northern Bank* [1900] 1 Ch. 220.
- ^{274.} *Bruner v Moore* [1904] 1 Ch. 305; cf. *Stevenson Jacques & Co v McLean* (1880) 5 Q.B.D. 346. See also *Cowan v O’Connor* (1888) 20 Q.B.D. 640 (place of acceptance).
- ^{275.} e.g. in *Henthorn v Fraser* [1892] 2 Ch. 27. Such a written acceptance of an oral offer does not, however, create a “contract by correspondence” within the Law of Property Act 1925 s.46: *Stearn v Twitchell* [1985] 1 All E.R. 631.
- ^{276.} cf. *Quenerduaine v Cole* (1883) 32 W.R. 185 (telegram).
- ^{277.} *Bal v Van Staden* [1902] T.S. 128.
- ^{278.} *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327; *Brinkibon Ltd v Stahag Stahl und Stahlwarengesellschaft mbH* [1983] 2 A.C. 34; *NV Stoomv Maats “De Maas” v Nippon Yusen Kaisha (The Pendrecht)* [1980] 2 Lloyd’s Rep. 56, 66; *Gill & Duffus Landauer Ltd v London Export Corp GmbH* [1982] 2 Lloyd’s Rep. 627; cf. *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd’s Rep. 249, 252 (telexed notice withdrawing ship from charterparty); and (in tort) *Diamond v Bank of London & Montreal* [1979] Q.B. 333.
- ^{279.} See the *Entores* case, above n.274, at 333 and the *Brinkibon* case, above n.274, at 43.
- ^{280.} Above, para.2-044.

- [281.](#) At n.275, above.
- [282.](#) *Contra Winfield* (1939) 55 L.Q.R. 499, 515.
- [283.](#) *JSC Zestafoni Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep. 335, where a fax message was classified at [75] as an "instantaneous communication" and to take effect only on full receipt as the sender's machine would usually indicate whether the message had been received "effectively" (as distinct from having been received only in part). cf. also *Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) (misdirected fax acceptance, below, para.2-057).
- [284.](#) This possibility is not considered (as it did not arise) in the *JSC Zestafoni* case, above n.279.
- [285.](#) *Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 155; cf. *New Hart Builders Ltd v Brindley* [1975] Ch. 342.
- [286.](#) *Brinkibon* case (above, n.274) at 41; *Gill & Duffus Landauer* case (above, n.274) at 631.
- [287.](#) *Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 157, 161.
- [288.](#) *Harris' Case* (1872) L.R. 7 Ch. App. 587; *Byrne & Co v Leon van Tienhoven* (1880) 5 C.P.D. 344; *Henthorn v Fraser* [1892] 2 Ch. 27; *Re London & Northern Bank* [1900] 1 Ch. 200.
- [289.](#) Below, paras 2-093, 4-193.
- [290.](#) Below, para.2-094.
- [291.](#) *Household Fire Insurance Co Ltd v Grant* (1879) 4 Ex. D. 216.
- [292.](#) See *Dunlop v Higgins* (1848) 1 H.L.C. 381, which would probably be followed in England though it is expressly restricted (at 402) to Scots law.
- [293.](#) (1879) 4 Ex. D. 216.
- [294.](#) Above, para.2-024.
- [295.](#) *British & American Telegraph Co v Colson* (1871) L.R. 6 Ex. 108.
- [296.](#) *Household Insurance case* (1879) 4 Ex. D. 216, 223.
- [297.](#) *Household Insurance case* (1879) 4 Ex. D. 216, 223.
- [298.](#) Below, para.2-067.
- [299.](#) *Potter v Sanders* (1846) 6 Hare 1.
- [300.](#) But, see, by way of analogy, *Getreide-Import Gesellschaft v Contimar* [1953] 1 W.L.R. 207 and 793.
- [301.](#) cf. *Townsend's Case* (1871) L.R. 13 Eq. 148 (the actual reasoning of which is obsolete since *Household Fire Insurance Co Ltd v Grant* (1879) 4 Ex. D. 216).
- [302.](#) [2005] EWHC 1345 (QB) at [15].
- [303.](#) (1870) 6 Ex. 7.
- [304.](#) cf. above, para.2-049.
- [305.](#) This view is sometimes said to be supported by *Wenkheim v Arndt* (N.Z.) 1 J.R. 73 (1873), where the defendant had by letter accepted an offer of marriage: her mother then sent a

telegram purporting to cancel the acceptance. The actual decision was that the mother had no authority to act on behalf of her daughter in this way, so that the claimant recovered damages (of no more than one farthing). The view stated in the text is supported by *Morrison v Thoelke* 155 So. 2d 889 (1963) and by *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* (1974) (4) S.A. 392 (c) (discussed by Turpin [1975] C.L.J. 25); but contradicted by *Dick v US*, 82 F.Supp. 326 (1949). It is also sometimes said to be contradicted by *Dunmore v Alexander* (1830) 9 Shaw 190, but there the first letter was probably an offer; only the dissenting judge regarded it as an acceptance. See generally Hudson (1966) 82 L.Q.R. 169. cf. *Kinch v Bullard* [1999] 1 W.L.R. 423 (notice which, by virtue of Law of Property Act 1925 s.196(3), had taken effect on being left at a person's place of abode, but without having been actually communicated to him, could not thereafter be withdrawn by sender).

[306.](#) Above, para.2-047.

[307.](#) Above, para.2-053.

[308.](#) For similar reasoning in the case of a misdirected acceptance (above, para.2-057) see *L.J. Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) at [11].

[309.](#) cf. above, para.2-057. Contrast Hudson, above, n.301.

[310.](#) Below, para.24-001.

[311.](#) cf. *Kinch v Ballard* [1999] 1 W.L.R. 423, 430 (purported withdrawal by sender of a notice after it had taken effect ineffective against addressee (above, n.300) but said at 430-431 to be effective against sender).

[312.](#) Below, Vol.II, para.44-014.

[313.](#) art.15(1).

[314.](#) art.18(2).

[315.](#) art.24.

[316.](#) art.21(2).

[317.](#) art.16(1); "dispatch" is not defined.

[318.](#) art.22.

[319.](#) SI 2013/3134. These Regulations have replaced the Consumer Protection (Distance Selling) Regulations 2000 with effect from June 13, 2014. For amendments of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) see Consumer Protection Regulations 2014 (SI 2014/870) regs 2 to 4. For further discussion of the 2013 Regulations see below, paras 38-055—38-144.

[320.](#) SI 2013/3134 reg.27; for definitions of these expressions see regs 4 and 5.

[321.](#) SI 2013/3134 reg.29.

[322.](#) SI 2013/3134 reg.5.

[323.](#) This is also true of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (implementing Directive 2000/31/EC) which merely provide that in the case of, for example, a contract made on a website, "the order and the acknowledgement of receipt [of the order] will be deemed to be received when the parties to whom they are addressed are able to access them" (reg.11(2)(a)). The effect of acknowledgement of receipt of an order falls to be determined as a matter of common law: see the definition of acceptance in para.2-026 above. The provision of reg.11(2)(a) quoted in this note does *not*, in any event apply to "contracts

concluded exclusively by exchange of electronic mail or by equivalent individual communications”: reg.11(3).

[324.](#) SI 2013/3134 reg.29(1); for limits of the right to cancel, see reg.28.

[325.](#) SI 2013/3134 reg.29(2).

[326.](#) SI 2013/3134 reg.30(3).

[327.](#) SI 2013/3134 reg.28(1)(a). Other transactions to which Pt 3 does not apply are listed in reg.28(1)(b) to (h); the operation of Pt 3 is further restricted by reg.28(2) and (3); and by the fact that the Regulations do not apply to a contract “to the extent that it is for” transactions of the kinds listed in reg.6(1) and 6(2), subject to reg.6(3).

[328.](#) SI 2013/3134 reg.5.

[329.](#) SI 2013/3134 reg.33(1)(a); “ancillary contracts” (as defined in reg.38(3)) are “automatically terminated”.

[330.](#) SI 2013/3134 regs 33(1)(b) and 34-36.

[331.](#) Here, it is interesting to note that regs 33, 34 and 38 of the 2013 Regulations treat “withdrawal” of an offer (under Pt 3) and “cancellation” of a contract as distinct concepts.

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Chapter 2 - The Agreement

Section 3. - The Acceptance

(d) - Prescribed Mode of Acceptance

Method must generally be complied with

2-063

An offer which requires the acceptance to be expressed or communicated in a specified way ³³² can generally ³³³ be accepted only in that way. Thus, if the offeror asks for the acceptance to be sent to a particular place, one sent elsewhere will not bind him ³³⁴; nor will he be bound by an oral acceptance if he has asked for one to be expressed in writing. ³³⁵ This rule is particularly strict where the offer is contained in an option. ³³⁶

Purported acceptance as counter-offer

2-064

It is sometimes possible for a purported acceptance which does not comply with the prescribed method to be regarded as a counter-offer and for a contract to come into existence when that counter-offer is in turn accepted. ³³⁷ Since such acceptance may be effected by conduct, ³³⁸ the contract may be concluded without any further communication between the parties after the original, ineffective, acceptance.

Other equally efficacious mode

2-065

⚠ Stipulations as to the mode of acceptance are usually made by the offeror with some particular object in view, e.g. to obtain a speedy acceptance, or one expressed (for the sake of certainty) in a particular form. It seems that an acceptance which accomplishes that object just as well as, or better than, the stipulated method may bind the offeror. For this purpose, the court must first decide, as a matter of construction, what object it was that the offeror had in view. For example, a requirement that the acceptance must be sent by letter by return of post may “fix the time for acceptance and not the manner of accepting”. ³³⁹ ⚠ An acceptance by telex could then suffice. But such an acceptance would not be effective if the offeror's object (on the true construction of the offer) was to have a full, accurate and signed record of the acceptance.

Method of acceptance waived

2-066

⚠ Even if the prescribed method of acceptance is not complied with, the offeror would no doubt be bound by, ³⁴⁰ ⚠ and apparently entitled to enforce, ³⁴¹ the contract if he had acquiesced in a different mode of acceptance and had so waived the stipulated mode. But a waiver by the offeror alone of a stipulation as to the method of acceptance would not entitle him to enforce the contract if the stipulation was, on its true construction, one for the benefit of both parties. ³⁴²

Terms of offer drawn up by offeree

2-067

⚠ The rules relating to failure to use a prescribed mode of acceptance are traditionally based on two assumptions: that the offer was drawn up by the offeror; and that stipulations as to the mode of acceptance were made by him for his own benefit. It is, however, also possible for the offer to be made on a form drawn up by the offeree: e.g. where a customer submits to a finance company a proposal to enter into a hire-purchase agreement; or where an offer is made by tender on a form of tender issued by the offeree. Stipulations as to the mode of acceptance in such documents are usually intended for the benefit and protection of the *offeree*. If the offeree accepts in some other way, this will often be evidence that he has waived the stipulation; and it is submitted that the acceptance should be treated as effective unless it can be shown that failure to use the stipulated mode has prejudiced the offeror. ³⁴³ In one case, ³⁴⁴ for example, an offer to enter into a conditional sale agreement was made by the buyer on a form provided by the offeree (a finance company). It was held that the offer had been accepted by delivery of the subject-matter in spite of a provision in the offer to the effect that this was *not* to constitute acceptance, that provision having been waived by the offeree. In another case, ³⁴⁵ ⚠ the Court of Appeal, approving this and the previous paragraphs, set out the rules in play here ³⁴⁶ ⚠ and found a concluded contract despite the contract document remaining unsigned by the offeree as required by the contract, because ³⁴⁷ ⚠: the contract was on the offeree's standard form and the signature requirement was for its benefit; the requirement was waived by the offeree performing the contract as contemplated; there was no prejudice to the offeror, who had benefitted from and had actively facilitated the offeree's performance; subsequent conduct on both sides confirmed the existence of the contract; and finding a contract "accords with what would be the reasonable expectations of Lord Steyn's honest, sensible business people". Nevertheless, the Court acknowledged that the offeree's failure to sign "was at the expense of certainty as to the precise date the contract was formed", although this was not significant on the facts. ³⁴⁸ ⚠







^{332.} There is no "prescribed" mode of acceptance in the sense under consideration here merely because "the agreement envisages a signature [by each party] and leaves a space for these signatures": *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 at [16]. Even if the offer expressly refers to a method of acceptance (such as signature by the offeree) that method need only be complied with if, on the true construction of the offer, it is intended to be the *only* method of acceptance: *Mulcaire v News Group Newspapers Ltd* [2011] EWHC 3469 (Ch), [2012] Ch. 435 at [11].

^{333.} See qualifications in para.2-065 below.

^{334.} *Frank v Knight* (1937) O.P.D. 113; cf. *Eliason v Henshaw* 4 Wheat. 225 (1819); *Walker v Glass* [1979] N.I. 129.

^{335.} *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184, 1186. Contrast *Hitchens v General Guarantee Corp* [2001] EWCA Civ 359, *The Times*, March 13, 2001 (where there was *no* requirement that the acceptance must be in writing).

^{336.} *Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 157.

- [337.](#) *Wettern Electricity Ltd v Welsh Development Agency* [1983] Q.B. 796.
- [338.](#) As in the *Wettern Electricity* case, above; provided, however, that such conduct is accompanied by the requisite contractual intention: see *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd* [1986] A.C. 207 and below, para.2-168; for counter-offers, see above para.2-031; below, para.2-097.
- [339.](#)  *Tinn v Hoffmann & Co* (1873) 29 L.T. 271, 278; cf. *Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1970] 1 W.L.R. 242; *Edmund Murray v B.S.P. International Foundations* (1994) 33 Con. L.R. 1; *A Ltd v B Ltd* [2015] EWHC 137 (Comm).
- [340.](#)  *A Ltd v B Ltd* [2015] EWHC 137 (Comm).
- [341.](#) On the analogy of the reasoning of *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 28, below paras 2-123, 4-082.
- [342.](#) *MSM Consulting Ltd v Tanzania* [2009] EWHC 121 (QB), 123 Con. L.R. 154 at [120].
- [343.](#) See *Robophone Facilities v Blank* [1966] 1 W.L.R. 1428 and cf. the *Manchester Diocesan* case, above, n.335; from this point of view these cases are, it is submitted, to be preferred to *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184.
- [344.](#) *Carlyle Finance Ltd v Pallas Industrial Finance Ltd* [1999] All E.R. (Comm) 659, approving the reasoning now contained in para.2-067 above.
- [345.](#)  *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443.
- [346.](#)  [2016] EWCA Civ 443 at [40]–[41].
- [347.](#)  [2016] EWCA Civ 443 at [53].
- [348.](#)  [2016] EWCA Civ 443 at [53].

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(e) - Silence

Offeree generally not bound

2-068

As a general rule, an offeree who does nothing in response to an offer is not bound by its terms. This is so even though the offer provides that it can be accepted by silence. Thus in *Felthouse v Bindley*³⁴⁹ an uncle offered to buy a horse from his nephew for £30 15s., adding "If I hear no more about him I shall consider the horse is mine at £30 15s". The uncle brought an action for conversion against an auctioneer who had by mistake included the horse in a sale of the nephew's property. It was held that, the auctioneer was not liable because:

"The uncle had no right to impose upon the nephew the sale of his horse ... unless he chose to comply with the condition of writing to repudiate the offer"³⁵⁰

The reason for the rule is that it is, in general, undesirable to impose on an offeree the trouble and expense of rejecting an offer which he does not wish to accept. But in *Felthouse v Bindley* this was not the position. The nephew had, before the auction, told the auctioneer that he "intended to reserve" the horse for his uncle, and later correspondence showed that the nephew did at the time of the auction intend to sell the horse to the uncle. In spite of this, it was held that there was no contract because the nephew "had not communicated his intention to the uncle".³⁵¹ But the need to communicate an acceptance can be waived by the terms of the offer³⁵² and it seems clear that the uncle's letter did waive that need. The actual decision is, in view of these facts, hard to support, but this is no criticism of the general rule laid down in the case.

Silence generally equivocal

2-069

The question whether silence may amount to an acceptance binding the offeree has also arisen in the arbitration cases (discussed in para.2-006 above) in which the issue was whether an agreement to abandon an earlier agreement to submit a claim to arbitration could be inferred from inactivity in the form of long delay in prosecuting the claim. Such a delay is now in certain circumstances a statutory ground for dismissing the claim for want of prosecution³⁵³; but the statutory power to dismiss claims on this ground can be excluded by contrary agreement³⁵⁴, and similar questions of agreement to abandon *other* types of claim could still be governed by the common law principles developed in the arbitration cases. In these cases, it had been held that, even if one party's inactivity could be regarded as an offer to abandon the arbitration,³⁵⁵ the mere silence or inactivity of the other did not normally amount to an acceptance. For one thing, such inactivity was often³⁵⁶ equivocal,³⁵⁷ being explicable on other grounds (such as forgetfulness or delay on the part of the offeree's solicitors).³⁵⁸

For another, acceptance could not, as a matter of law, be inferred from silence alone³⁵⁹ “save in the most exceptional circumstances”.³⁶⁰

Can offeree exceptionally be bound?

2-070

As the above reference to “exceptional circumstances” suggests, there may be exceptions to the general rule that an offeree is not bound by silence. First, if the offer has been solicited by the offeree, the argument that he should not be put to the trouble of rejecting it³⁶¹ loses much of its force,³⁶² especially if the offer is made on a form provided by the offeree³⁶³ and that form stipulates that silence may amount to acceptance.³⁶⁴ Secondly, if there is a course of dealing between the parties, the offeror may be led to suppose that silence amounts to acceptance: e.g. where his offers to buy goods have in the past been accepted as a matter of course by the despatch of the goods in question.³⁶⁵ In such a case it may not be unreasonable to impose on the offeree an obligation to give notice of his rejection of the offer, especially if the offeror, in reliance on his belief that the goods would be delivered in the usual way, had forborne from seeking an alternative supply. It has been held that one party’s wrongful repudiation of a contract may be accepted by the other party’s failure to take such further steps in the performance of that contract as he would have been expected to take, if he were treating the contract as still in force³⁶⁶; and similar reasoning might be applied in the present context. Thirdly, there may also be “an express undertaking or implied obligation to speak”³⁶⁷ arising out of the course of negotiations between the parties, e.g. “where the offeree himself indicates that an offer is to be taken as accepted if he does not indicate the contrary by an ascertainable time.”³⁶⁸ The offeree’s failure to perform such an “obligation to speak” could thus be treated by the offeror as an acceptance by silence. But it is not normally open to the offeree in such cases to treat his own silence (in breach of his duty to speak) as an acceptance.³⁶⁹ This course would be open to him only in situations such as that in *Felthouse v Bindley*,³⁷⁰ in which the offeror had indicated (usually in the terms of the offer) that he would treat silence as an acceptance. Fourthly, it is also possible that silence may constitute an acceptance by virtue of a custom of the trade or business in question.³⁷¹ Fifthly, parties may have entered into a binding contract but have left some of its terms to be settled in later negotiations; where one party then made a proposal as to the contents of such a term or terms, it was held that “lack of objection to those terms is to be regarded as an acceptance of them”.³⁷² An “implied obligation to speak”³⁷³ could in such a case be said to have arisen out of the antecedent negotiations between the parties. Lastly, the offeree can accept by conduct, which can, in principle, take the form of a forbearance.³⁷⁴

Liability of offeree based on estoppel?

2-071

Even where silence of the offeree does not amount to an acceptance, it is arguable that he might be liable on a different basis. In *Spiro v Lintern* it was said that:

“If A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with such an obligation, which would be to B’s disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation.”³⁷⁵

Although this statement was made with reference to wholly different circumstances, it could also be applied to certain cases in which an offeror had, to the offeree’s knowledge,³⁷⁶ acted in reliance on the belief that his offer had been accepted by silence. The liability of the offeree would then be based on a kind of estoppel.³⁷⁷ But the application of this doctrine to cases of alleged acceptance by silence gives rise to the difficulty that such an estoppel can arise only out of a “clear and unequivocal”³⁷⁸ representation. For this purpose, mere inactivity is not generally sufficient,³⁷⁹ so that silence in response to an offer will not normally give rise to an estoppel. It is likely to do so only in cases of the

kind discussed above, ³⁸⁰ in which there are special circumstances which give rise to a “duty to speak,” and in which it would be unconscionable for the party under that duty to deny that a contract had come into existence. ³⁸¹

Performance by offeror benefiting offeree

2-072

It is finally possible that the offeree may be bound by silence if the offeror to the offeree’s knowledge actually performs in accordance with his offer and so confers a benefit on the offeree; though the better solution in this type of case would be to make the offeree restore the benefit or be subject to a claim for unjust enrichment, ³⁸² rather than to hold him to an obligation to perform his part of a contract to which he had never agreed.

Can offeror be bound?

2-073

There is some authority for saying that the offeror cannot, any more than the offeree, be bound where the offeree simply remains silent in response to an offer, ³⁸³ and the case is not one of the exceptional ones, discussed in para.2-070 above, in which an offer can be accepted by silence. ³⁸⁴ But it is submitted that the general rule in *Felthouse v Bindley* ³⁸⁵ does not lead invariably to such a conclusion. For the object of this rule is to protect the offeree from having to incur the trouble and expense of rejecting the offer so as to avoid being bound. No similar argument can be advanced for protecting the offeror. He may, indeed, be left in doubt on the point whether his offer has been accepted; but this is a matter about which he cannot legitimately complain where he has drawn his offer so as to permit (and even to encourage) acceptance by silence. ³⁸⁶ Thus, it is submitted that the uncle in *Felthouse v Bindley* might have been bound if the nephew had resolved to accept the offer and had, in reliance on its terms, forbore from attempting to dispose of the horse elsewhere. This possibility has, indeed, been doubted ³⁸⁷; but in the case in which the doubt was expressed there was no express stipulation in the offer that silence would be regarded as acceptance. Where the offer does contain such a stipulation, it is submitted that silence in response to it by the offeree should be capable of binding the offeror.

Silence and conduct

2-074

The general rule that there can be no acceptance by silence does not mean that an acceptance always has to be given in so many words. An offer can be accepted by conduct; and this is never thought to give rise to any difficulty where the conduct takes the form of a positive act. ³⁸⁸ In principle, conduct can also take the form of a forbearance ³⁸⁹: for example, a debtor’s offer to give additional security for a debt can be accepted by the creditor’s forbearing to sue for the debt. ³⁹⁰ Similarly, a tenant can accept an offer of a new tenancy by simply not vacating the premises. In one such case it was said that the offer had been accepted by “silence” ³⁹¹; but it seems better to say that it was accepted by conduct ³⁹² and that the landlord had waived notice of acceptance. Similarly an offer made to a landowner to occupy land under a licence containing specified terms may be accepted by the landowner’s permitting the offeror to occupy the land. ³⁹³ An offer by a contractor to carry out building work on the offeree’s land may also sometimes be accepted by the offeree’s allowing the work to proceed. ³⁹⁴ The possibility of acceptance by conduct is, yet again, illustrated by the arbitration cases already mentioned, in which an agreement to abandon the proceedings was alleged to have arisen from delay in prosecuting them. As already noted, legislation has now dealt with the practical problems which used to arise from delay in the pursuit of arbitration claims, ³⁹⁵ but the reasoning of the arbitration cases could still apply where the legislative provisions have been excluded by agreement ³⁹⁶ or where it was alleged that some other type of claim or remedy had been abandoned by tacit agreement. According to those cases, an offer of abandonment can be accepted by reacting to it, not merely by inactivity, ³⁹⁷ but also by some further conduct: e.g. by closing, or

disposing of, the relevant files.³⁹⁸ On the same principle, the wrongful repudiation of an arbitration agreement (by repeatedly denying its existence) can be accepted by starting court proceedings to enforce the injured party's substantive claim.³⁹⁹

2-075

In *Rust v Abbey Life Ins Co*⁴⁰⁰ the plaintiff applied and paid for a "property bond" which was allocated to her on the terms of the defendants' usual policy of insurance. After having retained this document for some seven months, she claimed the return of her payment, alleging that no contract had been concluded. The claim was rejected on the ground that her application was an offer which had been accepted by issue of the policy.⁴⁰¹ But it was further held that, even if the policy constituted a counter-offer, that counter-offer had been accepted by "the conduct of the plaintiff in doing and saying nothing for seven months ...".⁴⁰² Thus, mere inaction was said to be sufficient to constitute acceptance; but it is submitted that this conclusion may be justified by reference to the special circumstances of the case. The negotiations had been started by the plaintiff (the counter-offeree)⁴⁰³ and, in view of this fact, it was reasonable for the defendants to infer from her silence over a long period that she had accepted the terms of the policy which had been sent to her and which she must be "taken to have examined".⁴⁰⁴ The case thus falls within one of the suggested exceptions⁴⁰⁵ to the general rule that an offeree is not bound by silence where this alone is alleged to amount to an acceptance.⁴⁰⁶

^{349.} (1862) 11 C.B.(N.S.) 869; affirmed (1863) 1 N.R. 401; Miller (1972) 35 M.L.R. 489; cf. *Financial Techniques (Planning Services) v Hughes* [1981] I.R.L.R. 32

^{350.} (1862) 11 C.B.(N.S.) 869 at 875.

^{351.} (1862) 11 C.B.(N.S.) 869 at 876.

^{352.} Above, para.2-046.

^{353.} Arbitration Act 1996 s.41(3).

^{354.} Arbitration Act 1996 s.41(2).

^{355.} Above, para.2-006

^{356.} But not always: see para.2-070 at n.357.

^{357.} e.g. *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437, 445.

^{358.} For acceptance by silence and conduct, see below, para.2-074.

^{359.} *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* [1985] 1 W.L.R. 925, 927; *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) Plc* [1992] 1 Lloyd's Rep. 513, 542; *Exmar NV v BP Shipping Ltd (The Gas Enterprise)* [1993] 2 Lloyd's Rep. 352, 357, affirmed without reference to this point, at 364; *Vitol SA v Norelf Ltd* [1996] A.C. 800, 812; *Front Carriers Ltd v Atlantic and Orient Shipping Corporation (The Archimidis)* [2007] EWHC 421; [2007] 2 Lloyd's Rep. 131 at [45]-[46].

^{360.} *The Leonidas D.*, above, n.350, at 927; *Cie Française d'Importation, etc. v Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592, 598; *Gebr. van Weelde Scheepvaart Kantoor BV v Compania Naviera Orient SA (The Agrabele)* [1987] 2 Lloyd's Rep. 223, 234-235. *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear)* [1987] 1 Lloyd's Rep. 330 is hard to reconcile with these cases and was apparently doubted in *The Antclizo* [1987] 2 Lloyd's Rep. at 147. Such "exceptional circumstances" may be illustrated by *André & Cie SA v Marine Transocean Ltd (The Splendid Sun)* [1981] Q.B. 694 (where the acceptance may have been by conduct: below, para.2-074 n.389), though it has been said that this case is

hard to reconcile with *The Leonidas D*, above: see *Food Corp of India v Antclizo Shipping Corp (The Antclizo)* [1987] 2 Lloyd's Rep. 130, 149, affirmed [1988] 1 W.L.R. 607.

- [361.](#) Above, para.2-068.
- [362.](#) cf. *Rust v Abbey Life Ins. Co* [1979] 2 Lloyd's Rep. 335, below, para.2-075.
- [363.](#) cf. above, para.2-067.
- [364.](#) As in *Alexander Hamilton Institute v Jones* 234 Ill.App. 444 (1924).
- [365.](#) As in *Cole-McIntyre-Norfleet Co v Holloway* 141 Tenn. 679, 214 S.W. 87 (1919).
- [366.](#) *Vitol SA v Norelf Ltd* [1996] A.C. 800.
- [367.](#) *Gebr. van Weelde Scheepvaart Kantor BV v Compania Naviera Orient SA (The Agrabele)* [1985] 2 Lloyd's Rep. 496, 509, per Evans J., whose statement of the relevant principles was approved on appeal though the actual decision was reversed on the facts: [1987] 2 Lloyd's Rep. 223, 225. The case concerned an alleged "abandonment" by delay of an agreement to submit a claim to arbitration and would now be governed by Arbitration Act 1996 s.41(3) (above, para.2-006).
- [368.](#) *Re Selectmove* [1995] 1 W.L.R. 474, 478 (where the point was left open).
- [369.](#) *Yona International Ltd v La Réunion Française, etc.* [1996] 2 Lloyd's Rep. 84, 110.
- [370.](#) Above, para.2-068; further discussed in para.2-073 below.
- [371.](#) *Minories Finance Ltd v Afribank Nigeria Ltd* [1995] 1 Lloyd's Rep. 134 (where a contract between two banks for the collection of drafts and remittance of their proceeds arose in this way).
- [372.](#) *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685 at [82], also referring at [70] to *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601 at 614, where the further requirement is stated that "the other party does not object to [the term] *when asked if it has objections*" (italics added).
- [373.](#) See above at n.358.
- [374.](#) See below para.2-074.
- [375.](#) [1973] 1 W.L.R. 1002, 1011.
- [376.](#) See *Yona International Ltd v Law Réunion Française, etc.* [1996] 2 Lloyd's Rep. 84, 107 (where this requirement of knowledge was not satisfied).
- [377.](#) Below, para.4-104; and cf. *The Stolt Loyalty* [1993] 2 Lloyd's Rep. 281, 289-291; affirmed, without reference to this point, [1995] 1 Lloyd's Rep. 598. The case put in the text above would not be one of estoppel by convention (below, para.4-108); for such estoppel is based on an *agreed* assumption, while in cases of the present kind the question is whether there was any agreement.
- [378.](#) Below, para.4-091.
- [379.](#) Below, para.4-093.
- [380.](#) Above, at n.358.
- [381.](#) See *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360 (TCC), [2007] B.L.R. 499.

- [382.](#) See below, paras 29-017 et seq.
- [383.](#) *Fairline Shipping Corp v Anderson* [1975] Q.B. 180, 189.
- [384.](#) Even in such exceptional cases, the offeror is not *invariably* bound by the offeree's silence: see above, at n.360.
- [385.](#) Above, para.2-068.
- [386.](#) This argument would not apply where the terms of the offer had been drafted by the offeree: cf. above, para.2-067.
- [387.](#) *Fairline Shipping Corp v Anderson*, above, n.374.
- [388.](#) cf. above, para.2-029.
- [389.](#) This statement is cited with apparent approval in *Vis Trading v Nazarov* [2014] EWCA Civ 313 at [40]. The actual decision in this case was based on a provision of the Russian Civil Code, which did "not wholly rule out silence as acceptance".
- [390.](#) Below, para.4-058.
- [391.](#) *Roberts v Hayward* (1828) 3 C. & P. 432.
- [392.](#) See *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2010] EWHC 2567 (Comm), [2011] 2 All E.R. (Comm) 38 (above, para.2-035 n.185), when Gloster J. said (at [52] that there was "some artificiality in the concept of an implied agreement to the counter-offer by nonresponsive silence", but concluded at [55] that the buyer had "accepted [the seller's] counterproposal by its subsequent performance", i.e. by conduct rather than by silence.
- [393.](#) *Wettern Electric Ltd v Welsh Development Agency* [1983] Q.B. 796. For acceptance by conduct (as opposed to mere silence) see also *Aspinall's Club Ltd v Al Zayat* [2007] EWCA Civ 1001 at [19], [30] (acceptance of alleged terms on which a cheque was given by the recipient's accepting the cheque and returning "scrip" cheques previously given in respect of gambling losses).
- [394.](#) See *Westminster Building Co Ltd v Buckingham* [2004] EWHC 138, [2004] B.L.R. 163; contrast *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International OAPIL (No.2)* [2004] EWHC 1750, 97 Con. L.R. 1. In these cases the point at issue related to the terms, rather than to the existence, of the contract.
- [395.](#) Arbitration Act 1996 s.41(3); above, para.2-006.
- [396.](#) Arbitration Act 1996 s.41(2).
- [397.](#) cf. *Collin v Duke of Westminster* [1985] Q.B. 581.
- [398.](#) See *André & Cie v Marine Transocean Ltd (The Splendid Sun)* [1981] Q.B. 694, 712, 713 ("closed their file"), cf. 706 ("did so act"). *Tracom SA v Anton C. Nielsen A/S* [1984] 2 Lloyd's Rep. 195 can be supported on the same ground even though it was in part based on the decision at first instance in *Allied Marine Transport Ltd v Vale do Rio Doce Navegação SA (The Leonidas D.)* which was reversed on appeal [1985] 1 W.L.R. 925; above para.2-051; cf. *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multibank Holsatia)* [1988] 2 Lloyd's Rep. 486, 493 (where the offeree had destroyed relevant files, so that the case was not one of mere inaction). There seems to have been no "conduct" amounting to an acceptance in *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear)* [1987] 1 Lloyd's Rep. 330.
- [399.](#) *Downing v Al Tameer Establishment* [2002] EWCA Civ 545; [2002] 2 All E.R. (Comm) 545.
- [400.](#) [1979] 2 Lloyd's Rep. 335.

- [401.](#) cf. above, para.2-024.
- [402.](#) [1979] 2 Lloyd's Rep. 335, 340; affirming [1978] 2 Lloyd's Rep. 386, 393. For another illustration of acceptance by silence and conduct, see *AC Yule & Son Ltd v Speedwell Roofing and Cladding Ltd* [2007] EWHC 1360 (TCC), [2007] B.L.R. 499.
- [403.](#) cf. above, para.2-067 and *Vitol SA v Norelf Ltd* [1996] A.C. 800 (above, para.2-070).
- [404.](#) *Yona International Ltd v La Réunion Française, etc.* [1996] 2 Lloyd's Rep. 84, 110 (where no inference of assent was drawn from silence).
- [405.](#) Above, para.2-070.
- [406.](#) See *Cooper v National Westminster Bank Plc* [2009] EWHC 3055 (QB), [2010] 1 Lloyd's Rep. 490, distinguishing *Rust v Abbey Life Ins. Co* (above, n.391) and applying the general rule that "acceptance notoriously cannot, in ordinary circumstances, be inferred from silence" (at [69]).

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(f) - Electronic Contract Formation

Electronic communication ⁴⁰⁷

2-076

The internet has changed the way that many people communicate and conduct business. How do the rules of offer and acceptance apply to intentions manifested through electronic messages (email), and interactions with websites? The basic structure of email communications is the same as that concluded by an exchange of letters via the post so the basic principles determining what constitutes an offer ⁴⁰⁸ and what constitutes an acceptance ⁴⁰⁹ remain the same. The additional difficulties with respect to contract formation by email communications relate to the time that an email acceptance takes effect and the consequences of failures of communication, which are discussed below. ⁴¹⁰ In contrast, contract formation through interaction on websites usually raises no problems of timing since communications are usually instantaneous and any failures of communication should be immediately apparent. ⁴¹¹ However, contract formation through interaction on websites is significantly different from contract formation through letters exchanged by the post and this can raise some difficulties in determining what words or conduct amount to offer or acceptance, although the basic principles on contract formation remain the same.

Digital purchases online

2-077

One common scenario involves contracts for digital products such as music, videos or software. In these cases, the websites are like virtual vending machines, which are generally regarded as offers ⁴¹² because there is no expectation or opportunity to negotiate, and no practical scope for withdrawal because the product or service is delivered immediately and cannot be easily returned. In the usual course of such transactions, the customer selects the digital content, provides payment details and confirms the order, whereupon the digital content will immediately download onto the customer's device (e.g. computer, smartphone or tablet). In these circumstances, it is submitted that the website is a standing offer, which the customer accepts by confirming his order. Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ⁴¹³ the consumer who makes a "contract for the supply of digital content which is not supplied on a tangible medium" may cancel the contract before "the end of 14 days after the day on which the contract is entered into". ⁴¹⁴ However, the consumer's right to cancel will be lost if the consumer has expressly consented to the supply of the digital content before the end of the cancellation period and has "acknowledged that the right to cancel the contract ... will be lost". ⁴¹⁵

Non-digital purchases online

2-078

Where the website transaction involves goods and services, rather than digital content, the trader's performance does not immediately follow the customer's confirmation of his order, and a different analysis is appropriate. Neither the Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013 ⁴¹⁶ nor, the Electronic Commerce (EC Directive) Regulations ⁴¹⁷ specify when such a contract is made, referring instead to "order", ⁴¹⁸ and "acknowledgement of receipt" of the order. ⁴¹⁹ The effect of an acknowledgement of receipt of an order falls to be determined as a matter of common law. Websites are analogous to virtual shop displays or virtual advertisements. Therefore, in the absence of clear intention to the contrary, the general rule should be that the content of the websites constitutes invitations to treat. ⁴²⁰ In exceptional cases, the objective intention evinced by a website will be that it contains an offer; thus, the result in *Carlill v Carbolic Smoke Ball Co Ltd*, ⁴²¹ namely that the advertisement contained a unilateral offer to pay £100 to any person catching influenza despite using the smoke ball as instructed, should be the same even if the advertisement had been made online rather than on paper. But, in the absence of such exceptional circumstances, the customer makes the offer when he confirms his payment details and order, usually by clicking an appropriate "button" on the website. ⁴²² The trader may respond in a number of ways to the customer's offer. First, the trader may send the customer an email acknowledging receipt of the order (as required by the Electronic Commerce (EC Directive) Regulations 2002) ⁴²³ or stating that the customer's order is being processed. These are insufficient to constitute an acceptance by the trader who may yet have good reasons not to accept the customer's offer; he may have insufficient stock to fulfil the order, he may pick up a pricing error on the website, or there may be a problem with the customer's payment or the customer being in a different jurisdiction. Second, the trader may, in addition, send one of or a combination of emails stating that the order has been successfully processed, or that the items have been despatched, or that the item has been delivered, or the trader may simply deliver the item without sending an email. Subject to the precise content of the email message, any of these emails may amount to an acceptance; actual delivery would certainly do so.

The time of email acceptances

2-079

Although the general rule is that an acceptance must be communicated to the offeror, ⁴²⁴ the posting rule discussed above provides a notable exception. ⁴²⁵ The similarity of email communications to communications by an exchange of letters raises the question of whether the posting rule should also be applied to acceptances sent by email. It is submitted that the exceptional posting rule should not be so extended. The Court of Appeal in *Entores v Miles Far East Corp* ⁴²⁶ and the House of Lords in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH* ⁴²⁷ refused to extend the posting rule to acceptances made by telex, holding instead that acceptance takes effect when the telex arrives on the offeror's machine. Both courts attached importance to the fact that any failure of communication (e.g. where the line goes dead or the offeror notifies the offeree that ink on the receiving end has run out) would be apparent to the offeree. Likewise, the offeree sending the acceptance is more likely than the offeror (the intended recipient) to know that the email delivery has failed since he will receive a message informing him of this. This contrasts with the post where the offeree sender usually has no means of knowing that his acceptance letter has been delayed or lost. Therefore, in general, the time of acceptance by email should be when the email is received by the offeror.

When an email acceptance is received

2-080

Although email communication is sufficiently unlike post so that it should not be governed by the posting rule, ⁴²⁸ it is also sufficiently different from the core examples of instantaneous communications (e.g. face-to-face and telephone conversations) that a question arises as to when an email acceptance should be regarded as having been *received*. In the *Brinkibon* case Lord Wilberforce accepted the rule on instantaneous communication "where the condition of simultaneity is met". ⁴²⁹ The assumption is that both parties are present, so that there is no time lag between the sending and receiving of the acceptance and any failures of communication are usually detectable and immediately rectifiable. ⁴³⁰ However, the condition of simultaneity should be assumed in the case of email and other similar instantaneous methods of communication (e.g. texts, telephone answering

machines, faxes, telexes); the message arrives almost instantaneously, but the recipient may not, at that moment, be at the other end and ready to receive the message. Lord Wilberforce has said that:

“No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.” ⁴³¹

One possibility is to treat an email acceptance as having been received when it arrives on the offeror's email server. This is supported by a number of international conventions, restatements and national laws, ⁴³² and has the merit of certainty since that time is recorded in the email. A second possibility is to treat an email acceptance as received when the addressee can access it. There is some support for this position, ⁴³³ but, it is not only more uncertain, it may also seem unfair because the causes of the offeror's lack of access to the email will usually be, broadly speaking, within the offeror's sphere of control (e.g. problems with the offeror's computer or server or the connection between them, or the operation of spam filters or firewalls), and those risks should not be borne by the offeree. ⁴³⁴ A third possibility is to treat the acceptance email as received when, in all the circumstances, a reasonable offeror would have accessed the message (e.g. during normal business hours) or when the offeror actually accessed the message if earlier. However, the authorities consistent with this position ⁴³⁵ relate to the “quite different” ⁴³⁶ question of when notice of withdrawal of a charterparty is deemed to have occurred. Moreover, this approach would create a great deal of uncertainty where, for example, business hours vary within the same business or across different businesses, or as between the offeror and offeree, or where the offeror may reasonably be expected to check his email in the evenings and at weekends, or where the parties do not negotiate in a business context, or where the offeror sends an automatic email response about his limited access to his email during certain periods of time. Therefore, subject to the reasonableness of the parties' conduct and fault discussed in the next paragraph, it is submitted that the first option should be adopted as the default position; that is, an email acceptance should be treated as having been received when it arrives on the offeror's email server, unless the parties or the context indicate to the contrary.

Failure of email communication

2-081

Email communications may fail; for example, they may not arrive, arrive in garbled form or be blocked by antivirus programmes or spam filters. Three principles can be derived from the judgments of Denning L.J. in *Entores v Miles Far East Corp* ⁴³⁷ and Lord Frazer in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH*: ⁴³⁸

(1)

If the offeree knows or should know that the communication has failed, ⁴³⁹ or the failure is due to an occurrence for which the offeree is responsible, then there is no contract. This would be the case where, for example, the offeree sender has received an error message, the offeree has mistyped the offeror's email address, the email that is sent is blocked because it contains a virus or has not come to the offeror's notice because it was sent to an unexpected email address.

(2)

If (1) does not apply, the offeror will be bound by the email acceptance if his failure to receive the email is due to his fault or to an occurrence for which he is responsible. ⁴⁴⁰ This would be the case if, for example, the offeror has given the offeree the wrong or incorrect email address; the incoming email is blocked because the offeror's inbox is full, because of a problem with the offeror's server, or because of the operation of the offeror's firewall or spam filter.

(3)

Where neither is at fault nor responsible for the failure of communication, then there is no contract.

Denning L.J. said:

“if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract.” ⁴⁴¹

^{407.} See D. Nolan, *Contract Formation and Parties*, (2010), 61; J. Hill, *Cross-Border Consumer Contracts* (2008).

^{408.} See above paras 2-003—2-013.

^{409.} See below paras 2-026—2-043.

^{410.} See below paras 2-079—2-081.

^{411.} See below paras 2-077—2-078.

^{412.} See *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163 at 169, Lord Denning held that an automatic machine outside a car park stating charge rates makes an offer, which the motorist accepts by putting money into the slot and driving in.

^{413.} SI 2013/3134.

^{414.} reg.27(2)(b).

^{415.} reg.37(1).

^{416.} SI 2013/3134. These Regulations replaced the Consumer Protection (Distance Selling) Regulations 2000 with effect from June 13, 2014. For amendments of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) see the Consumer Protection Regulations 2014 (SI 2014/870) regs 2-4. For further discussion of the 2013 Regulations see below, paras 38-055—38-144.

^{417.} SI 2002/2013 (implementing Directive 2000/31/EC) which merely provides that in the case of a contract made on a website, “the order and the acknowledgement of receipt [of the order] will be deemed to be received when the parties to whom they are addressed are able to access them” (reg.11(2)(a)).

^{418.} SI 2002/2013 reg.12 states that the word “‘order’ may be but need not be the contractual offer” for the purposes of regs 9 and 11, except in relation to reg.9(1)(c) and reg.11(1)(b). However, SI 2013/3134 reg.14 (3) stipulates: “The trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay.” Regulation 14(4) stipulates: “If placing an order entails activating a button or a similar function, the trader must ensure that the button or similar function is labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader.” These are consistent with treating the customer’s order as the acceptance that concludes the contract. On the other hand, room is

made for the alternative view that the consumer's order is merely the offer by the last two words of reg.14(5), which stipulates that if the trader fails to comply with regs 14(3)-(4), "the consumer is not bound by the contract *or order*".

- [419.](#) SI 2002/2013 regs 9, 11(2)(a).
- [420.](#) See above paras 2-011 and 2-014. This is consistent with art.11 of the United Nations Convention on the Use of Electronic Communications in International Contracts. The Electronic Commerce (EC Directive) Regulations (SI 2002/2013) regs 9 and 11(1) requires the trader to clearly set out for their customers, prior to orders being placed, the procedure for concluding a contract and to allow consumers to "identify and correct input errors prior to the placing of an order".
- [421.](#) [1893] 1 Q.B. 256. Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (partly implementing Directive 2000/31/EC) reg.12 states that an "order" may be, but need not be, the contractual offer ..." for certain purposes specified in regs 9 and 11.
- [422.](#) See Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (partly implementing Directive 2000/31/EC) regs 9(1)-(2), 11 and 12.
- [423.](#) SI 2002/2013 (implementing Directive 2000/31/EC) reg.11(1)(a). Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134, replacing the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) for contracts made on or after June 13, 2014) the customer will almost certainly have the right to cancel at this stage under regs 30-31.
- [424.](#) See above para.2-044.
- [425.](#) See above para.2-047.
- [426.](#) [1955] 2 Q.B. 327.
- [427.](#) [1983] 2 A.C. 34.
- [428.](#) See above paras 2-047—2-060, 2-079.
- [429.](#) [1983] 2 A.C. 34 at 42.
- [430.](#) In *Entores v Miles Far East Corp* [1955] 2 Q.B. 327 Denning L.J. gives the examples of face-to-face and telephone communication and communication by telex.
- [431.](#) [1983] 2 A.C. 34 at 42.
- [432.](#) See the UN Convention on Contracts for the International Sale of Goods art.24 as interpreted in CISG Advisory Council Opinion No.1, Electronic Communications under CISG (August 15, 2003), Opinion on art.24 and Opinion on art.18(2); UNIDROIT Principles of International Commercial Contracts art.1.303(3); US Restatement of Contract (1981) §68; Uniform Commercial Code §1-201(26); UN Model Law on Electronic Commerce art.15(2); US Uniform Computer Information Transactions Act s.102(a)(52)(B)(II); Australian Electronic Transactions Act 1999 (Cth) s.14(3).
- [433.](#) See UN Convention on the Use of Electronic Communications in International Contracts art.10(2); the Electronic Commerce (EC Directive) Regulations 2000 (SI 2002/2013) reg.11(2)(a).
- [434.](#) Although the offeror's lack of access may also result from the operation of processes outside the offeror's sphere of control (e.g. the offeror's mail-client may not be able to process and display a message composed on the offeree's mail-client), or due to the justifiable operation of the offeror's anti-virus software.

- [435.](#) See *Tenax S.S. Co Ltd v The Brimnes (The Owners) (The Brimnes)* [1974] EWCA Civ 15, [1975] 1 Q.B. 929 (CA) and *Schelde Delta Shipping BV v Astart Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep. 249 (QB).
- [436.](#) *Schelde Delta Shipping BV v Astart Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep. 249, 252.
- [437.](#) [1955] 2 Q.B. 327.
- [438.](#) [1983] 2 A.C. 34 at 43.
- [439.](#) [1955] 2 Q.B. 327 at 332; he states that if a face-to-face oral acceptance is drowned out by a noisy aircraft flying overhead, the offeree must repeat his acceptance once the aircraft has passed if he wishes to make a contract; likewise, if the telephone goes "dead" before the acceptance is completed, the offeree must telephone back to complete the acceptance.
- [440.](#) [1955] 2 Q.B. 327 at 333; Denning L.J. states that if the offeree does not know that his communication has failed but the offeror knows or has reason to know e.g. because the ink of the receiving teleprinter runs out, the offeror recipient should alert the offeree sender of the problem, failing which, the offeror should be bound.
- [441.](#) [1955] 2 Q.B. 327 at 333.

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(g) - Unilateral Contracts

Introduction

2-082

An offer of a unilateral contract is made when one party promises to pay the other a sum of money (or to do some other act, or to forbear from doing something) if the other will do (or forbear from doing) something without making any promise to that effect: for example where A promises to pay B £100 if B will walk from London to York ⁴⁴² or find and return A's lost dog or give up smoking for a year. ⁴⁴³ The contract in these cases is called "unilateral" because it arises without B's having made any counter-promise to perform the stipulated act or forbearance; it is contrasted with a bilateral contract under which each party undertakes an obligation. The distinction between the two types of contract is not always clear cut ⁴⁴⁴; but once a promise is classified as an offer of a unilateral contract, a number of rules apply to the acceptance of such an offer. First, the offer can be accepted by fully performing the required act or forbearance. ⁴⁴⁵ Secondly, there is no need to give advance notice of such acceptance to the offeror. ⁴⁴⁶ Thirdly, the offer can be accepted *only* by performance and not by a counter-promise, since such a counter-promise would not be what the promisor had bargained for. And fourthly, the offer can, like all offers, be withdrawn before it is accepted. ⁴⁴⁷ It is the application of this fourth rule which gives rise to the greatest difficulty, for it raises the issue of fairness to the offeree who has embarked on, but not completed, performance when the offeror attempts to withdraw his offer.

Acceptance by part performance

2-083

It is disputed whether an offer of a unilateral contract can be withdrawn after the offeree has *partly* performed the stipulated act or forbearance. The first question (to be discussed here) is whether at this stage the offeree has accepted the offer; the second (to be discussed in Ch.3) is whether (before full performance) he has provided any consideration for the offeror's promise. ⁴⁴⁸ With regard to the first question, one possible view is that there is no acceptance until the stipulated act or forbearance has been completely performed. This may, indeed, be the position where the offeror clearly intends to have a locus poenitentiae until then, and the offeror commences performance on that understanding. But in most cases the offeree will not intend to expose himself to the risk of withdrawal when he has partly performed, ⁴⁴⁹ intends to complete performance and is able to do so. ⁴⁵⁰ In such cases, the offeree's position can be protected in two ways. The first is by distinguishing between two stages: (1) that at which the offer is accepted and (2) that at which the offeree has satisfied the conditions which must be satisfied before he can enforce the offeror's promise. ⁴⁵¹ Where the contract is unilateral, the second stage is not reached until performance of the stipulated act has been completed. ⁴⁵² But it may be that the first stage (of acceptance) can be reached as soon as the offeree has unequivocally begun performance of the stipulated act or abstinence. If so, the part performance can amount to an acceptance so that the offer can no longer be withdrawn. Of course it may be difficult in fact to tell when performance has begun, particularly where the offer amounts to a promise in return for an

abstention. But once the conduct of the offeree has gone beyond mere preparation to perform, and amounts to actual part performance, then it can amount to an acceptance, so that as a general rule ⁴⁵³ the offer can no longer be withdrawn. ⁴⁵⁴

2-084

Support for this view is to be found in *Errington v Errington*, ⁴⁵⁵ where a father bought a house, subject to a mortgage, allowed his son and daughter-in-law to live in it, and told them that if they paid the mortgage instalments the house would be theirs when the mortgage was paid off. The couple started to live in the house and paid some of the mortgage instalments; but they did not bind themselves to go on making the payments. It was held that the arrangement amounted to a contract which could not, after the father's death, be revoked by his personal representatives. Denning L.J. said:

"The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on the performance of the act, but it would cease to bind him if they left it incomplete and unperformed." ⁴⁵⁶

This dictum was cited with approval in *Soulsbury v Soulsbury* ⁴⁵⁷ where a husband (H) promised his former wife (W) to leave her £100,000 in his will if (1) during their joint lives, she did not enforce or seek to enforce a maintenance order which she had obtained against him in divorce proceedings and (2) she survived him. ⁴⁵⁸ Longmore L.J. described this promise as "a classic unilateral contract" and said that, in the case of such a contract,

"[o]nce the promisee acts on the promise by inhaling the smoke ball, by starting the walk to York or (as here) by not suing for the maintenance to which she was entitled, the promisor cannot revoke or withdraw his offer." ⁴⁵⁹

He added that the present case was "stronger than *Errington* since on [H's] death [W] had completed all possible performance of the act required for the enforcement of [H's] promise." ⁴⁶⁰

2-085

An alternative analysis for the substantive position that the offeror cannot revoke once the offeree commences performance is contained in *Daulia Ltd v Four Millbank Nominees Ltd*. ⁴⁶¹ Goff L.J. said that while the general rule is that an offeror "is entitled to require full performance of the condition which he has imposed and short of that he is not bound", this is:

"subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer." ⁴⁶²

On this analysis, the offeror makes two offers; first, the main offer to pay (or otherwise perform) on the offeree's completion of performance, and second, a separate collateral unilateral offer not to revoke the main offer once the offeree's performance has commenced.

Continuing guarantees

2-086

The view that the offeree's part performance of a unilateral contract can amount to an acceptance, either of the main offer or of a collateral offer not to revoke the main offer once the offeree commences performance of the condition of the main offer, and so deprive the offeror of the power to withdraw, is also supported by the law relating to continuing guarantees. These may be divisible, where each advance constitutes a separate transaction; or indivisible, e.g. where, on A's admission to an association, B guarantees all liabilities which A may incur as a member of the association.⁴⁶³ If the guarantee is divisible, it can be revoked at any time with regard to future advances,⁴⁶⁴ but an indivisible guarantee cannot be revoked once the creditor has begun to act on it by giving credit to the principal debtor.⁴⁶⁵ This rule applies even though the contract of guarantee is unilateral, in the sense that the creditor has not made any promise to the guarantor (in return for the guarantee) to give credit to the principal debtor.

Bankers' irrevocable credits

2-087

The issue (or confirmation) by a bank of an irrevocable credit amounts to a promise to pay to the beneficiary a sum of money on certain conditions, usually if the beneficiary will present specified documents to the bank.⁴⁶⁶ Often the beneficiary is a seller of goods who will have done some act of part performance, e.g. in manufacturing or shipping the goods. As he makes no promise *to the bank*, its liability to him might at first sight seem to be based on a unilateral contract between them. But the bank's promise is regarded as binding as soon as it is communicated to the seller, i.e. before he has done any act of part performance or indeed done any other act of acceptance. The binding force of the promise is therefore not explicable in terms of acceptance of an offer of a unilateral contract.⁴⁶⁷

Estate agents' contracts

2-088

A unilateral contract may arise where an estate agent is engaged to negotiate the sale of a house. In one case of this kind it was said that "No obligation is imposed on the agent to do anything".⁴⁶⁸ If he succeeds in negotiating a sale, his claim for the agreed commission could be regarded as a claim based on a unilateral contract. However, it is well settled that the client may revoke his instructions, or sell through another agent, or without any agent, in spite of the fact that the first agent has made considerable efforts to find a purchaser.⁴⁶⁹ It could be argued that this line of cases supports the view that, where a contract is unilateral, the offeror (i.e. in cases of the present kind, the client) can withdraw after part performance by the offeree (the agent). Alternatively, these cases can be regarded as one of the exceptional types of case in which, on the true construction of the offer, a locus poenitentiae is intended to be reserved to the client even after part performance by the agent. A commission is payable, however, where a defendant seller breaches an implied term that it would not do anything to prevent the claimant agent from earning the commission.⁴⁷⁰ This was the case where the defendant seller and the purchaser had got together, formed a new vehicle, transferred the benefit of the sale to that vehicle, for the sole or dominant motive of depriving the claimant of commissions.⁴⁷¹

Estate agents appointed "sole agents"

2-089

There is a further group of cases in which persons appointed "sole agents" have been held entitled to damages when the client sold through another agent.⁴⁷² However, these have been treated as cases of bilateral contracts, on the ground that the agents promised to use their best endeavours to effect a sale,⁴⁷³ or to bear advertising expenses.⁴⁷⁴ Such promises may be (and, it seems, commonly are) made by agents who are not sole agents at all, though the question whether a promise to use best endeavours is sufficiently certain to have any legal effect may still be an open one.⁴⁷⁵ The rules as to the revocability of the client's promise would, it seems, apply whether the contract is regarded as a unilateral or as a bilateral one and accordingly it is doubtful whether the estate agency cases shed

any light on the problems of acceptance in unilateral contracts.

Unilateral contract becoming bilateral

2-090

A contract may be in its inception unilateral but become bilateral in the course of its performance.⁴⁷⁶ In the examples given in para.2-082 above, a bilateral contract would not indeed arise merely because the promisee had promised to perform the stipulated act or abstention (e.g. to walk to York). This is because the promisor has not bargained for a counter-promise, so that his offer cannot be accepted by promising to perform but only by actually performing (or by beginning to do so). But if A promises to pay B a sum of money in return for some service to be rendered by B (such as repainting A's house) it is possible that B may, by beginning to render the service (e.g. by stripping off the old paint), impliedly promise⁴⁷⁷ to complete it.⁴⁷⁸ In such a case, the contract would at this stage become bilateral, so that neither party could withdraw with impunity.

Extent of liability

2-091

It is generally assumed that, where a unilateral contract takes the form of a promise to pay money, an offeror who purports to withdraw after part performance by the offeree must either be liable in full or not be liable at all. There is, however, also an intermediate possibility. If, for example, the offer is withdrawn after the offeree has walked halfway to York, it is arguable that, on being notified of the withdrawal, he should desist and recover damages⁴⁷⁹ amounting to his expenses, or to the value of the chance of completing the walk,⁴⁸⁰ less the expenses saved by not completing it.

^{442.} *Rogers v Snow* (1573) *Dalison* 94; *Great Northern Ry v Witham* (1873) *L.R.* 9 *C.P.* 16, 19.

^{443.} cf. *Hamer v Sidway* 124 *N.Y.* 538 (1881).

^{444.} See below, para.2-090.

^{445.} See *Daulia Ltd v Four Millbank Nominees Ltd* [1978] *Ch.* 231, 238; *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] *A.C.* 207, 229.

^{446.} *Carlill v Carbolic Smoke Ball Co* [1893] 1 *Q.B.* 256; *Bowerman v Association of British Travel Agents* [1995] *N.L.J.* 1815.

^{447.} Below, para.2-093.

^{448.} Below, para.4-191.

^{449.} Lord Diplock in *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] *A.C.* 207, 224 can be read as depriving the offeror of the power to withdraw as soon as his offer is communicated (i.e. before any performance by the offeree); but in that case the offeree had completely performed the required act by making the requested bid.

^{450.} See n.444 below.

^{451.} Pollock, *Principles of Contract*, 13th edn (1950), p.19.

^{452.} For a quasi-exception, see para.2-091 below.

^{453.} i.e. so long as no *locus poenitentiae* has been reserved and so long as performance remains

within the offeree's power: see *Morrison S.S. Co v The Crown* (1924) 20 Ll.L. Rep. 283 (where the House of Lords held that the offer could be withdrawn, in spite of the fact that the offeree had taken steps towards performance, as the acts of foreign governments had made it impossible for the offeree to complete performance).

- [454.](#) The corresponding paragraph of the above text in the 29th edition of this book is (among others) cited with approval in *Schweppe v Harper* [2008] EWCA Civ 442 at [41] by Waller L.J. in a dissenting judgment, but the issue on which he dissented was the different one, whether the agreement lacked contractual force for want of certainty: see below, para.2-150 n.795. Dyson L.J. at [62] treated the alleged contract as bilateral, while Sir Robin Auld at [77] left open the question whether, if it had come into existence, the contract would have been "bilateral or unilateral". See also the American Law Institute's Restatement of the Law, Contracts (hereinafter called Restatement, Contracts), § 45, and Restatement of the Law, 2d, Contracts (hereinafter called Restatement, 2d, Contracts), § 45. The Restatement, 2d, Contracts, § 12 abandons the distinction between bilateral and unilateral contracts, and in § 45 substitutes "option contract" where formerly "unilateral contract" had been used. See also below, para.4-011.
- [455.](#) [1952] 1 K.B. 290; doubted on other points in *National Provincial Bank Ltd v Ainsworth* [1965] A.C. 1175, 1239-1240, 1251-1252 and in *Ashburn Anstalt v Arnold* [1989] Ch. 1, 17 (overruled on another ground in *Prudential Assurance Co Ltd v London Residuary Body* [1992] A.C. 386). For another possible illustration, see *Beaton v McDivitt* (1988) 13 N.S.W.L.R. 162, 175.
- [456.](#) [1952] 1 K.B. 290, 295. cf. *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch. 231, 239.
- [457.](#) [2007] EWCA Civ 969 [2008] 2 W.L.R. 874 at [50].
- [458.](#) [2007] EWCA Civ 969 at [10]; cf. at [22], where the condition of survivorship is not expressly stated.
- [459.](#) [2007] EWCA Civ 969 at [49].
- [460.](#) [2007] EWCA Civ 969 at [50].
- [461.](#) [1978] Ch. 231.
- [462.](#) [1978] Ch. 231 at 239.
- [463.](#) As in *Lloyd's v Harper* (1880) 16 Ch. D. 290.
- [464.](#) As in *Offord v Davies* (1862) 12 C.B.(N.S.) 748. An obscure passage in the argument at 753 is inconclusive on the general question of acceptance in unilateral contracts; cf. below, para.2-090 n.467.
- [465.](#) *Lloyd's v Harper* (1880) 16 Ch. D. 290. cf. *National Merchant Building Society v Bellamy* [2013] EWCA Civ 452, [2013] 2 All E.R. (Comm) 674, distinguishing between (i) a guarantee of a debtor's liability under a specific contract and (ii) a guarantee of obligations arising out of a course of dealing between debtor and creditor and not linked to the debtor's credit limit under the contract between debtor and creditor when the guarantee was given. The Court of Appeal held that a guarantee of "all sums which are or may hereafter be owing" was, on its true construction, of the second of the above two kinds. No issue arose in this case as of the revocability of the guarantee.
- [466.](#) See below, Vol.II, para.34-447.
- [467.](#) Vol.II, para.34-505.
- [468.](#) *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 124. But in fact he may promise to do something: see below, at nn.462 and 463; cf. *Murdoch* (1975) 91 L.Q.R. 357. "Obligation" in the dictum quoted in the text above refers to obligations under any contract between agent and

client (as distinct from obligations that may be imposed on the agent by legislation).

[469.](#) Below, Vol.II, paras 31-140, 31-150.

[470.](#) *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] Q.B. 290.

[471.](#) *C Christo & Co Ltd v Marathon Advisory Service Ltd* [2015] EWHC 1971 (QB).

[472.](#) *Hampton & Sons v George* [1939] 3 All E.R. 627; *Christopher v Essig* [1958] W.N. 461; and see below, Vol.II, para.31-150.

[473.](#) *Christopher v Essig*, above, n.461; *John McCann & Co v Pow* [1974] 1 W.L.R. 1643, 1647. In *Wood v Lucy, Lady Duff-Gordon* 222 N.Y. 88; 118 N.E. 214 (1917) it was held that such a promise could be implied.

[474.](#) cf. *Bentall, Horsley & Baldry v Vicary* [1931] 1 K.B. 253 (where it was held that the owner committed no breach of a "sole agency" agreement by selling it without the intervention of a second agent).

[475.](#) Below, paras 2-143—2-145.

[476.](#) *New Zealand Shipping Co Ltd v A.N. Satterthwaite Ltd (The Eurymedon)* [1975] A.C. 154, 167-168 ("a bargain initially unilateral but capable of becoming mutual"); cf. *The Mahkutai* [1996] 2 A.C. 650, 664, treating the contract in *The Eurymedon* as "nowadays bilateral"; but this description should not be understood as meaning that the contract imposed on the offeree any executory obligations to the offeror: *Hombourg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 13, [2004] 1 A.C. 715 at [34], [59], [93], [153] and [196], where the contract is described as "unilateral". See also Treitel, *Carver on Bills of Lading*, 3rd edn (2011) para.7-052.

[477.](#) It has, indeed, been suggested that it is "impossible to imply terms ... which impose legal obligations ... into a unilateral contract" (*Little v Courage* (1995) 70 P. & C.R. 469, 474). The reason for this view seems to be that such an implication would destroy the unilateral character of the contract by imposing an obligation on the promisee. But there is, it is submitted, no good reason why an intention to undertake such an obligation should not be inferred from the conduct of the promisee *after* the unilateral contract has come into existence. This possibility is recognised in the dictum from *The Eurymedon* cited in n.465 above and by the example given in the text to this note.

[478.](#) See *The Unique Mariner* [1979] 2 Lloyd's Rep. 37, 51-2; *Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 Lloyd's Rep. 553, 559; contrast *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504, 510-511, where such an implied promise was negated by the fact that the terms of a bilateral contract were still under negotiation and were never agreed. It is not clear whether the situation discussed in *Offord v Davies* (1862) 12 C.B.N.S. 748, 753 falls into the category of a unilateral or into that of a bilateral contract.

[479.](#) Unless the offeree has a "substantial or legitimate interest" in completing the work, this may be the law under the principles laid down in *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413, below, para.26-106.

[480.](#) The suggestion made in the text above is adopted in *Schweppe v Harper* [2008] EWCA Civ 442 at [51]-[54] by Waller L.J. who dissented on the different issue, whether the agreement was sufficiently certain to have contractual force: see below, para.2-150 n.795.

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Introductory

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An offer may be terminated by withdrawal, rejection, lapse of time, occurrence of a condition, death and supervening incapacity. These methods of termination will be discussed in the paragraphs that follow.

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(a) - Withdrawal

General rule

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The general rule is that an offer may be withdrawn at any time before it is accepted.⁴⁸¹ The rule applies even if the offeror has promised to keep the offer open for a specified time,⁴⁸² for such a promise is unsupported by consideration⁴⁸³ and is therefore not binding. Thus, in *Routledge v Grant*⁴⁸⁴ the defendant offered to buy a house, giving the offeree six weeks for a definite answer; and it was held that the defendant was free to withdraw at any time before acceptance even though the six weeks had not expired. Likewise, in *Dickinson v Dodds*⁴⁸⁵ the defendant offered to sell land to the offeree and said that the offer was to be "left over till Friday". It was held that he could nevertheless withdraw before Friday.

Communication of withdrawal generally required

2-094

An offer cannot be withdrawn merely by acting inconsistently with it: for example, an offer to sell goods to A is not withdrawn by selling them to B.⁴⁸⁶ If A accepts the offer before he has notice of the subsequent sale, he will be entitled to damages (though not to the goods themselves). To be effective in law, a withdrawal must, in general, be communicated to the offeree: that is, notice of the withdrawal must actually reach the offeree.⁴⁸⁷ This requirement of communication applies to withdrawals sent through the post and by telegram as well as to those sent by other methods. In *Byrne & Co v Van Tienhoven*⁴⁸⁸ an offer to sell tinplates was posted in Cardiff on October 1 and reached the offerees in New York on October 11; on the same day, the offerees accepted the offer by a telegram, which they confirmed by a letter posted on October 15. Meanwhile, on October 8, the offerors had posted a letter withdrawing their offer; this letter reached the offerees on the October 20. It was held that this withdrawal did not take effect on posting: it took effect only when it reached the offerees on October 20. As the acceptance had been posted on October 15, there was a binding contract⁴⁸⁹ even though the parties were demonstrably never in agreement; for when the offerees first learnt (on October 11) of the defendants' offer the defendants had already (on October 8) ceased to intend to deal with the offerees.

Communication need not come from offeror

2-095

Although the withdrawal of an offer must, in general, be communicated *to the offeree*,⁴⁹⁰ the communication need not come *from the offeror*: it is sufficient if the offeree knows from any reliable source that the offeror no longer intends to deal with him. In *Dickinson v Dodds*⁴⁹¹ it was accordingly held that an offer to sell land could not be accepted after a third party informed the offeree that the

offeror had been offering or agreeing to sell the land to another third party. The judgments stress the fact that there is, in such circumstances, no agreement between the parties; but this would also be true even if the offeree had accepted the offer in ignorance of the offeror's change of mind. Yet in the latter case there can be a contract, as *Byrne & Co v Van Tienhoven* ⁴⁹² shows. The rule that communication of withdrawal need not come from the offeror can be a source of uncertainty, making it hard for the offeree to tell exactly when the offer is withdrawn. For example, in *Dickinson v Dodds* it is not clear whether such acceptance was precluded when the offeree knew that the offeror had (a) sold the land to a third party or (b) started negotiations for its sale to a third party or (c) had simply decided not to sell it to the offeree.

Exceptions to the requirement of communication

2-096

If the general rule means that notice of withdrawal must actually be "brought to the mind of" ⁴⁹³ the offeree, convenience requires its qualification in a number of situations.

(1) Letter to commercial organisation

Where the offer has been made to a commercial organisation, it seems probable that the offer would be withdrawn when the letter of withdrawal "was opened in the ordinary course of business or would have been so opened if the ordinary course of business was followed" ⁴⁹⁴; it need not be brought to the actual notice of the officer responsible for the matter.

(2) Offeree's conduct displacing general rule

A withdrawal which was delivered to the offeree's last known address could be effective if he had moved without notifying the offeror. Similarly, a withdrawal which had reached the offeree could be effective even though he had simply failed to read it after it had reached him: this would be the position where a withdrawal by telex or fax arrived in the offeree's office during business hours ⁴⁹⁵ even though it was not actually read by the offeree or by any of his staff till the next day. ⁴⁹⁶ But the withdrawal would not be effective, in such a case, if it had been sent to the offeree at a time when he and all responsible members of his staff were, to the offeror's knowledge, away on holiday or on other business. ⁴⁹⁷

(3) Offers made to the public

The requirement that a withdrawal must be actually communicated does not apply to offers made to the public, e.g. of rewards for information leading to the arrest of the perpetrator of a crime. As it is impossible for the offeror to ensure that the notice of withdrawal comes to the attention of everyone who knew of the offer, it seems to be enough for him to take reasonable steps to bring the withdrawal to the attention of such persons, even though it does not in fact come to the attention of them all. ⁴⁹⁸

^{481.} See, e.g. *Payne v Cave* (1789) 3 T.R. 148; *Routledge v Grant* (1828) 4 Bing. 653; *Offord v Davies* (1862) 12 C.B.(N.S.) 748; *Hebb's Case* (1867) L.R. 4 Eq. 9; *Tuck v Baker* [1990] 2 E.G.L.R. 195; *Scammel v Dicker* [2001] 1 W.L.R. 631, applying the principle to an offer to settle an action under CPR Pt 36 (for further proceedings in this case, see [2005] EWCA Civ 405, [2005] 3 All E.R. 838, below para.2-153; for the method of withdrawal of such an offer, see below, para.2-097 n.488); *Bircham Nominees (No.2) Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 775; (2001) 82 P. & C.R. 472 at [24], [35]; *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [184], quoted in para.2-031 n.173. cf. Defamation Act 1996 s.2(6). Contrast Vienna Convention on Contracts for the International Sale of Goods (above, para.2-061) art.16(2).

- [482.](#) An offer is assumed to be open for a reasonable time if no time limit is expressed in it: see *Ramsgate Victoria Hotel Co Ltd v Montefiore* (1866) L.R. 1 Ex. 109; below, para.2-102.
- [483.](#) Below, para.4-193.
- [484.](#) (1828) 4 Bing. 653. See also *Cooke v Oxley* (1790) 3 T.R. 653.
- [485.](#) (1876) 2 Ch. D. 463.
- [486.](#) *Adams v Lindsell* (1818) 1 B. & Ald. 681; *Stevenson, Jacques & Co v Maclean* (1880) 5 Q.B.D. 346; it is submitted that contrary dicta in *Dickinson v Dodds* (1876) 2 Ch. D. 463, 472 would no longer be followed.
- [487.](#) For a statutory exception to the rule stated in the text, see Consumer Credit Act 1974 s.69(1)(ii) and (7), as substituted by Consumer Credit Act 1974 (Electronic Communications) Order 2004 (SI 2004/3236) art.2(5).
- [488.](#) (1880) 5 C.P.D. 44. See also *Stevenson Jacques & Co v McLean* (1880) 5 Q.B.D. 346; *Henthorn v Fraser* [1892] 2 Ch. 27; *Raeburn & Verel v Burness & Son* (1895) 1 Com. Cas. 22.
- [489.](#) The same result would be reached under Vienna Convention on Contracts for the International Sale of Goods art.16(1) (see above, para.2-061), even though under arts 18(2) and 24 the contract would not be made until the acceptance was communicated to the offeror or delivered to his address.
- [490.](#) A salesperson who obtains consumer credit for the consumer is also the financier's agent to receive communication of the consumer's withdrawal of offer: see *CF Asset Finance Ltd v Okonji* [2014] EWCA Civ 870; *Financing Ltd v Stimson* [1962] 1 W.L.R. 1184.
- [491.](#) (1876) 2 Ch. D. 463; cf. *Cartwright v Hoogstoel* (1911) 105 L.T. 628.
- [492.](#) (1880) 5 C.P.D. 344; above, para.2-094.
- [493.](#) *Henthorn v Fraser* [1892] 2 Ch. 27, 32.
- [494.](#) *Eaglehill Ltd v J. Needham (Builders) Ltd* [1973] A.C. 992, 1011, discussing notice of dishonour of a cheque; cf. *Curtice v London, etc., Bank* [1908] 1 K.B. 291, 300–301 (notice to countermand a cheque); *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep. 249, 252; *NV Stoomv Maats "De Maas" v Nippon Yusen Kaisha (The Pendrecht)* [1980] 2 Lloyd's Rep. 56, 66 (telex notice of arbitration) and *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [2005] EWHC 3020 (Comm), [2006] 1 Lloyd's Rep. 537 at [30], [37]; according to these passages, it is not necessary for such notices to arrive during business hours. Quaere whether a notice withdrawing an offer must so arrive; there seems to be no good reason for distinguishing between such a notice and an acceptance by telex, as to which see above, para.2-046 at nn.259, 260.
- [495.](#) For the effect of such messages when sent out of business hours, see above, para.2-046 (acceptance received out of business hours).
- [496.](#) cf. *Tenax Steamship Co Ltd v Brimnes (Owners), (The Brimnes)* [1975] 5 Q.B. 929 (notice withdrawing ship from charterparty) and the last two cases cited in n.483 above. The common law principle stated at n.483 above does not apply for the purpose of determining "the effective date of termination" within s.87(1)(b) of the Employment Rights Act 1996. It was held in *Gisda Cyf v Barratt* [2010] UKSC 41, [2010] S.C.R. 475 that this "effective date" was not the date when a letter notifying an employee of her dismissal was delivered at her address, but was the date when she read the letter or had a reasonable opportunity of learning its contents; cf. *Vasella Ltd v Eyre* UKEATS/0039/11/BL, applying similar reasoning to an employee's notice of resignation. See also below, Vol.II para.40-221.
- [497.](#) *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 A.C. 34, 42.

[498.](#) *Shuey v US* 92 U.S. 73 (1875).

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(b) - Rejection

What amounts to rejection; counter-offers

2-097

A rejection terminates an offer, so that it can no longer be accepted. ⁴⁹⁹ For this purpose, an attempt to accept an offer on new terms (not contained in the offer) may be a rejection accompanied by a counter-offer. ⁵⁰⁰ Thus in *Hyde v Wrench* ⁵⁰¹ the defendant offered to sell a farm for £1,000. The offeree replied offering to buy for £950, and when that counter-offer was rejected, purported to accept the defendant's original offer to sell for £1,000. It was held that there was no contract as the offeree had, by making a counter-offer of £950, rejected, and so terminated, the original offer. A communication can amount to a counter-offer only if it relates to the subject matter of the original offer. Where, for example, A offered to indemnify B in respect of legal costs incurred in litigation against both of them, it was held that this offer was not rejected by B's seeking compensation from A for loss of employment in return for B's co-operating with A in the litigation to an extent beyond that which B was already bound to give. ⁵⁰² The negotiations for such compensation were said to be "collateral" ⁵⁰³ to the offer of indemnity and therefore not to amount to a rejection, by way of counter-offer, of the original offer. This offer accordingly remained open for acceptance and had been accepted by conduct. ⁵⁰⁴

2-098

A rejection of an offer is not prevented from having the effect of terminating the offer by reason of being contained in a communication expressed to be "subject to contract". The effect of these words is that the negotiations will lead to the conclusion of a legally binding agreement only on the execution of a formal contract. ⁵⁰⁵ They have no bearing on the question whether the communication amounts to a rejection of the offer, as to preclude its subsequent acceptance. ⁵⁰⁶

Inquiries and requests for information

2-099

A communication from the offeree *may* be construed as a counter-offer (and hence as a rejection) even though it takes the form of a question as to the offeror's willingness to vary the terms of the offer. ⁵⁰⁷ But such a communication is not *necessarily* a counter-offer: it may be a mere inquiry or request for information made without any intention of rejecting the terms of the offer. ⁵⁰⁸ Whether the communication is a counter-offer or a request for information depends on the intention, objectively ascertained, ⁵⁰⁹ with which it was made. In *Stevenson, Jacques & Co v McLean* ⁵¹⁰ an offer was made to sell iron to offerees who asked by telegram whether they might take delivery over a period of four months. It was held that this telegram was not a counter-offer but only a request for information as it was "meant ... only as an inquiry" and as the offeror "ought to have regarded it" in that sense. ⁵¹¹ Similarly, if an offer is made to sell a house at a specified price, an inquiry whether the intending vendor is prepared to reduce that price will not amount to a rejection of the offer if the inquiry is

“merely exploratory”. ⁵¹²

Rejection must be communicated

2-100

A rejection takes effect when it is communicated to the offeree. There is no reason to apply the posting rule here; the offeree will not act in reliance on posting his rejection as he derives no rights or liabilities from it; and the offeror will not know that he is free from the offer until the rejection is actually communicated to him. Hence if the rejection is overtaken by a subsequently despatched acceptance, which reaches the offeror first, the latter should take effect so long as the offeree has made his intention to accept (in spite of his original rejection) clear to the offeror. If, however, the rejection has reached the offeror, it is submitted that he would not be bound by an acceptance posted after the rejection and also reaching him after the rejection. To apply the “posted acceptance” rule ⁵¹³ here could expose the offeror to hardship particularly where he had acted on the rejection, e.g. by disposing of the subject-matter elsewhere. An offeree who has posted a rejection and then wishes, after all, to accept the offer should ensure that the subsequently posted acceptance comes to the notice of the offeror before the latter has received the rejection.

^{499.} *Tinn v Hoffmann & Co* (1873) 29 L.T. 271, 278; *Grant v Bragg* [2009] EWCA Civ 1228, [2010] 1 All E.R. (Comm) 1166 at [17], [22]. The above common law rule does not apply where an offer to settle a claim is made under CPR Pt 36. Such an offer can be withdrawn only by serving a notice of withdrawal on the offeree in accordance with that Part: *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2010] 1 W.L.R. 2081 at [16]; *Carillion JM Ltd v PHI Group Ltd* [2011] EWHC 1581 (TCC), [2011] B.L.R. 504 at [12]–[14].

^{500.} Above, para.2-031; for an exception see Vienna Convention on Contracts for the International Sale of Goods (above, para.2-061) art.19(2).

^{501.} (1840) 3 Beav. 334; cf. *O.T.M. Ltd v Hydranautics* [1981] 2 Lloyd’s Rep. 211, 214; *Sterling Hydraulics Ltd v Dichtomatic Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd’s Rep. 8 at [17]; *Withers LLP v Langbar International Ltd* [2011] EWCA Civ 1419, [2012] 2 All E.R. 619 at [47].

^{502.} *Mulcaire v News Group Newspapers Ltd* [2011] EWHC 3469 (Ch), [2012] Ch. 435.

^{503.} *Mulcaire v News Group Newspapers Ltd* [2011] EWHC 3469 (Ch) at [27].

^{504.} *Mulcaire v News Group Newspapers Ltd* [2011] EWHC 3469 (Ch) at [35].

^{505.} See below, para.2-125; for the further requirement of “exchange of contracts”, see below, para.2-126.

^{506.} *Bonner Properties Ltd v McGurran Construction Ltd* [2009] NICA 49, [2010] N.I. 97 at [13].

^{507.} See the treatment in *Tinn v Hoffmann* (1873) 29 L.T. 271, 278 of the claimant’s letter of November 27. For recognition of the distinction between a counter-offer and a request for information, see *Grant v Bragg* [2009] EWCA Civ 1228, [2010] 1 All E.R. (Comm) 1166 at [22] (where the relevant communication was held to amount to a rejection of the offer).

^{508.} cf. above, para.2-031.

^{509.} Above, paras 2-002, 2-003.

^{510.} (1880) 5 Q.B.D. 346.

^{511.} (1880) 5 Q.B.D. 346 at 349–350; in fact the offeror did not so regard it but sold the iron to a

third party.

[512.](#) *Gibson v Manchester City Council* [1979] 1 W.L.R. 294, 302.

[513.](#) Above, para.2-047.

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(c) - Lapse of Time

Specified time

2-101

An offer which expressly states that it will last only for a specified time cannot be accepted after that time; and the same is true where the time limit is set, not in the offer itself, but in the course of later negotiations between the parties to the alleged contract. ⁵¹⁴ The most common application of the present rule is to offers that take the form of options, ⁵¹⁵ which obviously cannot be accepted after the expiry of the period during which the option is expressed to be exercisable. On a similar principle, an offer that stipulates for acceptance "by return of post" must be accepted either in the specified way or by some other no less expeditious method. ⁵¹⁶

Reasonable time

2-102

Where the duration of an offer is not limited in one of the ways described in para.2-101 above, the offer comes to an end after the lapse of a reasonable time. ⁵¹⁷ What is a reasonable time depends on all the circumstances: for example on the nature of the subject-matter and on the means used to communicate the offer. An offer to sell a perishable thing, or a thing subject to sudden price fluctuations, would terminate after a relatively short time; and this would often also be true of an offer made by telegram ⁵¹⁸ or by other equally speedy means of communication such as email, telex or fax.

Effect of conduct of offeree known to offeror

2-103

The period which would normally constitute a reasonable time for acceptance may be extended if the conduct of the offeree within that period indicates an intention to accept and this is known to the offeror. Often on such facts there would be an acceptance by conduct, but this possibility may be ruled out by the terms of the offer, which may require the acceptance to be by written notice sent to a specified address. ⁵¹⁹ In such a case the offeree's conduct, though it could not *amount* to an acceptance, could nevertheless prolong the time for giving a proper notice of acceptance. For the offeree's conduct to have this effect, it must be known to the offeror; for if this were not the case the offeror might reasonably suppose that the offer had not been accepted within the normal period of lapse, and act in reliance on that belief: e.g. by disposing elsewhere of the subject-matter.

Offer delayed

2-104

If there has been some delay in the transmission of an offer that contains a time limit for its acceptance, the question *when* the offer was made may arise. In *Adams v Lindsell* ⁵²⁰ the offeror sent a letter containing an offer to sell wool that required an acceptance by return post. The offer letter was misdirected by the offerors and consequently delayed by two days. On receipt of the letter, the offeree immediately posted an acceptance. It was held that there was a binding contract as the delay arose “entirely from the mistake of the” offerors. However, if the delay had been of such length as to make it clear to the offeree that the offer was “stale,” it seems unlikely that the offeree could still have accepted; a fortiori, he could not have done so if the offer had reached him only after an expiry date specified in it. The emphasis placed in *Adams v Lindsell* on the fault of the offerors also makes it possible to argue for a different result in that case if the delay had been due to some other factor, such as an accident in the post. The time within which the offer could be accepted might then have run, not from the time of the offeree’s receipt of the offer, but from the time at which the offer would, but for the accident, have been communicated ⁵²¹ to the offeree.

^{514.} *Grant v Bragg* [2009] EWCA Civ 1228, [2009] 1 All E.R. (Comm) 1166 at [25]. The concept that an offer is terminated by lapse of time does not apply to an offer made under CPR Pt 36. It was held in *C v D* [2011] EWCA Civ 646, [2012] 1 All E.R. 302 at [40], [70] and [83] that such an offer remains open for acceptance until it is formally withdrawn, in accordance with the provisions of Pt 36.

^{515.} For the legal nature of an enforceable option, see below, para.4-193 n.1234.

^{516.} cf. above, paras 2-063, 2-065.

^{517.} *Ramsgate Victoria Hotel Co v Montefiore* (1866) L.R. 1 Ex. 109; see also *Reynolds v Atherton* (1922) 127 L.T. 189; *Chem Co Leasing SpA v Rediffusion* [1987] 1 F.T.L.R. 201. And cf. *L.J. Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) (offer to appoint an arbitrator to whom disputes under a charterparty were to be referred held to have lapsed after eight months; the fact that the charterparty required agreement on the appointment to be made “forthwith” was said at [18] to connote “some urgency”). Semble, the offeror could waive the delay. See also Vienna Convention on Contracts for the International Sale of Goods (above, para.2-061) art.21(1).

^{518.} *Quenerduaine v Cole* (1883) 32 W.R. 185.

^{519.} As in *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1970] 1 W.L.R. 241.

^{520.} (1818) 1 B. & Ald. 681; *Winfield* (1939) 55 L.Q.R. at 499, 503–504.

^{521.} As to the meaning of “communicated” cf. above, paras 2-045, 2-094.

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(d) - Occurrence of Condition

Provision for termination of offer

2-105

An offer which expressly provides that it is to determine on the occurrence of some condition cannot be accepted after that condition has occurred; and a similar provision for determination may be implied. If an offer to buy, or hire-purchase, goods is made after the offeror has examined them, it may be subject to the implied condition that they should, at the time of the acceptance, still be in substantially the same state as that in which they were when the offer was made. Such an offer could not be accepted after the goods had been seriously damaged. ⁵²² Similarly, an offer to insure the life of a person cannot be accepted after he has suffered serious injuries by falling over a cliff. ⁵²³ On the same principle, it is submitted that the offer which is made by bidding at an auction impliedly provides that it is to lapse as soon as a higher bid is made. ⁵²⁴

^{522.} *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184.

^{523.} *Canning v Farquhar* (1885) 16 Q.B.D. 727; *Looker v Law Union Insurance Co Ltd* [1928] 1 K.B. 554.

^{524.} Above, para.2-019.

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(e) - Death

In general

2-106

It has been suggested that the death of either party terminates the offer as it is, thereafter impossible for the parties to reach agreement. ⁵²⁵ But there may be a contract in spite of a demonstrable lack of agreement, if this result is required by considerations of convenience ⁵²⁶; and such considerations might in some circumstances support the view that an offer should be capable of acceptance after the death of one party. This would, in particular, be the case if the death of one of the parties was unknown to the other at the relevant time; or where a person who had validly contracted not to revoke an offer for a fixed period died during that time. More generally, unless the offer is one to enter into a contract of a "personal" nature, it is doubtful that there are any grounds of convenience for holding that the death of either party should of itself terminate an offer. ⁵²⁷

Death of the offeror

2-107

The effect of the death of the offeror has been considered in a number of cases concerning continuing guarantees. Such a guarantee (e.g. of a bank overdraft) is, in general, divisible: it is a continuing offer, accepted from time to time as the bank makes further loans to its customer. It seems that a guarantee of this kind is not terminated merely by the death of the guarantor. ⁵²⁸ But it is terminated if the creditor knows that the guarantor is dead and that his personal representatives have no power under his will to continue the guarantee ⁵²⁹; or if for some other reason it is inequitable to charge the guarantor's estate. ⁵³⁰ If the guarantee expressly provides that it can be terminated only by notice given by the guarantor or his personal representatives, the death of the guarantor (even if known to the creditor) will not terminate the guarantee; only express notice will have this effect. ⁵³¹ In so far as any general statement can be based on this special group of cases, it seems that the death of the offeror determines an offer only if the offer on its true construction so provides.

Death of the offeree

2-108

Two cases have some bearing on the effect of the death of the offeree. In *Reynolds v Atherton* ⁵³² an offer to sell shares was made in 1911 to "the directors of" a company. An attempt to accept the offer was made in 1919 by the survivors of the persons who were directors in 1911 and by the personal representatives of those who had since died. The purported acceptance was held to be ineffective; and Warrington L.J. said:

“The offer having been made to a living person who ceases to be a living person before the offer is accepted, there is no longer an offer at all. The offer is not intended to be made to a dead person or to his executors, and the offer ceases to be an offer capable of acceptance.”

The actual ground for the decision, however, was that the offer had, on its true construction, been made to the directors of the company for the time being, and not to those who had happened to hold office in 1911. In *Kennedy v Thomassen* ⁵³³ acceptance by solicitors of the offeree in ignorance of her death was held ineffective on the grounds that their authority to act on her behalf had been revoked by her death ⁵³⁴ and that they had acted under a mistake. Neither case supports the view that an offer can never be accepted after the death of the offeree. It is submitted that, where an offer related to a contract that was not “personal”, ⁵³⁵ it might, on its true construction, be held to have been made to the offeree or to his executors, and that such an offer could be accepted after the death of the original offeree.

^{525.} *Dickinson v Dodds* (1876) 2 Ch. D. 463, 475.

^{526.} As, for example, in *Byrne & Co v Van Tienhoven* (1880) 5 C.P.D. 344 (above, para.2-094), where the offeree did not know that the offeror intended to contract with him until after the offeror had ceased to have any such intention.

^{527.} Below, para.23-037. Even in such cases the legal effects of saying that the offer was determined, so that there was never any contract, would be likely to differ from those of saying that there had been a contract which had been terminated: e.g. the Law Reform (Frustrated Contracts) Act 1943 could apply to the latter, but not to the former, situation.

^{528.} *Bradbury v Morgan* (1862) 1 H. & C. 249; *Harriss v Fawcett* (1873) L.R. 8 Ch. App. 866, 869; *Coulthart v Clementson* (1879) 5 Q.B.D. 42, 46.

^{529.} *Coulthart v Clementson*, above, n.517.

^{530.} *Harriss v Fawcett* (1873) L.R. 8 Ch. App. 866.

^{531.} *Re Silvester* [1895] 1 Ch. 573.

^{532.} (1921) 125 L.T. 690, 695; affirmed (1922) 127 L.T. 189; cf. *Somerville v N.C.B.*, 1963 S.L.T. 334.

^{533.} [1929] 1 Ch. 426.

^{534.} Vol.II, para.31-166.

^{535.} “Personal” is here used in the same sense as in the law relating to termination of a contract by the death of a party: see n.516, above.

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(f) - Supervening Personal Incapacity

Mental incapacity

2-109

If, after making an offer, the offeror suffers from “an impairment of, or a disturbance in the functioning of, the mind or brain” ⁵³⁶ and for that reason “lacks capacity”, ⁵³⁷ then he will not be bound by an acceptance made after this fact has become known to the offeree, or after the offeror’s property has been made subject to the control of the court. But the offeror could hold the other party to the acceptance; and an offer made to a person who later became so incapacitated could be accepted so as to bind the other party. These rules can readily be deduced from the law as to contracts with persons who lack mental capacity. ⁵³⁸

^{536.} Mental Capacity Act 2005 s.2.

^{537.} Mental Capacity Act 2005 s.2.

^{538.} Below, paras 9-075—9-104.

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(g) - Supervening Corporate Incapacity

Supervening corporate incapacity

2-110

In discussing the effect on an offer of supervening corporate incapacity, a distinction must be drawn between companies incorporated under the Companies Acts (and now governed by the Companies Act 2006) and other corporations.

Companies incorporated under the Companies Acts

2-111

In these Acts, the expression “company” generally means a company formed and registered under the Companies Act 2006 or under earlier Companies Acts. ⁵³⁹ The legal capacity of such a company depends on the company’s constitution, an expression which includes the company’s articles ⁵⁴⁰; and, in particular, on any statement of the company’s objects in the articles, ⁵⁴¹ which may be amended by special resolution. ⁵⁴² Unless the articles specifically restrict the objects of a company, its objects are (in general) unrestricted ⁵⁴³; but our present concern is with cases in which a special resolution amends the articles by either restricting originally unrestricted objects or imposing further restrictions on originally restricted objects. If the company nevertheless entered into a transaction which fell within the newly imposed restrictions on its objects, that transaction would formerly have been ultra vires and void. ⁵⁴⁴ The Companies Act 2006 does not abolish this ultra vires doctrine but it contains a number of provisions which significantly restrict its operation. Of these, the following are of particular importance for the purposes of the discussion that follows in paras 2-112—2-114 below. First, s.31(3) provides that, in general, ⁵⁴⁵ “Any such amendment does not affect any rights or obligations of the company”; the phrase “such amendment” here refers to an amendment of the company’s “articles so as to add, remove or alter a statement of the company’s objects”. ⁵⁴⁶ Secondly, s.39(1) provides that, in general ⁵⁴⁷:

“the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s constitution.” ⁵⁴⁸

Further problems can, however, arise from the fact that a contract which violated a restriction on the company’s objects would on that ground be beyond the power of its directors. Section 40(1) therefore provides, thirdly, that, in general ⁵⁴⁹:

“In favour of a person dealing with the company in good faith, the power of the directors

to bind the company, or authorise others to do so, is deemed to be free of any limitations under the company's constitution."

Section 40(4), however, provides that, in general, ⁵⁵⁰ s.40 "does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors"; but that "no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company." Our concern here is with the effect of these provisions where an offer is made either to or by a company which then changes its articles by restricting its objects so as to deprive itself of the power of entering into the contract that would, but for such changes, have resulted from an acceptance of the offer. ⁵⁵¹

Company as offeree

2-112

A company may receive an offer to enter into a contract and then amend its articles so as to restrict its objects in such a way as to deprive itself of its capacity to enter into that contract. If the company nevertheless then (whether by oversight or for good commercial reasons) accepts the offer, two provisions of the Companies Act 2006 referred to in para.2-111 above may determine the effect of the acceptance. The first is s.31(3), by which "any such amendment does not affect the rights or obligations of the company". The second is s.40(1), by which:

"in favour of a person dealing with the company in good faith, the power of the directors to bind the company ... is deemed to be free of any limitation under the company's constitution." ⁵⁵²

Both these provisions can lead to the conclusion that the acceptance is effective; but they give rise, in the present context, to the problem that the scope of s.40(1) differs in several respects from that of s.31(3). First, the requirement in s.40(1) of "dealing ... in good faith" has no counterpart in s.31(3). Secondly, s.40(1) applies only "in favour of a person dealing with the company" while s.31(3) can apply also in favour of the company itself; this view is reinforced by the reference in s.31(3) to "the rights or obligations of the company". Thirdly, s.40(4) provides that "*this section* does not affect any right of a member of a company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors ..."; and this subsection of s.40 (further provisions of which are discussed in para.2-113 below) has no counterpart in s.31. Fourthly, ss.31(3) and 40(1) lay down general rules but the qualifications to which these rules are subject are not the same. Section 31 is subject only to one qualification, which applies where the company is a charity ⁵⁵³; s.40 is subject to two qualifications which apply to certain transactions with directors and where the company is a charity. ⁵⁵⁴ The scope of s.40(1) is in all these respects narrower than that of s.31(3) and it is by no means obvious which subsection would, in case of a conflict between them, prevail. One possible view is that, in the present context, s.31(3) should prevail since it deals specifically with the effect of an *amendment* of the articles. But s.40(1) is expressed to apply to limitations on the directors' powers deriving "from a resolution of the company ..." ⁵⁵⁵ and "from any agreement between the members of the company ..."; and such resolutions and agreements can form part of the company's "constitution", ⁵⁵⁶ to which s.40(1) applies. A second possible view is that the words "rights or obligations of the company" in s.31(3) refer to rights already in existence at the time of the amendment of the articles, and not to rights which are alleged to have come into existence after that time. It is submitted, though not without hesitation, that this second view is to be preferred as it avoids what would be a conflict between the two subsections; and that accordingly the rights of the offeror would, in the situation discussed in this paragraph, be governed, not by s.31(3), but by s.40. The rights of the company itself would be governed by the general principle, stated in s.39(1), that the validity of an act done by it was not to be "called into question by reason of anything in the company's constitution". At the relevant time (i.e. that of the acceptance) the "constitution" would include the amendment of the articles. ⁵⁵⁷ Hence the company would be able to enforce the contract by virtue of s.39(1) and its right to do so would not be

subject to the restrictions placed by s.40 on the rights of the offeror to do so.

Company as offeror

2-113

A company may make an offer to enter into a contract, amend its articles so as to restrict its objects in such a way as to deprive itself of the capacity to enter into that contract, and the offeree may then (perhaps in ignorance of the amendment) accept the offer. If the reasoning in para.2-112 is correct, such a case would not be governed by s.31(3) of the Companies Act 2006 since at the time of the amendment of the articles the company would not have acquired any rights or been subjected to any liabilities by reason of the then unaccepted offer. Nor (subject to a possible argument to be discussed below) would the case be governed by s.40 since, when the offer was made, there was no relevant "limitation under the company's constitution" on "the power of the directors to bind the company" within s.40(1); or by s.39(1) since, when the offer was made, the company suffered from no "lack of capacity [to make it] by reason of anything in the company's constitution". It is, however, arguable that holding the offer open was a continuing act; and if that argument were accepted two consequences could follow. First, the offeree could acquire rights against the company by virtue of s.40(1) if he accepted the offer in good faith, i.e. (presumably) in ignorance of the amendment of the articles. But, secondly, it would appear to be open to a member of the company to bring proceedings to "restrain the doing of an action that is beyond the powers of the directors" (i.e. the continued making of the offer) at any time before the offer had been accepted. The company could also normally withdraw the offer at any time before it had been accepted ⁵⁵⁸ and would be likely to do so in pursuance of the policy which had led it to amend its articles in the way described at the beginning of this paragraph. But this possibility would not be open to the company where it had bound itself not to withdraw the offer, i.e. where it had granted a legally enforceable option. ⁵⁵⁹ In such a case, it is clear that a member of the company could not take proceedings to prevent the conclusion of the contract since "no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company" ⁵⁶⁰ i.e. in the case put, from the grant of the option.

2-114

A further problem that arises in the situation described in para.2-113 above is whether, if the company's offer were accepted when the company no longer had the capacity to enter into the contract, and were accepted by the offeree in good faith so as to confer rights under it on the offeree, the company would also be entitled to enforce the contract. No doubt, if the offeree sought to enforce the contract, then he could normally do so only on condition of performing his own obligations under it. But there is also the possibility that, having accepted the offer, the offeree might nevertheless refuse to perform its part and that the company might then seek to enforce the contract (e.g. by claiming damages for its breach) even though by the time of the acceptance of its offer it no longer had the capacity to enter into the contract. Section 40(1) of the Companies Act 2006 would not support such a claim since it applies only "in favour of a person dealing with the company ..." and not in favour of the company itself; nor could the claim be brought under s.31(3) if, as has been suggested in para.2-112 above, that section refers only to rights and obligations already in existence when the company amended its constitution. An attempt by the company to enforce the contract under s.39(1) would run into a difficulty similar to that discussed in para.2-113 above. The difficulty arises because s.39(1) provides that "The validity of an *act done by the company* shall not be called into question" by reason of anything in the company's constitution. If the "act done by the company" were the making of the offer, then s.39(1) would, at first sight, be irrelevant since, when the offer was made, it was, *ex hypothesi*, within the company's capacity. It would be the validity of an act done by the offeree (i.e. the acceptance), rather than any act by the company, that would be in question. The outcome would depend on s.39(1) only if a suggestion similar to that put forward in para.2-113 above were accepted: i.e. if the making of the offer were regarded as a continuous act. If that argument failed, the company would be driven back on argument that a contract outside its capacity was *at common law* ⁵⁶¹ enforceable *by*, even though not *against*, it. This argument would not prevail if, as is sometimes said, *ultra vires* contracts were at common law "wholly void", ⁵⁶² but the authorities give no clear guidance on the point. ⁵⁶³

Other corporations

2-115

Companies may also be incorporated by Royal Charter or by special legislation. Charter corporations have the legal capacity of a natural person so that an alteration of the charter would not affect the validity of an offer or acceptance made by the corporation. ⁵⁶⁴ The legal capacity of corporations incorporated by special statute is governed by the statute, and acts not within that capacity are ultra vires and void. ⁵⁶⁵ An alteration of the statute could therefore prevent the corporation from accepting an offer made to it, and from being bound by the acceptance of an offer made by it, where the offer was made before the alteration came into effect. In practice, the problem is likely to be dealt with in the statute which changes the capacity of the corporation.

Limited liability partnerships

2-116

Limited liability partnerships incorporated under the Limited Liability Partnerships Act 2000 ⁵⁶⁶ are bodies corporate ⁵⁶⁷ but problems of the kind discussed in paras 2-110—2-114 above cannot arise with regard to them as they have “unlimited capacity”. ⁵⁶⁸

^{539.} Companies Act 2006 s.1.

^{540.} Companies Act 2006 s.17(a).

^{541.} See Companies Act 2006 s.31.

^{542.} Companies Act 2006 s.21; such a resolution is also part of the company’s constitution: see ss.17(b), 29.

^{543.} Companies Act 2006 s.31(1); for special rules applicable to companies that are charities, see s.31(4); Charities Act 2011 ss.197, 198; cf. in the case of Charitable Incorporated Organisations (as defined in ss.204 and 205 of that Act), Pt 11 Ch.3 of the Act.

^{544.} See below, para.10-020.

^{545.} For the position of charitable companies, see above, n.532.

^{546.} Companies Act 2006 s.31(2).

^{547.} For special rules applicable to companies that are charities, see Companies Act 2006 ss.39(2), 42.

^{548.} Companies Act 2006 s.39(1).

^{549.} i.e. subject to s.40(6)(a) (certain transactions with directors: see s.41) and 40(6)(b) (companies that are charitable: see s.42).

^{550.} i.e. subject to the restrictions referred to in n.538 above.

^{551.} The text will be concerned only with the effect of the general rules stated in this paragraph. It will not deal with the exceptional cases referred to in nn.532, 536, 538 and 539 above.

^{552.} The company’s constitution includes its articles and any resolution amending them: see Companies Act 2006 ss.17, 29.

- [553.](#) Companies Act 2006 s.31(4), as amended by Charities Act 2011 s.354 and Sch.7 para.114.
- [554.](#) Companies Act 2006 s.40(6), referring to ss.41 and 42.
- [555.](#) Companies Act 2006 s.40(3)(a).
- [556.](#) Companies Act 2006 ss.17, 29.
- [557.](#) Companies Act 2006 ss.17, 29.
- [558.](#) See above, para.2-093.
- [559.](#) For the nature of legally enforceable options, see below, para.4-193 n.1234.
- [560.](#) Companies Act 2006 s.40(4).
- [561.](#) i.e. apart from s.39(1); no doubt in a case *within* s.39(1), the contract could be enforced by the company.
- [562.](#) See below, para.10-021.
- [563.](#) For a discussion of policy considerations which should govern the outcome in such cases, see Treitel, *The Law of Contract* 13th edn (2011), para.12–080.
- [564.](#) Below, para.10-004; but a member of the corporation could bring proceedings to restrain the conclusion of the contract.
- [565.](#) Subject to mitigations provided for, in the case of contracts with “local authorities”, by Local Government Contracts Act 1996.
- [566.](#) See Limited Liability Partnerships Act 2000 ss.2 and 3.
- [567.](#) Limited Liability Partnerships Act 2000 s.1(2).
- [568.](#) Limited Liability Partnerships Act 2000 s.1(3).

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Section 5. - Special Cases

Difficulty of offer and acceptance analysis in certain cases

2-117

The analysis of the process of reaching agreement into the elements of offer and acceptance gives rise, in a number of situations, ⁵⁶⁹ to considerable difficulties.

(1) Multilateral contracts

One such situation arises where participants in a competition address their entries to the organiser. It is then hard to say whether a particular entry constitutes an offer or an acceptance (or both), or whether two entry forms put into the post by different competitors at the same time constituted cross-offers. Yet in spite of such difficulties it has been held that the competitors enter into multilateral contracts binding each to the others to observe the rules of the competition. ⁵⁷⁰ Similar reasoning would seem to apply to the multilateral contract which governs the legal relations between members of an unincorporated association. ⁵⁷¹ Such decisions are based on the assumption that all the parties to the alleged multilateral contract were willing to agree to the same terms. Where one of the negotiating parties had refused to accept one of the terms of the proposed contract, no multilateral contract would arise between that party and any of the others, unless the others agreed to be bound to that party on terms excluding the one rejected by him. ⁵⁷²

(2) Reference to third party

It is, secondly, hard to apply the analysis of offer and acceptance where negotiations have reached deadlock and the parties simultaneously agree to a solution proposed by a third party whom they have asked to resolve their differences. ⁵⁷³ The same is true where parties negotiate through a single broker acting for both parties who eventually obtains their consent to the same terms. ⁵⁷⁴


(3) Agreements subject to contract

There is, thirdly, some difficulty, in applying the offer and acceptance analysis to transactions such as sales of land where parties agree "subject to contract", so that they are not bound until formal contracts are exchanged. ⁵⁷⁵ Strictly, an "offer" expressed to be "subject to contract" does not satisfy the legal definition of an offer, ⁵⁷⁶ since the person making such an "offer" has *no* intention to be bound immediately on its acceptance. ⁵⁷⁷ However, the *agreement* is generally made by the usual process; the reason why the parties to it are not bound until they exchange formal contracts is that the terms of the agreement negative, until then, the intention to enter into legal relations. ⁵⁷⁸ Alternatively, a party could be regarded as making an offer when he submits a signed contract for exchange, ⁵⁷⁹ and this would be accepted when the exchange took place.

2-118

¶ The difficulties described in para.2-117 above have given rise to the view that the analysis of the process of reaching agreement in terms of offer and acceptance is “out of date”⁵⁸⁰ and that “you should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement.”⁵⁸¹ But such an outright rejection of the traditional analysis is open to the objection that it provides too little guidance for the courts (or for the parties or for their legal advisers) in determining whether an agreement has been reached.⁵⁸² For this reason the cases described above are best regarded as exceptions⁵⁸³ to a general requirement of offer and acceptance. This approach is supported by cases in which it has been held that there was no contract precisely because there was no offer and acceptance⁵⁸⁴ ¶; and by those in which the terms of the contract have been held to depend on the analysis of the negotiations into offer, counter-offer and acceptance.⁵⁸⁵ In one case of the latter kind, ⁵⁸⁶ the Court of Appeal applied “the traditional offer and acceptance analysis”⁵⁸⁷ and one reason given by Dyson L.J. was that this approach had “the great merit of providing a degree of certainty which is both desirable and necessary in order to promote commercial relationships.”⁵⁸⁸

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- ^{569.} See, in addition to the situations discussed in para.2-117, e.g. *A. N. Satterthwaite & Co Ltd v New Zealand Shipping Co Ltd (The Eurymedon)* [1975] A.C. 154, 167; *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch. 259 (below, para.2-126) and see below at nn.569 and 570.
- ^{570.} *The Satanita* [1895] P. 248, affirmed sub nom. *Clarke v Dunraven* [1897] A.C. 59; Phillips, 92 L.Q.R. 499. cf. *Kingscroft Insurance Co Ltd v Nissan Fire and Marine Insurance Co Ltd* [2000] 1 All E.R. (Comm) 272 at 291 (admission of new members to an existing insurance pool analysed in terms of offer and acceptance).
- ^{571.} See *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All E.R. 277, 285; though breach of the rules by one member may not, on their true construction, be actionable in damages at the suit of another: *Anderton v Rowland*, *The Times*, November 5, 1999. For the question whether a member of an unincorporated association is liable to a person outside the association on contracts made on behalf of the association, see below para.10-064 and (for example) *Davies v Barnes Webster & Sons Ltd* [2011] EWHC 2560 (Ch).
- ^{572.} *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd’s Rep. 159 at 165.
- ^{573.} See Pollock, *Principles of Contract* 13th edn (1950), p.5.
- ^{574.} *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep. 601, 616.
- ^{575.} Below, paras 2-125, 2-126. *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch), [2014] 1 All E.R. (Comm) 655, the facts of which (so far as they are here relevant) are summarised in para.2-047, bears some resemblance to the “subject to contract” cases discussed here. Roth J. regarded the case as one which did “not fit easily into the normal analysis of a contract being constituted by offer and acceptance” (at [72]). The contract seems to have been one which was not intended to be binding until formal documents incorporating the (previously agreed) terms were executed by both parties: see below para.2-123.
- ^{576.} Above, para.2-003. cf. the statement in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd’s Rep. 63 that a communication “was not an offer capable of being accepted because it was expressed to be ‘subject to contract’ ”.
- ^{577.} Below, para.2-126.
- ^{578.} Below, para.2-171.
- ^{579.} See *Christie Owen & Davies v Rapacioli* [1974] Q.B. 781; cf. *Commission for the New Towns Ltd v Cooper (Great Britain) Ltd* [1995] Ch. 259 at 285.

580. *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401, 404; cf. *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5, 10; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multibank Holsatia)* [1988] 2 Lloyd's Rep. 486, 491–492; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Ch. 433, 443.
581. *Gibson v Manchester City Council* [1978] 1 W.L.R. 520, 523; reversed [1979] 1 W.L.R. 294; *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [247]; affirmed [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 without further reference to the present point. The case fell within the category of continuing negotiations (above, paras 2-027 and 2-028) rather than within any of the special situations discussed in para.2-117 above. For the view that the law does not invariably require strict compliance with the “offer and acceptance” analysis of contract formation, see also *Finmoon Ltd v Baltic Reefer Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep. 388 at [22].
582. See *Gay Choon Ing v Loh Sze T: Terence Peter* [2009] SGCA 3 at [63] (Singapore Court of Appeal), adopting the “traditional approach” while favouring a “less mechanistic or dogmatic application of” the concepts of offer and acceptance.
583. *Gibson v Manchester City Council* [1979] 1 W.L.R. 294, 297; cf. *Harmony Shipping Co SA v Saudi-Europe Line Ltd (The Good Helmsman)* [1981] 1 Lloyd's Rep. 377, 409; *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 27, 29–30.
584.  *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos N.L.)* [1987] 2 Lloyd's Rep. 323, 331 (“What was the mechanism of offer and acceptance?”); *The Aramis* [1989] 1 Lloyd's Rep. 213; Treitel [1989] L.M.C.L.Q. 162; *Taylor v Dickens* [1998] F.L.R. 806, 818 (doubted on another point in *Gillett v Holt* [2001] Ch. 210); *Schuldenfrei v Hilton* [1999] S.T.C. 821; *Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund* [2014] EWHC 3369 (Comm); *Price v Euro Car Parks Ltd* [2015] EWHC 3253 (QB); and *Burgess v Lejonvarn* [2016] EWHC 40 (TCC); [2016] T.C.L.R. 3. The “offer and acceptance” analysis is also used in many of the arbitration cases discussed above, paras 2-006, 2-074 though it is viewed with scepticism in *The Multibank Holsatia*, above n.569, at 491 and in *Thai-Europe Tapioca Service Ltd v Seine Navigation Inc (The Maritime Winner)* [1989] 2 Lloyd's Rep. 506, 515.
585. e.g. the “battle of forms” cases discussed above, paras 2-033 et seq.
586. *Tekdata Intercommunications Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 (above, para.2-036).
587. [2009] EWCA Civ 1209 at [20], [25]; it was recognised that this approach could be displaced but held that it had not been displaced by the existence of “a long term relationship” (at [21]), not amounting to “a prior overarching contract” (at [6]). For other “battle of forms” cases, also applying the “traditional offer and acceptance” analysis, see *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2010] EWHC 2567 (Comm), [2011] 2 All E.R. (Comm) 38 (above, para.2-035 n.185) at [55] and *Trebor Bassett Holdings Ltd v ADT Fire & Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661, where Coulson J. said (at [155]) that, in such a case, it would be “difficult” to displace the traditional “offer and acceptance” analysis.
588. [2009] EWCA Civ 1209 at [25]. The sentences between nn.570 and 571 above, as then contained in the 30th edition of this book, were cited with apparent approval by Longmore L.J. (at [20]) and Dyson L.J. at [25].

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 6. - Incomplete Agreement

Agreement in principle only. ⁵⁸⁹


2-119

⚠ Parties may reach agreement on essential matters of principle, but leave important points unsettled so that their agreement is incomplete. ⁵⁹⁰ It has, for example, been held that there was no contract where an agreement for a lease failed to specify the date on which the term was to commence ⁵⁹¹; that an agreement “in principle” for the redevelopment and disposal of residential property, which specified core terms but left important matters, such as the timing of the project, for future discussion was an “incomplete agreement” and so did not amount to a binding contract ⁵⁹²; that an agreement for sale of land by instalments was not a binding contract where it provided for conveyance of “a proportionate part” as each instalment of the price was paid, but failed to specify which part is to be conveyed on each payment ⁵⁹³; that a covenant in a contract of employment restricting competition in two named counties and in others “to the south” of them was too uncertain to be enforced ⁵⁹⁴; and that where, though agreement had been reached “covering some significant matters”, ⁵⁹⁵ there was no contract because “many fundamental matters remained to be resolved”. ⁵⁹⁶ In *Wells v Devani* ⁵⁹⁷ ⚠ an oral contract for an estate agent to find a buyer for a property was incomplete where the parties had failed to specify the event which would trigger the agent’s entitlement to commission since such contracts do not follow a single pattern. ⁵⁹⁸ ⚠ Moreover, a court cannot turn an incomplete contract into a legally binding contract by adding expressly agreed terms and implied terms together. ⁵⁹⁹ ⚠ In *Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd* ⁶⁰⁰ ⚠ an option agreement for the building of oil tankers was unenforceable because the delivery dates were left to be mutually agreed. The inclusion of a “best efforts” clause in respect of delivery date implicitly recognised that both sides could have regard to their own interests and so precludes fixing a delivery date by reference to what would be “reasonable”. ⁶⁰¹ ⚠ An agreement is also incomplete if it expressly provides that it is “subject to” specified points; there is no contract in such a case until either those points are resolved or the parties agree that their resolution is no longer necessary for the agreement to enter into contractual force. ⁶⁰²

Agreement complete despite lack of detail

2-120

⚠ On the other hand, an agreement may be complete although it is not worked out in meticulous detail. ⁶⁰³ Thus an agreement for the sale of goods may be complete as soon as the parties have agreed to buy and sell, where the remaining details can be determined by the standard of reasonableness or by law. ⁶⁰⁴ Even failure to agree the price is not necessarily fatal in such a case. Section 8(2) of the Sale of Goods Act 1979 provides that, if no price is determined by the contract, a reasonable price must be paid. Under s.15(1) of the Supply of Goods and Services Act 1982, a reasonable sum must similarly be paid where a contract for the supply of services fails to fix the remuneration to be paid for them. ⁶⁰⁵ These statutory provisions assume that the agreement amounts

to a contract in spite of its failure to fix the price or remuneration. The very fact that the parties have not reached agreement on this vital point may indicate that there is *no* contract, e.g. because the price or remuneration is to be fixed by further agreement.⁶⁰⁶ In such a case, the statutory provisions for payment of a reasonable sum do not apply. There may, however, be a claim for payment of such a sum at common law: for example, where work is done in the belief that there was a contract or in the expectation that the negotiations between the parties would result in the conclusion of a contract.⁶⁰⁷ Such liability is based on the need to deprive the recipient of the services of unjust enrichment that may result from his having benefited from the services without being required to pay for them⁶⁰⁸ ; and it arises in spite of the fact that there was *no* contract.⁶⁰⁹ It follows that the party doing the work, though he is entitled to a reasonable sum, is not liable in damages, e.g. for failing to do the work within a reasonable time.⁶¹⁰ If the claim arose under a contract by virtue of s.15(1) of the 1982 Act, the party doing the work would be both entitled and liable.

2-121

Even an agreement for sale of land dealing only with the barest essentials may be regarded as complete if that was the clear intention of the parties. Thus in *Perry v Suffields Ltd*⁶¹¹ an offer to sell a public house with vacant possession for £7,000 was accepted without qualification. It was held that there was a binding contract even though many important points, e.g. the date for completion⁶¹² and the question of paying a deposit, were left open. In another case⁶¹³ a buyer and seller of corn feed pellets had reached agreement on the “cardinal terms of the deal: product, price, quantity, period of shipment, range of loading ports and governing contract terms”.⁶¹⁴ The agreement was held to have contractual force even though the parties had not yet reached agreement on a number of other important points, such as the loading port,⁶¹⁵ the rate of loading and certain payments (other than the price) which might in certain events become payable under the contract. Similarly, where parties had, in negotiations for the manufacture by the claimants of machinery to be delivered to the defendants, reached agreement on “all essential terms”⁶¹⁶ and “substantial works were then carried out”,⁶¹⁷ a contract between them was held to have been concluded even though some points had been left unresolved⁶¹⁸; and even though those points were of “economic or other significance”.⁶¹⁹ An even more striking illustration of this approach is provided by a case⁶²⁰ in which parties had reached an oral agreement by telephone for the sale of notes evidencing “distressed debt” of a company which was in liquidation. The agreement identified the subject-matter and specified the price; and it was held to be contractually binding even though it did not specify the settlement date and left many other important points to be resolved by further agreement. In all these cases, the courts took the view that the parties intended to be bound at once in spite of the fact that further significant terms were to be agreed later and that even their failure to reach such agreement would not invalidate the contract unless without such agreement it was unworkable or too uncertain⁶²¹ to be enforced.

Agreement required for continued operation of contract

2-122

A distinction must finally be drawn between cases in which agreement on such matters as the price is required for the *making*, and those in which it is required for the *continued operation*, of a contract. The latter possibility is illustrated by a case⁶²² in which an agreement for the supply of services for 10 years fixed the fee to be paid only for the first two of those years. On the parties' failure to fix the fee in later years, it was held that they had intended to enter into a 10-year contract and that a term was to be implied into that contract for payment of a reasonable fee in those later years. Likewise, in another case⁶²³ an agreement for the use of the claimant's airport by the defendant airline for a period of ten years provided for the parties to “liaise and consult” about specified matters relating to the defendant's use of the airport. It was held that this provision did not deprive the agreement of its contractual force.

Stipulation for the execution of a formal document

2-123

⚠ The effect of a stipulation that an agreement is to be embodied in a formal written document ⁶²⁴ depends on its purpose. ⁶²⁵ One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, ⁶²⁶ until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature). ⁶²⁷ This is generally the position where “solicitors are involved on both sides, formal written agreements are to be produced and arrangements are made for their execution”. ⁶²⁸ The normal inference will then be that “the parties are not bound unless and until both of them sign the agreement”. ⁶²⁹ A second possibility is that such a document is intended only as a solemn record of an already complete and binding agreement. ⁶³⁰ ⚠ Yet a third possibility is that the main agreement lacks contractual force for want of execution of the formal document but that, nevertheless, a separate preliminary contract comes into existence at an earlier stage, e.g. when one party begins to render services requested by the other, so that under this contract the former party will be entitled to a reasonable remuneration for those services. ⁶³¹ Conversely, an agreement that originally lacked contractual force for want of execution of the formal document may acquire such force by reason of supervening events. This could, for example, be the position where “it can be objectively ascertained that the continuing intention [sc. not to be bound until execution of the document] has changed or ... subsequent events have occurred whereby the non-executing party is estopped by relying on his nonexecution” ⁶³², or where the party resisting the enforcement of the contract had “waive[d] ... [the] requirement” of “a formal written contract.” ⁶³³ ⚠ An oral agreement for the sale of land is enforceable in equity under a constructive trust despite not being in writing where both parties had considered it to be immediately binding upon them, and where the prospective buyer had then acted to his detriment in reliance upon it. ⁶³⁴ ⚠ Where an agreement for the joint acquisition of property lacks contractual force for want of execution of a formal document and one of the parties then acquires the property for himself, he may also be liable to hold a share of that property for the other party by virtue of a constructive trust. ⁶³⁵ The first two of the above possibilities are further illustrated in the following paragraphs.

Insurance

2-124

A contract of insurance is generally regarded as complete as soon as the insurer initials a slip setting out the main terms of the contract. This is so even though the execution of a formal policy is contemplated ⁶³⁶ and even though the contract, if it is one of marine insurance, is “inadmissible in evidence” unless it is embodied in a policy signed by the insurer and containing particulars specified by statute. ⁶³⁷

Agreement “subject to contract”

2-125

Agreements for the sale of land by private treaty are usually ⁶³⁸ made “subject to contract”. Such agreements are normally ⁶³⁹ regarded as incomplete until the terms of a formal contract have been settled and approved by the parties. Thus, in *Winn v Bull* ⁶⁴⁰ an agreement to take a lease of a house for a specified time at a stated rent, “subject to the preparation and approval of a formal contract” was held not to have given rise to an enforceable contract. Jessell M.R. said that, “where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared.” ⁶⁴¹ The same principle has been applied to an agreement to purchase freehold land “subject to a proper contract to be prepared by the vendor’s solicitors” ⁶⁴²; to an agreement to take a flat “subject to suitable agreements being arranged between your solicitors and mine” ⁶⁴³; to an agreement to grant a lease “subject to the terms of a lease” (because this meant “subject to the terms to be contained in a lease executed by the lessor” ⁶⁴⁴); and to an agreement to purchase a house “subject to formal contract to be prepared by the vendors’ solicitors if the vendors shall so require.” ⁶⁴⁵ In each of these cases the court held that the agreement gave rise to no legal liability. ⁶⁴⁶ The principle that agreements “subject to contract” are not legally binding, though most frequently applied to contracts

for the sale of land, is not restricted to such contracts. It has, for example, been held that an agreement to pay a fee to an estate agent was not legally binding where it was expressed to be "subject to contract".⁶⁴⁷ By a process of further analogous extension, the same reasoning has been applied to an agreement which was neither one for the sale of land nor one which was expressly "subject to contract". In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)*⁶⁴⁸ the principle was discussed in connection with a draft contract for the supply of goods, clause 48 of which provided that the proposed contract "shall not become effective until each party has executed a counterpart and exchanged it with the other". This was described⁶⁴⁹ as "the subject to contract clause;" and, if matters had rested there, the draft would not have had any contractual force. But the actual decision was that, in view of the parties' subsequent conduct, the objective interpretation of the parties' words and conduct at formation,⁶⁵⁰ the fact that substantial works were then carried out and thereafter, the basis for the work done varied,⁶⁵¹ failure to comply with the requirements of clause 48 did not prevent the formation of a binding contract.

General requirement of "exchange of contracts"

2-126

Even after the terms of the formal contract for the sale of land have been agreed, there is, where the agreement is "subject to contract", generally⁶⁵² no binding contract until there has been an "exchange of contracts".⁶⁵³ It is also necessary (though not sufficient) for the formal requirements for contracts for the sale of land (which are described in Ch.4) to be satisfied.⁶⁵⁴ The formal requirement in cases of the present kind is that each party must sign a document containing all the terms which have been expressly agreed⁶⁵⁵; and the requirement of exchange traditionally refers to the handing over by each party to the other of one of these documents, or to their despatch by post; if the latter method is adopted, the process is completed on the receipt of the second of the posted documents.⁶⁵⁶ Such an exchange may be effected by telephone or by telex.⁶⁵⁷ It has been held in Australia that, once an exchange has taken place, there can be a binding contract even though the two parts do not match precisely (unless it is clear that the parties only intended to be bound by an exchange of precisely corresponding parts).⁶⁵⁸ The discrepancy can then be remedied by rectification. No doubt the mechanics of "exchange" will be suitably modified when the proposed system of electronic conveyancing is brought into operation.⁶⁵⁹ Before "exchange" (or whatever requirement may be substituted for it under that system), there is no uncertainty as to the terms of the agreement, but the agreement has no contractual force because, at this stage, neither party intends to be legally bound.⁶⁶⁰

Mitigations of the requirement of "exchange of contracts"

2-127

The rules stated in paras 2-125—2-126 above enable either party to a concluded agreement to go back on it with impunity. This position has been described as "a social and moral blot on our law"⁶⁶¹ and there are indications that the courts are prepared to mitigate the former strictness of the requirement of "exchange of contracts". Thus it has been held that certain technical slips in the process of exchange may be disregarded⁶⁶², and that exchange is not necessary where both parties use the same solicitor.⁶⁶³ The parties may also create a binding contract by a subsequent agreement to remove the effect of the words "subject to contract," thus indicating their intention henceforth to be legally bound.⁶⁶⁴ Subsequent conduct may also give rise to liability on other grounds: where one party to the agreement encourages the other to believe that he will not withdraw, and the other acts to his detriment in reliance on that belief, the former may be liable on the basis of "proprietary estoppel".⁶⁶⁵ In "a very strong and exceptional context"⁶⁶⁶ the court may infer that the parties had an intention to be legally bound by the original document, even though it is expressed to be "subject to contract". This was held to be the position where a document containing these words laid down an elaborate timetable, imposed a duty on the purchaser to approve the draft contract (subject only to reasonable amendments) and required him then to exchange contracts.⁶⁶⁷ In these exceptional circumstances, the words "subject to contract" were taken merely to mean that the parties had not yet settled all the details of the transaction and therefore not to negative the intention to be bound.

Collateral contracts; “lock out” agreements

2-128

There is also the possibility that the freedom of action of the parties may be restricted by a collateral contract. For example a vendor who has agreed to sell land “subject to contract” may, either at the same time or subsequently, undertake not to negotiate for the sale of the land with a third party. Such a collateral agreement (sometimes called a “lock-out” agreement) must itself satisfy the requirement of certainty ⁶⁶⁸ and in *Walford v Miles* ⁶⁶⁹ it was held that this requirement had not been satisfied where the agreement failed to specify the time for which the vendor’s freedom to negotiate with third parties was to be restricted. But in a later case ⁶⁷⁰ it was held that a vendor’s promise not to negotiate with third parties *for two weeks* was sufficiently certain, and that the purchaser had provided consideration for it by in turn promising to complete within that time. The uncertainty may also be resolved in other ways. In one case, ⁶⁷¹ for example, an agreement for the supply of chemicals to a manufacturer of pharmaceutical products gave the supplier “a first opportunity and right of refusal” ⁶⁷² in respect of supplies to be made under the agreement. The period for which the supplier was to have this right was not specified but the clause conferring it was not too uncertain to be enforced, since it could be interpreted to mean that the right was to cease on the termination of the agreement ⁶⁷³ in which that clause was contained.

Exceptions to requirement of execution and exchange of formal contracts

2-129

Agreements for the sale of land by auction or by tender are not normally made “subject to contract”. The intention of the parties in such cases is to enter into a binding contract as soon as an offer has been accepted; and the terms of that contract are usually set out, or referred to, in a document signed to provide a written record of the fact of agreement. In one case of this kind, ⁶⁷⁴ however, the words “subject to contract” were, by a clerical error, added to the acceptance. It was held that there was nevertheless a binding contract since the tender documents set out in full the description of the property and the terms of the transaction. In these highly exceptional ⁶⁷⁵ circumstances, the words “subject to contract” were treated as meaningless and disregarded. ⁶⁷⁶ Presumably this reasoning could also apply where the sale was by auction. The same reasoning has also been applied where a notice exercising an option to purchase land was expressed to be “subject to contract”: this phrase was again held to be meaningless as the notice was clearly intended to give rise to a binding contract. ⁶⁷⁷

Binding provisional agreements

2-130

Even in the case of an ordinary sale of land, the agreement is not invariably made “subject to contract,” ⁶⁷⁸ and the court may on construction find that the parties have made an immediately binding agreement, even though this is later to be superseded by a formal contract. Thus in *Rossiter v Miller* ⁶⁷⁹ the defendant offered to purchase land and was informed that he must purchase subject to certain conditions; his offer remained open and was accepted “subject to the conditions and stipulations printed on the plan”. It was held that the acceptance gave rise to a binding contract and Lord Blackburn said ⁶⁸⁰:

“... the mere fact that the parties have expressly stipulated that there shall be a formal agreement prepared ... does not, by itself, show that they continue merely in negotiation.”

And in *Branca v Cobarro* ⁶⁸¹ an agreement for the sale of a farm provided that it was “a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions

herewith stated, is signed." It was held that the provisional agreement was binding until it was superseded when the formal agreement was drawn up and signed; execution of the formal agreement was not a condition which had to be fulfilled before the parties were bound.

Acting on agreement subsequently completed

2-131

The parties may begin to act on the terms of an agreement before it has contractual force. When it is later given such force, the resulting contract may then, if it expressly or by implication so provides, have retrospective effect so as to apply to work done or goods supplied before it was actually made.⁶⁸² But where parties have negotiated "subject to contract" (or used expressions to the same effect),⁶⁸³ then the fact that the contemplated work is begun before the execution of a formal contract, will not (in the words of Lord Clarke S.C.J. in the *RTS* case) "always or even usually" ⁶⁸⁴ give rise to a binding contract. The facts of that case, however, illustrate an exception to this general approach; for one of the factors mentioned in support of the conclusion that a contract had there come into existence was that, after "essentially all the terms were agreed ... substantial works were then carried out".⁶⁸⁵ The resulting contract was one for the supply of goods, a type of contract to which the further requirement of an "exchange of contracts" (which as a matter of law normally applies to a contract for the sale of land)⁶⁸⁶ does not normally extend, though in the *RTS* case such a requirement was imposed by one of the express terms of the draft which formed the basis of the negotiations in that case.⁶⁸⁷ It seems that the mere carrying out of "substantial works" *before* agreement had been reached on "essentially all the terms" would not have sufficed to give rise to a binding contract on such terms as had been agreed, unless the conduct of the parties supported the inference of an implied contract between them.⁶⁸⁸

Letters of intent; letters of comfort.⁶⁸⁹

2-132

⚠ Issues of contractual intention have arisen in a number of cases concerned with the legal effects of the commercial practice whereby parties to a transaction issue or exchange "letters of intent" on which they act pending the preparation of formal contracts. One possibility is that such letters may, by their express terms or on their true construction, negative contractual intention.⁶⁹⁰ There is, similarly, judicial support for the view that "a letter of comfort, properly so called," is "one that does not give rise to contractual liability".⁶⁹¹ This position is illustrated by a case ⁶⁹² in which a company issued a "letter of comfort" to a lender in respect of a loan to one of the company's subsidiaries. The letter stated that "it is our policy that [the subsidiary] is at all times in a position to meet its liabilities". This was held to be no more than a statement of the present policy of the company: it was not an undertaking that the policy would not be changed since the parties had not intended it to take effect as a contractually binding promise. On the other hand, "[t]he label used by the parties is not necessarily determinative",⁶⁹³ so that "sometimes a legal obligation may arise as a matter of construction, notwithstanding the rubric of a letter of comfort".⁶⁹⁴ Hence where the language of such a document, or of a letter of intent, does not negative contractual intention, it is open to the courts to hold the parties bound by the document.⁶⁹⁵ They will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it.⁶⁹⁶

⚠ The fact that the parties envisage that the letter is to be superseded by a later, more formal, contractual document does not, of itself, prevent the letter from taking effect as a contract.⁶⁹⁷ The final possibility is that a letter of intent may be so worded that one part of it has, while the rest of it does not, have, contractual force. In *Shaker v VistaJet Group Holding SA*,⁶⁹⁸ one of the terms of a letter of intent (LOI) began with the words:

"Non-binding: other than the provisions relating to the application, payment and refund of the Deposit and the confidentiality provisions hereunder, it is specifically understood as agreed that this letter of intent does not constitute a binding agreement upon the Guarantor, Seller and Buyer to enter into the Transaction Documents."

On this basis, it was held that the claimant buyer was contractually entitled to enforce the provisions of the LOI relating to the return of his deposit,⁶⁹⁹ even though other parts of the LOI, in particular, the buyer's undertaking to negotiate in good faith, had no contractual force, because of the express terms of the LOI quoted above. In any case, an undertaking to negotiate in good faith is not binding in law.⁷⁰⁰ The binding force of the provisions as to the repayment would not be impaired even if they were subject to a condition precedent⁷⁰¹ that the buyer should negotiate in good faith, since such a *condition* could not, any more than an *undertaking* to negotiate in good faith, be enforced in law.⁷⁰²

Terms "to be agreed"

2-133

The parties to an agreement may be reluctant to commit themselves to a rigid long-term arrangement, particularly when prices and other circumstances affecting performance are likely to fluctuate. They sometimes attempt to introduce an element of flexibility by providing that certain terms are to be agreed later, or from time to time. The result of such a provision may be to make the agreement so uncertain that it cannot be enforced. In *May & Butcher v R*,⁷⁰³ an agreement for the sale of tantage provided that the price, dates of payment and manner of delivery should be agreed from time to time. The House of Lords held that the agreement was incomplete as it left vital matters to be settled. Had the agreement simply been silent on these points, they could perhaps have been settled in accordance with the provisions of the Sale of Goods Act 1979⁷⁰⁴ or by the standard of reasonableness⁷⁰⁵; but the parties' agreement precluded this by providing that such points were to be settled by further agreement between them.⁷⁰⁶ Similarly, a lease at "a rent to be agreed" is not a binding contract.⁷⁰⁷ In the above cases, the most natural inference to be drawn from the fact that the parties left such an important matter as the price to be settled by further agreement was that they did not intend to be bound until they had agreed on the price. Even where the points left outstanding are of relatively minor importance, there will be no contract if it appears from the words used or other circumstances that the parties did not intend to be bound until agreement on these points had been reached.⁷⁰⁸ A fortiori parties are not bound by a term requiring outstanding points to be agreed if that term forms part of an agreement which is itself not binding because it was made without any intention of entering into contractual relations.⁷⁰⁹

Options and rights of pre-emption

2-134

It follows from the principle stated in para.2-133 above that an option to sell land "at a price to be agreed" is not a binding contract⁷¹⁰; but such an option must be distinguished from a "right of pre-emption"⁷¹¹ by which a landowner agrees to give the purchaser the right to buy "at a figure to be agreed" should the landowner wish to sell.⁷¹² An *option* has at least some of the characteristics of an offer⁷¹³ in that it can become a contract of sale when the purchaser accepts it by exercising the option⁷¹⁴; and it cannot have this effect where it fails to specify the price. A *right of pre-emption*, on the other hand, is not itself an offer⁷¹⁵ but an undertaking to make an offer in certain specified future circumstances.⁷¹⁶ An agreement conferring such a right is, therefore, not void for uncertainty merely because it fails to specify the price. It obliges the landowner to offer the land to the purchaser at a price at which he is in fact prepared to sell; and if the purchaser accepts that offer there is no uncertainty as to price.⁷¹⁷ This is so even though the parties have described the right as an "option" when its true legal nature is that of a right of preemption.⁷¹⁸

Agreement not incomplete merely because further agreement is required

2-135

Because the courts are "reluctant to hold void for uncertainty any provision that was intended to have legal effect",⁷¹⁹ they may sometimes give effect even to an agreement which provides for further terms "to be agreed". This was the position in *Foley v Classique Coaches Ltd*.⁷²⁰ The claimant owned a petrol-filling station and adjoining land. He sold the land to the defendants on condition that they

should enter into an agreement to buy petrol for the purpose of their motor-coach business exclusively from him. This agreement was duly executed, but the defendants broke it, and argued that it was incomplete because it provided that the petrol should be bought “at a price to be agreed by the parties from time to time”. The Court of Appeal rejected this argument and held that, in default of agreement, a reasonable price must be paid. ⁷²¹ *May & Butcher v R* ⁷²² was distinguished on a number of grounds: the agreement in *Foley’s* case was contained in a stamped document; it was believed by both parties to be binding and had been acted upon for a number of years ⁷²³; it contained an arbitration clause in a somewhat unusual form which was construed to apply “to any failure to agree as to the price” ⁷²⁴; and it formed part of a larger bargain under which the defendants had acquired the land at a price which was no doubt based on the assumption that they would be bound to buy all their petrol from the claimant. ⁷²⁵ While none of these factors is in itself conclusive, ⁷²⁶ their cumulative effect seems to be sufficient to distinguish the two cases. ⁷²⁷

2-136

Thus an agreement is not incomplete *merely* because it calls for some further agreement between the parties. The parties’ later failure to agree on the matters left outstanding may then vitiate the contract only if it makes it “unworkable or void for uncertainty”. ⁷²⁸ Often, the failure will not have this effect, for it may be possible to resolve the uncertainty in one of the ways already discussed, e.g. by applying the standard of reasonableness ⁷²⁹; or the matter to be negotiated may be of such subsidiary importance ⁷³⁰ as not to negative the intention of the parties to be bound by the more significant terms to which they have agreed. Thus in *Neilson v Stewart* ⁷³¹ a contract for the sale of shares provided that part of the price payable by the buyer was to be lent back to him and to a third party on repayment terms to be negotiated after one year. The House of Lords held that there was nevertheless a binding contract for the sale of the shares as the parties had not intended the validity of this contract to depend on the outcome of the negotiations as to the repayment of the loan. In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* ⁷³² the Supreme Court held that a contract had come into existence when “essentially all the terms were agreed between the parties”, ⁷³³ even though other terms were still the subject of further negotiations between them. ⁷³⁴ There can be no doubt as to the commercial convenience of the judicial approach described in this paragraph. Commercial agreements are often intended to be binding in principle even though the parties are not at the time able or willing to settle all the details. For example, contracts of insurance may be made “at a premium to be arranged” when immediate cover is required but there is no time to go into all the details at once: such agreements are perfectly valid and a reasonable premium must be paid. ⁷³⁵ All this is not to say that the courts will hold parties bound when they have not yet reached substantial agreement, ⁷³⁶ but once they have reached such agreement it is not fatal that some points (even important ones) remain to be settled by further negotiation. ⁷³⁷

Criteria laid down in the agreement

2-137

The courts have less difficulty in upholding agreements which lay down *criteria* for determining matters which are left open. For example, in *Hillas & Co Ltd v Arcos Ltd* ⁷³⁸ an option to buy timber was held binding even though it did not specify the price, since it provided for the price to be calculated by reference to the official price list. Similarly, an option to renew a lease “at a rent to be fixed having regard to the market value of the premises” has been held binding as it provided a criterion (though not a very precise one ⁷³⁹) for resolving the uncertainty. ⁷⁴⁰ Even a provision that hire under a charterparty was in certain specified events to be “equitably decreased by an amount to be mutually agreed” has been held (by reason of its reference to what was equitable) “to provide a sufficient criterion to enable the appropriate reduction ... to be determined”. ⁷⁴¹ It was said that “equitably” meant “fairly and reasonably” and that “a purely objective standard has been prescribed”. ⁷⁴² On the other hand, where an agreement provided for payment of a fixed percentage of the “open market value” of shares in a *private* company, it was held that these words did not provide a sufficiently precise criterion since there was more than one formula for calculating the market value of shares in such a company. ⁷⁴³ An agreement may also lack contractual force where, though it lays down a criterion for resolving matters which are left open, it goes on to provide that the principles for determining the application of that criterion are to be settled by further negotiations between the parties. ⁷⁴⁴

Machinery laid down in the agreement

2-138

⚠ An agreement is not incomplete where it provides *machinery* for resolving matters originally left open.⁷⁴⁵ Perhaps the most striking illustration of this possibility is provided by cases in which such matters are to be resolved by the decision of one party: for example a term by which interest rates are expressed to be variable on notification by the creditor, is in principle valid,⁷⁴⁶ though the creditor's power to set interest rates under such a contract is limited by an implied term that he must not exercise it "dishonestly, for an improper purpose, capriciously or arbitrarily".⁷⁴⁷ Similarly, an arbitration clause can validly provide for the arbitration to take place at one of two or more places to be selected by one of the parties⁷⁴⁸; a compromise agreement can provide that one party is to have the right to choose which assets are to be transferred under it⁷⁴⁹; and a "staff handbook" can allow an employer unilaterally to vary terms of a contract of employment.⁷⁵⁰ Agreements are a fortiori not incomplete merely because they provide that outstanding points shall be determined by arbitration⁷⁵¹ or other dispute resolution procedure,⁷⁵² or by the decision or valuation⁷⁵³ of a third party⁷⁵⁴; though the Sale of Goods Act 1979 provides that if the third party "cannot or does not make the valuation, the agreement is avoided".⁷⁵⁵ An agreement is not, however, ineffective merely because such machinery fails to work. Thus, in *Sudbrook Trading Estate Ltd v Eggleton*⁷⁵⁶ a lease gave a tenant an option to purchase the premises "at such price as may be agreed upon by two valuers, one to be nominated by" each party. Although the landlord refused to appoint a valuer, the House of Lords held that the option did not fail for uncertainty. It amounted, on its true construction, to an agreement to sell at a reasonable price to be determined by valuers. The stipulation that each party should nominate one of the valuers was merely "subsidiary and inessential"⁷⁵⁷; and where the agreed machinery (which fails to operate) is of this character,⁷⁵⁸ the court can, on its failure to operate, substitute other machinery: for example, the court can itself fix the price with the aid of expert evidence. This is so not only where the agreed machinery fails because of one party's failure⁷⁵⁹ or refusal to operate it,⁷⁶⁰ but also where it fails for some other reason, such as the refusal of a designated valuer to make the valuation.⁷⁶¹ However, where the designated machinery that fails is regarded as "essential", the agreement will be unenforceable. Thus, where one party agreed to pay compensation to the other for increased water-flow rates from flooding incidents, and the parties failed to identify a site at which water-flow rates could be gauged via their engineers or via arbitration, the court refused to substitute other machinery, and refused to allow the gauging site to be determined retrospectively by the engineers or arbitration.⁷⁶² ⚠

Rent review clauses

2-139

Problems of the kind discussed in paras 2-133—2-138 above have arisen in a number of cases involving rent review clauses in leases. A provision in a lease that, after an initial period for which the rent is specified, the tenant shall pay "such rent as may be agreed" is *prima facie* ineffective.⁷⁶³ It does not follow that the lease is, or becomes, void on failure to agree the new rent; indeed, it is unlikely that the court would so hold where the parties had acted during the initial period in the belief that the lease was binding for its full term; nor is it likely that the court would hold that, in default of agreement, no rent at all need be paid.⁷⁶⁴ Failure to agree a new rent will therefore lead to one of two results: that the old rent continues⁷⁶⁵ or that a reasonable rent must be paid. The first of these solutions is open to the objection that it makes the rent review clause inoperative since under it the party in whose interest it was to maintain the old rent would have no incentive to agree to a new one.⁷⁶⁶ The better view, therefore, is that a reasonable rent must be paid.⁷⁶⁷ The lease may, of course, contain an express provision to this effect,⁷⁶⁸ or provide for the rent to be determined by arbitration or by a valuer.⁷⁶⁹ The original rent may, however, continue to govern for some reason *other* than the fact that the clause provides that the new rent is to be agreed or to be fixed by a third party: for example, because the party who wishes to vary it has not complied with the conditions laid down by the contract as a prerequisite to the operation of the rent review clause.⁷⁷⁰

Facts to be ascertained

2-140

An agreement is not ineffective for uncertainty merely because the facts on which its operation is to depend are not known when it is made. The requirement of certainty will be satisfied if those facts become ascertainable and are ascertained, without the need for further negotiation, after the making of the agreement. Thus a finance agreement which depended on the merchantability of goods dealt with under it was held not to be invalid for uncertainty merely because it was not known, when the agreement was made, whether the goods were in fact merchantable. ⁷⁷¹

Contract to make a contract

2-141

In some cases of incomplete agreements it is said that there is a “contract to make a contract”. ⁷⁷² This expression may refer to a number of different situations; these are discussed in paras 2-142—2-145 below.

Contract to execute a document incorporating terms previously Agreed

2-142

One possibility is that the parties may agree to execute a formal document incorporating terms on which they have previously agreed. Such a provision does not deprive the agreement of contractual force. ⁷⁷³ For example, in *Morton v Morton* ⁷⁷⁴ an agreement to “enter into a separation deed containing the following clauses” (of which a summary was then given) was held to be a binding contract. The grant of an option to purchase can similarly be described as a contract by which one party binds himself to enter into a further contract if the other so elects; and neither of these contracts is (on this ground) void for uncertainty. ⁷⁷⁵

Agreement to negotiate

2-143

A further possibility is that the parties have simply agreed to negotiate. In spite of dicta to the contrary, ⁷⁷⁶ it has been held that an express agreement merely to negotiate is not a contract “because it is too uncertain to have any binding force”. ⁷⁷⁷ It therefore does not impose any obligations to negotiate, or to use best endeavours to reach agreement ⁷⁷⁸ or to accept proposals that “with hindsight appear to be reasonable”. ⁷⁷⁹ Nor, where an agreement fails to satisfy the requirement of certainty, can this defect be cured by *implying* into it a term to the effect that the parties must continue to negotiate in good faith. In *Walford v Miles*, ⁷⁸⁰ a “lock-out” agreement collateral to negotiations for the sale of a business lacked sufficient certainty because it failed to specify the period of time during which the vendors were not to negotiate with third parties. ⁷⁸¹ The House of Lords also unanimously rejected the argument that a term should be implied requiring the vendors to continue to negotiate in good faith with the purchaser for as long as the vendors continued to desire to sell, since such a term was itself too uncertain to be enforced. The uncertainty lay in the fact that the alleged duty was “inherently inconsistent with the position of a negotiating party” ⁷⁸² who must normally ⁷⁸³ be free to advance his own interests during the negotiations. The point is well illustrated by the facts of *Walford v Miles* itself, where the defendants had agreed, subject to contract, to sell a property to the purchasers for £2m and had (in breach of the above ineffective “lock-out” agreement) sold it to a third party for the same sum, and the purchasers then claimed damages of £1m on the basis that the property was (by reason of facts known to them but not to the defendants) worth £3m. If a duty to negotiate in good faith exists, it must be equally incumbent on both parties, so that it can hardly require a vendor to agree to sell a valuable property for only two thirds of its true value when the facts affecting that value are known to the purchaser and not disclosed (as good faith would seem to require) to the vendor. The actual result in *Walford v Miles* (in which the purchasers recovered the sum of £700 in respect of their

wasted expenses as damages for misrepresentation,⁷⁸⁴ but not the £1m which they claimed as damages for breach of contract⁷⁸⁵) seems, with respect, to be entirely appropriate on the facts, especially because the vendors reasonably believed themselves to be protected from liability in the principal negotiation by the phrase “subject to contract”.

2-144

In *Cobbe v Yeomans Row Management Ltd*⁷⁸⁶ Mummery L.J. said that “Under English law there is no general duty to negotiate in good faith”; but he added that there were “plenty of other ways of dealing with particular problems of unacceptable conduct occurring in the course of negotiations without unduly hampering the ability of the parties to negotiate their own bargains without the intervention of the courts.”⁷⁸⁷ In the *Cobbe* case itself, Court of Appeal had relied on the doctrine of proprietary estoppel to this end; and although on further appeal this doctrine was held not to apply on the facts of the case,⁷⁸⁸ the House of Lords did provide other relief, by way of quantum meruit, to the party prejudiced by the other party’s “unattractive”⁷⁸⁹ conduct in withdrawing from the agreement which required further negotiations to acquire contractual force; and in *Walford v Miles* the award of damages for misrepresentation may illustrate the same point.⁷⁹⁰ It should be emphasised that, in neither of these cases, did the claimant recover the full damages for loss of his bargain to which he would have been entitled, if the defendant’s failure to negotiate in good faith had amounted to a breach of contract.

2-145

In *Walford v Miles* Lord Ackner, with whom all the other members of the House agreed, described as “unsustainable” the view expressed in an American case⁷⁹¹ “that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and, as the latter is enforceable so is the former.”⁷⁹² He went on to say that “the reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours.”⁷⁹³ If (as appears to be the case) the reference in this passage is to an agreement to use best endeavours to reach agreement, then the passage gives rise to a number of difficulties. The first arises from dictum in an English case⁷⁹⁴ (which is cited with approval in *Walford v Miles*⁷⁹⁵) to the effect that an agreement to negotiate does not impose any obligation to use best endeavours to reach agreement; and this dictum certainly supports the view that an agreement to negotiate contains no *implied* term to use such endeavours. It may be that Lord Ackner’s reference was to an *express* term to use best endeavours to reach agreement, or that he was simply prepared to assume (without deciding) that an agreement (express or implied) to use such endeavours might be legally enforceable and that he was concerned only to make the point that, even on that assumption, the same was not true of an agreement to negotiate in good faith. That explanation of Lord Ackner’s statement in turn gives rise to the difficulty of distinguishing between the two types of agreement. One possibility is that an agreement to negotiate in good faith refers to the *formation* and one to use best endeavours to the *performance* of a contract, e.g. where an admitted contract between A and B requires A to use his best endeavours to make a computer software system work, or to procure C to enter into a contract with B. There is no doubt that a term of this kind can impose a legal obligation on A.⁷⁹⁶ But such cases are not concerned with the legal effect (if any) of an agreement to use best endeavours *to reach agreement*; and where the question is whether, in consequence of such an agreement, any contract has come into existence, later decisions support the view that an express agreement to use best or reasonable endeavours to agree on the terms of a contract is no more than an agreement to negotiate, lacking contractual force.⁷⁹⁷ An alternative explanation of Lord Ackner’s statement may be that, while an agreement to use best endeavours to reach agreement could be interpreted as referring to the *machinery* of negotiation, one to negotiate in good faith is more plausibly interpreted as referring to its *substance*. A promise to use such endeavours might, for example, oblige a party to make himself available for negotiations, or at least not (e.g. by deliberately failing to pick up his telephone) to prevent the other from communicating with him.⁷⁹⁸ A promise to negotiate in good faith, on the other hand, would oblige a party not to take unreasonable or exorbitant positions during the negotiations; and it is the difficulty of giving precise content to this obligation, while maintaining each party’s freedom to pursue his own interests, that makes such a promise too uncertain to be enforced.

Duty to negotiate outstanding details?

2-146

⚠ In *Walford v Miles* the principal agreement was not legally binding because it was subject to contract, and the lock-out agreement was not legally binding because it specified no dates.⁷⁹⁹ The case does not exclude the possibility that a different conclusion may be reached where the parties have reached agreement on all essential points so as to show that they do intend to be legally bound by the agreement, but have left other points open. The court may then imply a term that they are to negotiate in good faith so as to settle outstanding details which are to be incorporated in the formal document setting out the full terms of the contract between them.⁸⁰⁰ An express term in an agreement that is intended to be legally binding to negotiate outstanding matters in good faith may likewise have contractual force.⁸⁰¹ Similarly, a dispute resolution clause in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute may be referred to arbitration is enforceable. It is not incomplete; not uncertain (it has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute, the difficulty of proving a breach in some cases does not mean that the clause lacks certainty); and not inconsistent with the position of a negotiating party since the parties voluntarily accepted a restriction upon their freedom not to negotiate. Moreover, it is in the public interest, since courts should enforce freely agreed obligations and because it may avoid expensive and time-consuming arbitration.⁸⁰² ⚠

^{589.} Lücke (1967) 3 Adelaide L.Rev. 46.

^{590.} Referred to with apparent approval in *Western Broadcasting Services v Seaga* [2007] UKPC 19, [2007] E.M.L.R. 18 at [19].

^{591.} *Harvey v Pratt* [1965] 1 W.L.R. 1025; and see *Re Day's Will Trusts* [1962] 1 W.L.R. 1419.

^{592.} *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [15]; see also at [7], [88].






^{593.} *Bushwall Properties Ltd v Vortex Properties* [1976] 1 W.L.R. 591; cf. *Hillreed Land v Beautridge* [1994] E.G.C.S. 55; *Avintar v Avill*, 1995 S.C.L.R. 1012; *Hadley v Kemp* [1999] E.M.L.R. 589 at 628; *London & Regional Development v TBI Plc* [2002] EWCA Civ 355; *Spectra International Plc v Tiscali Ltd* [2002] EWHC 2084 (Comm); [2002] All E.R. (D) 2009 (Oct); *Morgan Grenfell Development v Arrows Autosport Ltd* [2003] EWHC 333 (Ch); [2003] All E.R. (D) 417 (Feb); *Jordan Grand Prix Ltd v Vodafone Group Plc* [2003] EWHC 1956 (Comm); [2003] 2 All E.R. (Comm) 864; *Compagnie Nogar D'Importation et D'Exportation SA v Abacha* [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915. It may sometimes be possible to resolve uncertainty as to the subject-matter of the contract by extrinsic evidence, as in *Westville Properties Ltd v Dow Properties Ltd* [2010] EWHC 30 (Ch), [2010] 2 P & C.R. 19.

^{594.} *Landmark Brickwork Ltd v Sutcliffe* [2011] EWHC 1239 at [39].

^{595.} *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 W.L.R. 12 at [32].

^{596.} *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45 at [35]. cf. *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [14] (no express contract as important terms were still being negotiated; nor, for reasons given in para.2-169 below could any contract be implied); *Haden Young Ltd v Laing O'Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [87], [116] and [138] (no contract between the relevant parties as essential terms had not been agreed); *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [52] (no enforceable contract where essential terms had not been agreed).

^{597.} ⚠ [2016] EWCA Civ 1106.

598.  [2016] EWCA Civ 1106 at [21]–[24].
599.  [2016] EWCA Civ 1106 at [19], [32] citing *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108 and *Scancarriers A/S v Aotearoa International Ltd* [1985] 2 Lloyd's Rep. 419.
600.  [2017] EWHC 253 (Comm).
601.  [2017] EWHC 253 at [175]–[210].
602. *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Co* [2002] EWHC 1993 (Comm); [2002] 2 All E.R. (Comm) 1064 at [24].
603. *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 195, 205; cf. *de Jongh Weill v Mean Fiddler Holdings Ltd* [2003] EWCA Civ 1058; *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [48]; *Attrill v Dresdner Kleinwort Ltd* [2011] EWCA Civ 229, [2011] I.R.L.R. 613 at [29] at [28], [31] (promise by employer to employees to establish a minimum bonus pool held legally binding through an individual employee could not point to any specific amount payable to him out of the pool). On appeal in the *Attrill* case, see [2012] EWHC 1189 (QB), the Court of Appeal affirming the decision, rejected the argument that the agreement was too uncertain to be enforced, even though “there were some loose ends”: [2013] EWCA Civ 394 at [60]. See also *Proton Energy Group SA v Orten Lietuva* [2013] EWHC 2872 (Comm), [2014] 1 Lloyd's Rep. 100 at [39]: “This was a classic spot deal where the speed of the market requires that the parties agree the main terms and leave the details, some of which may be important, to be agreed later.” Accordingly, a contract was held to have been made as soon as each party regarded itself as committed to the other even though the agreement stated that “other contractual terms not indicated in the offer shall be discussed and mutually agreed between the parties upon contract negotiations” (at [17]).
604. See *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC (below, para.2-121), where the fact that no settlement date had been agreed did not prevent the conclusion of a contract since, in the absence of express agreement on this point, there was “an implied term of the agreement that the parties would execute it within a reasonable time” (at [164]; cf. at [169]).
605. cf. at common law, *Way v Latilla* [1937] 3 All E.R. 759; *Furmans Electrical Contractors Ltd v Elecref Ltd* [2009] EWCA Civ 170 at [32], where the claim was described as “not strictly a quantum meruit claim”, presumably because it arose *under* a contract and not (as in the situations discussed at nn.591–593 below) in spite of the absence of one; and see, as to agents' commissions, *British Bank of Foreign Trade v Novinex* [1949] 1 K.B. 623; *Powell v Braun* [1954] 1 W.L.R. 401.
606. e.g. *May & Butcher v R.* [1934] 2 K.B. 17, below, para.2-133; *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297; *Dugdale and Lowe* [1976] J.B.L. 312; *Chamberlain v Boodle & King* [1982] 1 W.L.R. 1443; *Pagnan SpA v Granaria BV* [1986] 2 Lloyd's Rep. 547; *Russell Bros. (Paddington) Ltd v John Elliott Management Ltd* (1995) 11 Const. L.J. 377; *Southwark LBC v Logan* (1996) 8 Admin. L.R. 315.
607. Below, paras 2-218, 29-070 and 29-071. For the availability of a restitutionary remedy where no contract was concluded, see also *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [48] (where, for reasons given in paras 2-119 above and 2-123 and 2-169 below, the negotiations did not lead to the conclusion of a contract).
608.  *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [40]–[45], [93]. In *Hughes v Pendragon Sabre Ltd (t/a Porche Centre Bolton)* [2016] EWCA Civ 18 the Court of Appeal held that a customer had entered into a binding contract with a car dealership to buy a limited edition Porsche, even though the contract did not stipulate the price, specification or delivery date of the vehicle. These could be resolved by reference to the Sale of Goods Act 1979.


- [609.](#) For the distinction between cases in which a claim for a reasonable sum arises *under* a contract in spite of failure to agree on details and cases in which such a claim arises on restitutionary principles in spite of the fact that *no* contract was formed because of the parties' failure to reach a sufficient measure of agreement, see *Benourad v Compass Group Plc* [2010] EWHC 1182 (QB) at [106(g) to (l)]. In that case, Beatson J. concluded that, while in principle such a restitutionary claim might be available, there was no evidence on which he could determine its amount (see at [132], [134] and [135]). Contrast *Haden Young v Laing O'Rourke Midlands Ltd* [2008] EWHC 1016 (TCC), allowing a restitutionary claim of the kind here described where work had been done in anticipation of a contract which, for reasons given in paras 2-119 above and 2-123 below, never came into existence.
- [610.](#) *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504.
- [611.](#) [1916] 2 Ch. 187; cf. *Elias v George Sahely & Co (Barbados) Ltd* [1982] 3 All E.R. 801.
- [612.](#) cf. *Storer v Manchester City Council* [1974] 1 W.L.R. 1403.
- [613.](#) *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601.
- [614.](#) *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601 at 611.
- [615.](#) cf. below, para.2-150.
- [616.](#) *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 (before [70]); and at [61]. And see *Malcolm Charles Contracts Ltd v Crispin* [2014] EWHC 3898 at [55]–[59], [67]–[74]; *Bieber v Teathers Ltd (In Liquidation)* [2014] EWHC 4205 at [50]–[58].
- [617.](#) At [85].
- [618.](#) The further argument that no contract had come into existence because a requirement for the execution of formal contractual documents had not been complied with was also rejected: see below, para.2-123.
- [619.](#) *RTS* case, above n.600, at [61]; *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(f)].
- [620.](#) *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576.
- [621.](#) Below, para.2-147.
- [622.](#) *Mamidoil-Jetoil Arab Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 [2001] 2 Lloyd's Rep. 76; for further proceedings in this case, see [2003] EWCA Civ 1031, [2003] 2 All E.R. (Comm) 640, below, para.2-137. cf. *Scammell v Dicker* [2005] EWCA 405, [2005] 3 All E.R. 838 at [40] per Rix L.J. ("The world is full of perfectly sound contracts which require further agreement for the purpose of their implementation").
- [623.](#) *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep. 68. *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 (below para.2-145 n.778) could be regarded as a further illustration of the principle discussed in the present paragraph.
- [624.](#) The mere fact that a document about the terms of which the parties had negotiated contained spaces for their signatures does not amount to a stipulation for its execution by signature: *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWCA 1334, [2010] 2 All E.R. (Comm) 788.
- [625.](#) *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284, 288–289.
- [626.](#) *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504; *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306 at 329 ("no intention to create legal relations"); *Eurodata Systems Plc v Michael Gershon Plc*, *The Times*, March 25,

2003; *Emcor Drake & Scull Ltd v Sir Robert McAlpine Ltd* [2004] EWCA Civ 1733, 98 Con. L.R. 1; *Haden Young Ltd v O'Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [115]; *J D Cleverly Ltd v Family Finance Ltd* [2010] EWCA Civ 1477, [2011] R.T.R. 22; cf. the wording of the "Total Price Box" in *Smith Glaziers (Dunfermline) v Customs & Excise Commissioners* [2003] UKHL 7, [2003] 1 W.L.R. 656.



627. *Okura & Co Ltd v Navara Shipping Corp SA* [1982] 2 Lloyd's Rep. 537; cf. *R. v Sevenoaks DC Ex p. Terry* [1985] 3 All E.R. 226; *Samos Shipping Enterprises Ltd v Eckhart & Co KG (The Nissos Samos)* [1985] 1 Lloyd's Rep. 378; *Hofflinghouse & Co Ltd v C. Trade SA (The Intra Transporter)* [1985] 2 Lloyd's Rep. 159, 163; affirmed [1986] 2 Lloyd's Rep. 132; *Debattista* [1985] L.M.C.L.Q. 241; *Star Steamship Society v Beogradska Plovidba (The Junior K.)* [1988] 2 Lloyd's Rep. 583; *Debattista* [1988] L.M.C.L.Q. 441; *Atlantic Marine Transport Corp v Coscol Petroleum Corp (The Pina)* [1992] 2 Lloyd's Rep. 103, 107; *New England Reinsurance Corp v Messaghios Insurance Co SA* [1992] 2 Lloyd's Rep. 251; *CPC Consolidated Pool Carriers GmbH v CTM Cia Transmediterranea SA (The CPC Gallia)* [1994] 1 Lloyd's Rep. 68; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566; *Drake Scull Engineering Ltd v Higgs & Hill (Northern) Ltd* (1995) 11 Const. L.J. 214; *Regalian Properties Plc v London Dockland Development Corp* [1995] 1 W.L.R. 212; *Enfield LBC v Arajah* [1995] E.G.C.S. 164; *Galliard Homes Ltd v Jarvis Interiors Ltd* [2000] C.L.C. 411; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2001] 1 Lloyd's Rep. 20 at [64]; affirmed on other grounds [2002] EWCA Civ 548, [2002] 2 All E.R. (Comm) 321; *Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd* [2003] EWCA Civ 283; *Thoreson & Co (Bangkok) Ltd v Fathom Marine Co* [2004] EWHC 167 (Comm), [2004] 1 All E.R. (Comm) 935 (agreement for sale of ship "sub details" not a binding contract); *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 at [74]–[77] (MOA to be governed by later Transaction Documents not a binding contract; for further proceedings, see [2006] EWHC 1443 (Comm), [2007] 1 Lloyd's Rep. 629); *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 28 (charter "subject to the signing of mutually agreeable terms and condition" not a binding contract); *Service Power Asia Pacific Pty Ltd v Service Power Business Solutions Ltd* [2009] EWCH 179 (Ch), [2010] 1 All E.R. (Comm) 238 at [20] (stipulation for outcome of negotiations to be reduced to writing containing detailed terms); *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 (tender process "subject to contract" and contemplating execution of formal contract); *Benourad v Compass Group Plc* [2010] EWHC 1882 at [110] (draft providing that it would become effective from signature); cf. *Prudential Assurance Co Ltd v Mount Eden Land Co Ltd* [1997] 1 E.G.L.R. 37 (consent to alterations given by landlord "subject to licence" held effective as the consent was a unilateral act, so that no question of agreement arose). For a borderline case, see *Grant v Bragg* [2009] EWCA Civ 1228, [2010] 1 All E.R. (Comm) 1166, where Lord Neuberger concluded that, "contrary to ... [his] initial impression", there was to be no contract before formal signature of the draft (at [32]). The sentence (in the 30th edition of this book) ending with what is now n.611 is cited with apparent approval in *Investec Bank (UK) Ltd v Zulman* [2010] EWCA Civ 536 at [16], where failure to execute a formal document negated contractual intention even though the words "subject to contract" (below, para.2-125), or words to the same effect, were not used; see also *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(a)]; *Datasat Communications Ltd v Swindon Town Football Club Ltd* [2009] EWHC 859 (Comm) at [87].

628. *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303; [2007] 1 All E.R. (Comm) 124 at [45], per Sir Andrew Morritt C; the above statement was accepted at [81] by Carnwath L.J., who dissented in the result.

629. *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303 at [45]; cf. *Crossco No.4 Unlimited v Jolan Ltd*, Note [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [106], where similar reasoning was said at [108] to be "fatal to the claim to a constructive trust", even though there was no stipulation for the execution of a formal document.

630.  *Rossiter v Miller* (1878) 3 App. Cas. 1124 (below, para.2-130); *Filby v Hounsell* [1896] 2 Ch. 737; *Branca v Cobarro* [1947] K.B. 854 (below, para.2-130); *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379; *Elias v George Sahely & Co (Barbados) Ltd* [1982] 3 All E.R. 801; *Damon Cie Naviera SA v Hapag-Lloyd International SA (The Blankenstein)* [1985] 1 W.L.R. 435; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep. 547; *Malcolm v Chancellor, Masters and Scholars of the University of Oxford*, *The Times*,

December 19, 1990; *Ateni Maritime Corp v Great Marine Ltd (The Great Marine) (No.2)* [1990] 2 Lloyd's Rep. 250; affirmed (without reference to this point) [1991] 1 Lloyd's Rep. 421; *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437; *The Kurnia Dewi*, below n.615, at 559; *Harvey Shopfitters Ltd v ADI Ltd* [2004] EWCA Civ 1752, [2004] 2 All E.R. 982; *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973, [2005] B.L.R. 508; *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* [2008] EWHC 1301 (TCC), 119 Con. L.R. 155 at [55], [56]; *Whitney v Monster Worldwide Ltd* [2010] EWCA Civ 1312, [2011] Pens. L.R. 1; *Immingham Storage Co Ltd v Clear Plc* [2011] EWCA Civ 89; *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA (The Athena)* [2011] EWHC 589 (Admlty) at [45]; *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [70]; and *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542 at [30], where the actual decision turned on the question whether the formal requirement of signature imposed by Statute of Frauds 1677 s.4 had been satisfied; cf. *Crowden v Aldridge* [1993] 1 W.L.R. 433, applying the same principle to a document which was not a contract but a direction by beneficiaries to executors. *Crabbe v Townsend* [2016] EWHC 2450 (Ch), where the contemplated additional documents were "matters of machinery only, whose contents are sufficiently defined by the terms of the 2006 Letter and which were intended to give effect to an existing agreement, not to create one", and *Ely v Robson* [2016] EWCA Civ 774, where separating cohabitants had orally agreed their respective beneficial interests in the family home, recorded it a letter, and had acted in reliance upon it; the anticipated formal written agreement was merely the "mechanics necessary to achieve their stated objectives".

631. *Smit International Singapore Pte Ltd v Kurnia Dewi Shipping SA (The Kurnia Dewi)* [1997] 1 Lloyd's Rep. 553; *Galliard Homes Ltd v Jarvis Interiors Ltd* [2000] C.L.C. 411, where an incomplete agreement expressly provided for a reasonable remuneration to be paid in the events which happened. The "third possibility" described in the text above (para.2-116 in the 30th edition of this book) is referred to with apparent approval by Beatson J. in *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(f)]. For the possible availability of a restitutionary remedy where *no* contract was concluded, see above, para.2-120; on the facts of the *Benourad* case, no such remedy was available: see above, para.2-120 n.593.
632. *Cheverney Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303, [2007] 1 All E.R. (Comm) 124 at [46]; *Benourad v Compass Group Plc* [2010] EWHC 1882 at [106(b)]. These dicta envisage that the non-executing party may be *bound* by the "estoppel". *The Botnica* [2006] EWHC 1300 (Comm), [2007] 1 All E.R. (Comm) 28 envisages the further possibility that the non-executing party may, by "waiver" or "a kind of election" (at [90]) *acquire rights* under the unexecuted document. For this possibility, see further para.4-082 below.
633.  *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [86]; for the facts of this case, see below paras 2-123 and 2-131; *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, where the respondent had clearly and unequivocally represented by its conduct that it was bound by the deal memorandum and had waived the requirement to sign; contrast *J D Cleverly Ltd v Family Finance Ltd* [2010] EWCA Civ 1477, [2011] R.T.R. 22, when there was no conduct from which a waiver could be inferred (at [26]).
634.  *Matchmove Ltd v Dowding* [2016] EWCA Civ 1233; see below, paras 4-142 and 5-040.
635. *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372; contrast *London & Regional Investments Ltd v TBI Plc* [2000] EWCA Civ 355, where the joint venture agreement was expressly "subject to contract" (below, para.2-125), thus reserving a right to withdraw. In *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 Arden and McFarlane L.JJ. took the view that the decision in the *Banner Homes* case was based on constructive trust (at [129], [119], [124]) while Etherton L.J. took the view that it rested on breach of fiduciary duty (at [88], [93]). This difference of judicial opinion did not affect the outcome of the *Crossco* case and further discussion of it is beyond the scope of this chapter.
636. *Ionides v Pacific Insurance Co* (1871) L.R. 6 Q.B. 674, 684; *Cory v Patton* (1872) L.R. 7 Q.B. 304; *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856;


Hadenfayre Ltd v British National Insurance Soc. Ltd [1984] 2 Lloyd's Rep. 393; *G.A.F.L.A.C. v Tanter (The Zephyr)* [1984] 1 Lloyd's Rep. 56, 69–70; reversed in part on other grounds [1985] 2 Lloyd's Rep. 529; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127, 140–141; *HIH Casualty & General Insurance v New Hampshire Insurance* [2001] EWCA Civ 735; [2001] 2 All E.R. (Comm) 39 at [86], [87]. Under an “open cover” arrangement, it is not the initialling of the slip but the declaration of the insured, which creates the obligation of the insurer: *Citadel Insurance Co v Atlantic Union Insurance Co* [1985] 2 Lloyd's Rep. 543.

- 637. See Marine Insurance Act 1906 ss.22, 23 and 24.
- 638. Not always: see *Storer v Manchester City Council* [1974] 1 W.L.R. 1403; *Tweddell v Henderson* [1975] 1 W.L.R. 1496, 1501–1502; *Elias v Group Sahely & Co (Barbados) Ltd* [1982] 3 All E.R. 801.
- 639. See below at n.636.
- 640. (1877) 7 Ch. D. 29. See also *Santa Fé Land Co v Forestal Land Co* (1910) 26 T.L.R. 534.
- 641. (1877) 7 Ch. D. 29, 32.
- 642. *Chillingworth v Esche* [1924] 1 Ch. 97.
- 643. *Lockett v Norman-Wright* [1925] Ch. 56.
- 644. *Raingold v Bromley* [1931] 2 Ch. 307. See also *Berry Ltd v Brighton and Sussex Building Society* [1939] 3 All E.R. 217.
- 645. *Riley v Troll* [1953] 1 All E.R. 966.
- 646. See also *Kingston-upon-Hull (Governors) v Petch* (1854) 10 Ex. 610; *Chinnock v Marchioness of Ely* (1865) 4 De G.J. & S. 638; *Harvey v Barnard's Inn* (1881) 50 L.J.Ch. 750; *May v Thomson* (1882) 20 Ch. D. 705; *Hawkesworth v Chaffey* (1886) 55 L.J.Ch. 335; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284 (disapproving *North v Percival* [1898] 2 Ch. 128); *Rossdale v Denny* [1921] 1 Ch. 57; *Looker v Law Union Insurance Co Ltd* [1928] 1 K.B. 554; *Brilliant v Michaels* [1945] 1 All E.R. 121; *Lewis v Wilson* [1949] Ir.R. 347; *Graham & Scott (Southgate) Ltd v Oxlade* [1950] 2 K.B. 257; *Bennett, Walden & Co v Wood* [1950] 2 All E.R. 134; *Christie, Owen and Davies Ltd v Stockton* [1953] 1 W.L.R. 1353.
- 647. *Ronald Preston & Partners v Markheath Securities* [1988] 2 E.G.L.R. 23. For the potential applicability of the principle that an agreement “subject to contract” is not legally binding to an offer “subject to contract” to buy goods, see *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [70], quoted in para.2-117 at n.565.
- 648. *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [48].
- 649. [2010] UKSC 14 at [86].
- 650. [2010] UKSC 14 at [45]–[48]: “The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later.”
- 651. [2010] UKSC 14 at [61], and see below at para.2-131 at n.668.
- 652. i.e. subject to the qualifications discussed in paras 2-127—2-131 below.
- 653. *Eccles v Bryant & Pollock* [1948] Ch. 93; *Santa Fé Land Co Ltd v Forestal Land Co Ltd* (1910) 26 T.L.R. 534; cf. *Coope v Ridout* [1921] 1 Ch. 291; *Chillingworth v Esche* [1924] 1 Ch. 97; *Raingold v Bromley* [1931] 2 Ch. 307; *Cohen v Nessdale* [1982] 2 All E.R. 97; *Secretary of State for Transport v Christos* [2003] EWCA Civ 1073, [2004] 1 P. & C.R. 17; *Bolton MBC v*

Torkington [2003] EWCA Civ 1634, [2004] Ch. 66 at [53], where mere sealing (without delivery) of a counterpart lease by a local authority was held not to give rise to a contract binding the authority.

- 654. Below, para.5-011. A document setting out all the terms expressly agreed and signed by both parties would satisfy the formal requirements; but if it were expressed to be “subject to contract” it would not give rise to a contract until “exchange” had taken place.
- 655. Law of Property (Miscellaneous Provisions) Act 1989 ss.2(1), (3).
- 656. See *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259, 285, 289, cf. at 293, 295.
- 657. *Domb v Izoz* [1980] Ch. 548. This relaxation refers only to the process of exchange; the formal requirements referred to at n.637 above must also be satisfied.
- 658. *Sindel v Georgiou* (1984) 154 C.L.R. 661.
- 659. On the making of orders under the Land Registration Act 2002.
- 660. Below, para.2-171.
- 661. *Cohen v Nessdale* [1981] 3 All E.R. 118, 128; affirmed [1982] 2 All E.R. 97; cf. Law Commission Paper No.65.
- 662. *Harrison v Battye* [1975] 1 W.L.R. 53.
- 663. *Smith v Mansi* [1963] 1 W.L.R. 26; exchange is also unnecessary in the case of a deed which takes effect on execution and delivery: see above, paras 1-113 et seq.; *Vincent v Premo Enterprises Ltd* [1969] 2 Q.B. 609.
- 664. *Law v Jones* [1974] Ch. 112, as explained in *Daulia v Four Millbank Nominees* [1978] Ch. 231, 250; *Cohen v Nessdale* [1981] 3 All E.R. 118, 127, [1982] 2 All E.R. 97, 104; see also *Tiverton Estates Ltd v Wearwell* [1975] Ch. 146, followed in *Irani v Irani* [2006] EWHC 1811, [2006] W.T.L.R. 1561; cf. *Secretary of State for Transport v Christos* [2003] EWCA Civ 1073, [2004] 1 P. & C.R. 17 at [36]–[37] (statement that a party would “not renege” insufficient). For the present purpose, agreement of both parties is required: a “unilateral” waiver by one party will not suffice: *Haq v Island Homes Housing Association* [2011] EWCA Civ 805, [2011] 2 P. & C.R. 17 at [72]. Any subsequent agreement would now have to satisfy more stringent requirements, imposed by Law of Property (Miscellaneous Provisions) Act 1989 s.2 (below, para.5-011) than those which were in force at the time of the first four of the decisions cited in this note, though these requirements would not apply if the subsequent agreement could take effect as a collateral contract. The requirement of a subsequent agreement by *both* parties to remove the normal effect of the words “subject to contract” also does not apply where an offer to buy goods is qualified by these words. In *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd’s Rep. 63 such an offer was so qualified and it was said at [70] that “this qualification was removed” by the buyer’s later statement that [o]ur offer is not conditional, “whereupon the offer was an offer capable of being accepted”.
- 665. See the discussion at para.4-147 below of *Att-Gen of Hong Kong v Humphreys Estate (Queen’s Gardens) Ltd* [1987] A.C. 114. In *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 Lord Scott said that in a “subject to contract” case proprietary estoppel “cannot ordinarily arise” (at [25]) and that in such a case it would be “very difficult” (at [26]) to establish a proprietary estoppel. The difficulty is illustrated by *Haq v Island Housing Association* [2011] EWCA Civ 805, [2011] 2 P. & C.R. 17, where merely allowing a prospective lessee to enter the premises while the agreement was still “subject to contract” was not sufficient to give rise to a proprietary estoppel (at [73]).
- 666. *Alpenstow Ltd v Regalian Properties Ltd* [1985] 1 W.L.R. 721, 730; Harpum [1986] C.L.J. at 356.

- [667.](#) *Alpenstow Ltd v Regalian Properties Ltd*, above.
- [668.](#) Below, para.2-145.
- [669.](#) [1992] 2 A.C. 128. See further para.2-143.
- [670.](#) *Pitt v PHH Asset Management Ltd* [1994] 1 W.L.R. 327; cf. *Tye v House* [1997] 2 E.G.L.R. 171.
- [671.](#) *Astra Zeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574 (Comm).
- [672.](#) Clause H, set out at [8].
- [673.](#) At [29]. Under clause B, also set out at [8], the agreement was terminable by notice by either party, but not before March 2008; it could also be terminated by one party on account of the other's breach.
- [674.](#) *Michael Richards Properties Ltd v St Saviour's* [1975] 3 All E.R. 416; *Emery* [1976] C.L.J. 28.
- [675.](#) See *Munton v G.L.C.* [1976] 1 W.L.R. 649.
- [676.](#) cf. below, para.2-152.
- [677.](#) *Westway Homes v Moore* (1991) 63 P. & C.R. 480.
- [678.](#) *Storer v Manchester City Council* [1974] 1 W.L.R. 1403; *Tweddell v Henderson* [1975] 1 W.L.R. 1496, 1501–1502; *Elias v George Sahely & Co (Barbados) Ltd* [1982] 3 All E.R. 801.
- [679.](#) (1878) 3 App. Cas. 1124. For other examples of a completed agreement, see *Lewis v Brass* (1877) 3 Q.B.D. 667; *Bonnewell v Jenkins* (1878) 8 Ch. D. 70; *Bolton Partners v Lambert* (1888) 41 Ch. D. 295; *Gray v Smith* (1889) 43 Ch. D. 208; *Filby v Hounsell* [1896] 2 Ch. 737; *Lever v Koffler* [1901] 1 Ch. 543; *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379; cf. *Willis v Baggs and Salt* (1925) 41 T.L.R. 453; *Morton v Morton* [1942] 1 All E.R. 273; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293.
- [680.](#) (1878) 3 App. Cas. 1124, 1151.
- [681.](#) [1947] K.B. 854.
- [682.](#) *Trollope & Colls Ltd v Atomic Power Construction Ltd* [1963] 1 W.L.R. 333. The same principle can apply also where the parties act on an informal agreement which does not have contractual force and that agreement is later superseded by the execution of a formal contract: see *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC), [2014] B.L.R. 150 at [18], [45].
- [683.](#) As in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753; for the “subject to contract clause” (at [86]) in that case, see above, para.2-125.
- [684.](#) *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14 at [47].
- [685.](#) *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14 at [61]; cf. at [84]. A further reason for the decision was that the parties had agreed to vary the agreement even though the requirements of the “subject to contract” clause (above, para.2-125) had not been satisfied; and that a variation would make no sense if there was “nothing to vary” (at [61]). The point is perhaps overstated since the concept of varying a draft before it has acquired contractual force is not an obviously empty one.
- [686.](#) Above, para.2-126.
- [687.](#) See the words of clause 48, quoted in para.2-125 above.

- [688.](#) See the reasoning at first instance in *Rugby Group Ltd v Pro Force Recruit Ltd* [2005] EWHC 70 (QB) at [16], reversed on other grounds [2006] EWCA Civ 69.
- [689.](#) Lake and Draetta, *Letters of Intent* 2nd edn (1994); Furmston, Poole and Norinado, *Contract Formation and Letters of Intent* (1997).
- [690.](#) Below, para.2-194; cf. *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87.
- [691.](#) *Associated British Ports v Ferryways* [2008] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595 at [24], per Maurice Kay L.J; *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] EWHC 1560 (Comm), [2011] 2 All E.R. (Comm) 951, where it was said at [93] that the relevant document was "not expressed to be a 'letter of comfort', though that is not conclusive", and was held "as a matter of construction ... not intended to be legally binding" (at [96]), and see para.2-194 below.
- [692.](#) *Kleinwort Benson Ltd v Malaysian Mining Corp* [1989] 1 All E.R. 785; Reynolds 104 L.Q.R. 353 (1988); Davenport [1988] L.M.C.L.Q. 290; Prentice (1989) 105 L.Q.R. 346; Ayres and Moore [1989] L.M.C.L.Q. 281; Tyree (1989) 2 J.C.L. 279, cf. *Chemco Leasing SpA v Rediffusion* [1987] 1 F.T.L.R. 201 (where such a letter was held to be an offer but to have lapsed before acceptance); *Monk Construction v Norwich Union Life Insurance Society* (1992) 62 B.L.R. 107.
- [693.](#) *Associated British Ports v Ferryways* [2008] EWCA Civ 189 at [24].
- [694.](#) *Associated British Ports v Ferryways* [2008] EWCA Civ 189 at [27]. See also *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10, [2014] B.L.R. 150, where a building contractor issued a letter of intent (LOI) to a flooring sub-contractor and the parties accepted that the LOI constituted a binding contract (at [23]) but disagreed as to which terms of the contemplated later formal contract were intended to be incorporated into the LOI agreement.
- [695.](#) In *Associated British Ports v Ferryways* [2008] EWCA Civ 189, a "letter of comfort" was held to be a legally binding guarantee, though this had been discharged by a later agreement.
- [696.](#)  cf. *Turriff Construction Ltd v Regalia Knitting Mills* (1971) 22 E.G. 169 (letter of intent held to be a collateral contract for preliminary work); *Wilson Smithett & Cape (Sugar) Ltd v Bangladesh Sugar Industries Ltd* [1986] 1 Lloyd's Rep. 378 (LOI held to be an acceptance); *Chemco Leasing SpA v Rediffusion* [1987] 1 F.T.L.R. 201 (LOI held to be an offer but to have lapsed before acceptance). *Spartafield Ltd v Penten Group Ltd* [2016] EWHC 2295 (TCC), 168 Con. L.R. 221 (letter of intent displaced by contract when the key principles for the contract were agreed and it was agreed that the terms would be those contained in the JCT ICD form; the contemplated execution of a formal contract was not a precondition to the existence of the contract).
- [697.](#) Above, para.2-123. For a combination of the factors described in the text above at nn.673 and 674, see *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC), 119 Con. L.R. 33 where a LOI was held to have contractual force even though its provisions indicated that a formal contract was to be executed but the parties acted on the letter without executing any such contract.
- [698.](#) [2012] EWHC 1329 (Comm), [2012] 2 Lloyd's Rep. 93.
- [699.](#) [2012] EWHC 1329 (Comm) at [8].
- [700.](#) [2012] EWHC 1329 (Comm) at [7]; see below paras 2-143, 2-194.
- [701.](#) The existence of such a condition was doubted in [2012] EWHC 1329 (Comm) at [9].
- [702.](#) [2012] EWHC 1329 (Comm) at [12].
- [703.](#) [1934] 2 K.B. 17n; cf. *British Homophone Ltd v Kunz* (1935) 152 L.T. 589; *Mmecen SA v Inter Ro-Ro SA (The Samah)* [1981] 1 Lloyd's Rep. 40, 43; *Harmony Shipping Co SA v*

Saudi-Europe Line Ltd (The Good Helmsman) [1981] 1 Lloyd's Rep. 377, 409; *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep. 304, 307; *Cedar Trading Co Ltd v Transworld Oil Ltd (The Gudermes)* [1985] 2 Lloyd's Rep. 623; *iSoft Group Plc v Misys Holdings Ltd* [2003] EWCA Civ 229, [2003] All E.R. (D) 438 (Feb); *Minter v Julius Baer Investments Ltd* [2004] EWHC 2472, [2005] Pens. L.R. 73; *Scottish Coal Co Ltd v Danish Forestry Co Ltd* [2010] CSJH 56, 2010 S.C. 729, referring at [8] to *May & Butcher v R.*, above n.686.


704. Above, para.2-120; cf. Supply of Goods and Services Act 1982 s.15(1).
705. cf. *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep. 76, especially at [73]; *Malcolm v Chancellor, Masters & Scholars of the University of Oxford, The Times*, December 19, 1990.
706. cf. *Willis Management (Isle of Man) Ltd v Cable & Wireless Plc* [2005] EWCA Civ 806, [2005] 2 Lloyd's Rep. 597 at [33].
707. *King's Motors (Oxford) Ltd v Lax* [1970] 1 W.L.R. 426; cf. *King v King* (1981) 41 P. & C.R. 311 (rent review clause).
708. *Metal Scrap Trade Corporation v Kate Shipping Co Ltd (The Gladys)* [1994] 2 Lloyd's Rep. 402; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566.
709. *Orion Insurance Plc v Sphere Drake Insurance Plc* [1992] 1 Lloyd's Rep. 239.
710. This is assumed in *Brown v Gould* [1972] Ch. 53, where, however, the option was upheld as it specified criteria for determining the price: see below, para.2-137.
711. The word "pre-emption" would not be appropriate where the object of the term in question was to confer a right on a seller to be given the first opportunity of making a supply of goods to a buyer, as in *Astra Zeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574; and this point may account for the use in that case of the expression "first opportunity and right of refusal" to refer to the opportunity of this kind there conferred by the contract on the seller. It may also account for the statement at [24] that "a right of pre-emption" was "essentially another name for a right of first refusal". What seems to be meant is that the nature of these two rights is similar. As a matter of terminology, it is hard to see how a seller can have the first right to buy the subject-matter (or, in other words, a right of pre-emption). The phrase "right of first refusal" is more equivocal and seems to be just as capable of referring to a right conferred on a seller as to one conferred on a buyer: that is to a right of one party to an agreement to receive an offer from the other in priority to other potential offerees.
712. *Pritchard v Briggs* [1980] Ch. 339. For the purposes of Landlord and Tenant (Covenants) Act 1995, "option" includes "a right of first refusal": s.1(6).
713. Below, para.4-193 n.1234. See also *Bircham & Co Nominees (No.2) Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 775, (2001) 82 P. & C.R. 427 at [41]; *Re Gray* [2004] EWHC 1538 (Ch), [2005] 1 W.L.R. 815 at [25]. On the exercise of a right of pre-emption, the right may acquire characteristics of an option; see *Cottrell v King* [2004] EWHC 397, [2004] B.C.C. 309.
714. See *Coaten v PBS Corporation* [2006] EWHC 1781, [2006] 3 E.G.L.R. 43 (agreement held to be an option, not a right of pre-emption, as the exercise of the right conferred by it on the grantee imposed on the grantor an "immediate obligation to sell ... if [the grantee] wished that to happen" (at [35])).
715. *Coaten v PBS Corporation* [2006] EWHC 1781 at [16], [23]; *Speciality Shops Ltd v Yorkshire & Metropolitan Estates Ltd* [2002] EWHC 2969, [2003] 2 P. & C.R. 410 at [28]; for other types of rights of pre-emption, in which the offer comes from the grantee, see [2002] EWHC 2969 at [26], [27]. For the distinction between options and rights of pre-emption, see also *Tiffinany Investments Ltd v Bircham & Co Nominees (No.2)* [2003] EWCA Civ 1759, [2002] 2 P. & C.R. 10 and *Coaten v PBS Corp* [2006] EWHC 1781, [2006] 3 E.G.L.R. 43 (above, n.697).
716. Similarly, a "lock-out" agreement (above, para.2-128) does not bind the promisor to sell to the

promisee; it merely restricts his freedom to sell to someone else: see *Tye v House* [1997] 2 E.G.L.R. 171.

- [717.](#) *Smith v Morgan* [1971] 1 W.L.R. 803; cf. *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87, 93; *Fraser v Thames Television Ltd* [1984] Q.B. 44, 57; *Miller v Lakefield Estates Ltd*, *The Times*, May 16, 1988; *Astra Zeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm) at [30].
- [718.](#) See *Fraser v Thames Television Ltd* [1984] Q.B. 44.
- [719.](#) *Brown v Gould* [1972] Ch. 53, 57–58; cf. *Smith v Morgan* [1971] 1 W.L.R. 803, 807; *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87, 93; *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep. 205, 210; *Global Container Lines Ltd v State Black Sea Shipping Co* [1999] 1 Lloyd's Rep. 127, 155; *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All E.R. 838 at [31], [40]; *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep. 68 at [54] (and see para.2-122 above and 2-151 below); *Astra Zeneca UK Ltd v Albermarle International Corp* [2011] EWHC 1574 (Comm) at [31].
- [720.](#) [1934] 2 K.B. 1.
- [721.](#) cf. *British Bank for Foreign Trade v Novinex* [1949] 1 K.B. 623; *Beer v Bowden* [1981] 1 W.L.R. 522; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505, 518–519; *Tropwood A.G. of Zug v Jade Enterprises (The Tropwind)* [1982] 2 Lloyd's Rep. 233, 236; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601; *Granit SA v Benship International SA* [1994] 1 Lloyd's Rep. 526; *Mitsui Babcock Engineering Ltd v John Brown Engineering Ltd* (1996) 51 Const. L.R. 129; *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep. 76; for further proceedings, see n.706 below.
- [722.](#) [1934] 2 K.B. 17n; above, para.2-133.
- [723.](#) cf. *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD (No.3)* [2003] EWCA Civ 1031, [2003] 2 All E.R. (Comm) 640 at [38].
- [724.](#) [1934] 2 K.B. 1, 10; the clause covered disputes as to “the *subject-matter* or construction of this agreement,” while the arbitration clause in *May & Butcher v R* covered “disputes with reference to or arising out of this agreement”. For the distinction between the two forms of clause, see *Heyman v Darwins* [1942] A.C. 356, 385, 392. cf. also *Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep. 53; *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1985] 2 Lloyd's Rep. 547; and see *Vosper Thorneycroft Ltd v Ministry of Defence* [1976] 1 Lloyd's Rep. 58 where the existence of a contract was admitted and the arbitration clause referred to “any dispute or *difference* ...”.
- [725.](#) Scrutton L.J. said at 7 that he was glad to decide in favour of the claimant “because I do not regard the appellants’ [defendants’] contention as an honest one”.
- [726.](#) R.S.T.C. (1933) 49 L.Q.R. at 316.
- [727.](#) *Foley's* case, above, n.703 was approved by the House of Lords in *G. Scammell & Nephew Ltd v Ouston* [1941] A.C. 251.
- [728.](#) *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601, 619.
- [729.](#) Above, para.2-120; below, para.2-150; or by imposing on one party the duty to resolve the uncertainty: below, para.2-151; *Pagnan SpA v Feed Products Ltd*, above n.711.
- [730.](#) Though this point is not decisive: see above, para.2-133 at n.691.
- [731.](#) (1991) S.L.T. 523.
- [732.](#) [2010] UKSC 14, [2010] 1 W.L.R. 753.

- [733.](#) [2010] UKSC 14 at [61].
- [734.](#) [2010] UKSC 14 at [61]. And see *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156, [2013] 1 Lloyd's Rep. 638. In that case a "Settlement Agreement" left a number of issues (such as shipping schedules, treatment charges (TC) and refining charges (RC)) "to be agreed" between the parties. Tomlinson L.J. held the settlement to be enforceable since "the language used by the parties" showed that "they did not intend that" "they should remain free to agree or disagree" about the points which were "to be agreed"; rather, a term was "to be implied that the TC/RC and shipping schedule shall be reasonable, and that in the event of any dispute ... [the matter was] to be determined by arbitration" (at [19]). At [20]–[22] Tomlinson L.J. expressed his agreement with Eder J. who had, in the court below [2012] EWHC 1988, [2012] 2 Lloyd's Rep. 638 at [30] and [31] relied on the mandatory language and other expressions used by the parties to show that the parties intended the agreements in question to be legally binding. For the application of the standard of reasonableness, cf. para.2-135 at n.704. See also *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 1 All E.R. (Comm) 513 at [61], [64], where acceptance of an offer (see paras 2-003, 2-027) was held to have concluded a contract even though the acceptance envisaged further "fine tuning" of detailed terms.
- [735.](#) *Gliksten & Son Ltd v State Assurance Co* (1922) 10 L.L. Rep. 604; cf. Marine Insurance Act 1906 s.31(2); and *American Airline Inc v Hope* [1973] 1 Lloyd's Rep. 233; affirmed [1974] 2 Lloyd's Rep. 301 ("at an additional premium and geographical area to be agreed").
- [736.](#) e.g. *Shakleford's Case* (1866) L.R. 1 Ch. App. 567; *Bertel v Neveux* (1878) 39 L.T. 257; *Loftus v Roberts* (1902) 18 T.L.R. 532; *Hofflinghouse SpA v C-Trade SA (The Intra Transporter)* [1986] 2 Lloyd's Rep. 132; *Pagnan SpA v Granaria BV* [1986] 2 Lloyd's Rep. 547; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] EWCA Civ 485, (2001) 76 Con. L.R. 224 at [35]; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66 at [40] ("It is not commercially sensible to suppose that the parties can have intended to enter into a contract of this size for sulphur of indeterminate quantity, to be delivered over an indeterminate period and with no provision as to payment." At a later stage an agreement not open to this objection was reached: see at [48]).
- [737.](#) *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep. 547; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [223]; affirmed without further reference to this point [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 (for this case, see also above, para.2-004 n.22).
- [738.](#) (1932) 147 L.T. 503; cf. *Miller v F.A. Sadd & Son Ltd* [1981] 3 All E.R. 265; *Mamidoil-Jetoil Greek Petroleum SA v Oka Crude Oil Refinery AD (No.3)* [2003] 1 Lloyd's Rep. 1 at [161]–[165]; affirmed [2003] EWCA Civ 1031, [2003] 2 All E.R. (Comm) 640 at [36]–[41].
- [739.](#) cf. *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47, [2011] 1 All E.R. 175 for a difficult question of construction arising from the obscurity of a formula by which the price at which an option to purchase became exercisable was to be determined. The Supreme Court's decision was unanimous with regard to the outcome but (arguably) not with respect to the reasons for that outcome.
- [740.](#) *Brown v Gould* [1972] Ch. 53.
- [741.](#) *Didymi Corp v Atlantic Lines & Navigation Co Inc* [1987] 2 Lloyd's Rep. 166, 169; Reynolds (1988) 104 L.Q.R. 353; affirmed [1988] 2 Lloyd's Rep. 108; cf. below, para.2-149.
- [742.](#) At 117.
- [743.](#) *Gillatt v Sky Television Ltd* [2000] 1 All E.R. (Comm) 461.
- [744.](#) *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 1287, [2005] 2 Lloyd's Rep. 597; below para.2-150.

- [745.](#) The requirement of certainty may be satisfied even though the operation of the machinery still lay in the future when the agreement was made. In *Anderson v London Fire and Emergency Planning Authority* [2012] I.R.L.R. 888 (EAT), a collective agreement incorporated into individual employment contracts (see para.2-187) provided for pay to be increased by 2.5 per cent or by the amount of a National Joint Committee (NJC) settlement plus 1 per cent. The fact that the agreement left open which of these two alternatives was to apply did not deprive it of contractual force. Maurice Kay L.J. said at [9], it “was an agreement for pay to be determined in accordance with agreed terms, properly construed”. Nor did the existence of choice render the agreement too uncertain to be enforced if (as was the case here) “the choices are clear” (at [10]). *Machinery* for resolving matters left open must be distinguished from *mechanism* in the sense of an agreed formula for determining the price (or other matters): e.g. where work is done on a “cost plus” basis. The purpose of such a “mechanism” is not to resolve matters originally left open. The already agreed mechanism merely has to be *applied* to determine the matter governed by it. It is in this sense that the word “mechanism” is used in *Coaten v PBX Corporation* [2006] EWHC 1781 (Ch), [2006] 3 E.G.L.R. 43 at [13].
- [746.](#) *Lombard Tricity Finance Ltd v Paton* [1989] 1 All E.R. 918. Such terms may be unenforceable for unfairness under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) reg.5(5) and Sch.2 para.2(b). These Regulations are replaced by the Consumer Rights Act 2015: s.75 and Sch.4 para.34, s.63 and Sch.2 paras 11, 22–24.
- [747.](#) *Paragon Finance Ltd v Staunton* [2001] EWCA Civ 1466, [2001] 1 W.L.R. 685 at [36]; the power (to maintain interest rates at a level above that charged by other lenders) had in that case been validly exercised. For similar restrictions on the exercise of contractually reserved discretions, see also *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [48] (below, para.2-185); cf. *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151, [2007] 2 All E.R. (Comm) 825; *McCarthy v McCarthy & Stone Plc* [2007] EWCA Civ 664, [2008] 1 All E.R. (Comm) 221 at [54]; *Socimer International Bank Ltd v Standard Bank (London) Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd’s Rep. 558 at [60], [66]; *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 at [57] (where one party’s contractual rights depend, at least to some extent, on the exercise by the other of a discretion, then it is “implied that the exercise of discretion shall not be carried out arbitrarily or in bad faith”).
- [748.](#) *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd’s Rep. 445. See also the *Anderson* case, the facts of which are summarised in n.728. It was further held that the agreement gave the employer a choice between two methods of calculating the pay increases (at [25]; see also [28], [32]).
- [749.](#) *Halpern v Halpern* [2007] EWCA Civ 291, [2007] 3 All E.R. 478 at [50].
- [750.](#) *Bateman v Asda Stores Ltd* [2010] I.R.L.R. 370 (where the question was not whether a contract had been made, but was whether an undoubtedly existing contract had been varied).
- [751.](#) *Arcos Ltd v Aronson* (1930) 36 Ll.L. Rep. 108; cf. *Campbell v Edwards* [1976] 1 W.L.R. 403; *Buber v Kenwood Mfg Co Ltd* [1978] 1 Lloyd’s Rep. 175; *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd’s Rep. 205.
- [752.](#) *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), [2002] 2 All E.R. (Comm) 1041; *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1232, 95 Con. L.R. 55; *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), [2008] 1 All E.R. (Comm) 653 at [66]–[85].
- [753.](#) *Halpern v Halpern* [2007] EWCA Civ 291, [2007] 3 All E.R. 478 at [50] (“machinery for valuation”).
- [754.](#) *Premier Telecom Communications Group Ltd v Webb* [2014] EWCA Civ 994 (“expert valuer”).
- [755.](#) Sale of Goods Act 1979 s.9(1); cf. *Pym v Campbell* (1856) 6 E. & B. 370.
- [756.](#) [1982] 1 A.C. 493; *Robertshaw* (1982) 46 M.L.R. at 493.

- [757.](#) *Re Malpas* [1985] Ch. 42, 50; cf. *Tito v Waddell (No.2)* [1877] Ch. 106, 314; *Didymi Corp v Atlantic Lines & Navigation Co Ltd* [1988] 2 Lloyd's Rep. 108, 115.
- [758.](#) i.e. not if it is "an integral and essential part of the definition of the payments to be made": *Gillatt v Sky Television Ltd* [2000] 1 All E.R. (Comm) 461 at 419. In that case, the machinery was of this kind so that, neither party having taken any steps to bring it into operation, it was held that the court could not intervene by making its own valuation.
- [759.](#) *Herbert v Doyle* [2010] EWCA Civ 1095 at [87] (court applying "objective criteria which the parties had agreed" for making a choice left by the contract to one of them, who had failed within a reasonable time to make it). For this case, see also para.4-160 below.
- [760.](#) As in *Sudbrook Trading Estate Ltd v Eggleton* [1982] 1 A.C. 493 (above, n.739).
- [761.](#) As in *Re Malpas*, above; cf. *Royal Bank of Scotland v Jennings* [1996] E.G.C.S. 168; *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA* [2011] EWHC 1822 (Ch), [2011] 2 Lloyd's Rep. 538 at [72].
- [762.](#)  *Manchester Ship Canal Co Ltd v Environment Agency* [2017] EWHC 1340 (QB).
- [763.](#) *King v King* (1981) 41 P. & C.R. 311.
- [764.](#) See *Beer v Bowden* [1981] 1 W.L.R. 522, 525.
- [765.](#) *King v King*, above.
- [766.](#) *Beer v Bowden*, above.
- [767.](#) *Beer v Bowden*, above; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505; cf. above, para.2-122.
- [768.](#) See *Brown v Gould* [1972] Ch. 53.
- [769.](#) In *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd*, above, the lease was rectified to include such a term.
- [770.](#) *Weller v Akehurst* [1981] 3 All E.R. 411 (where the rent review clause was invoked too late and time was expressly made of the essence of the contract); contrast *Metrolands Investment Ltd v J.H. Dewhurst Ltd* [1986] 3 All E.R. 659 (where time was not of the essence).
- [771.](#) *Welsh Development Agency v Export Finance Co Ltd* [1992] B.C.L.C. 148.
- [772.](#) *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284, 284, 288–289 ("contract to enter into a contract").
- [773.](#) Subject to statutory exceptions: see Consumer Credit Act 1974 s.59.
- [774.](#) [1942] 1 All E.R. 273.
- [775.](#) See *The Messiniaki Bergen* [1983] 1 Lloyd's Rep. 424, 426. cf. below, para.4-193 n.1234 for the nature of an option.
- [776.](#) *Chillingworth v Esche* [1924] 1 Ch. 91, 113; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 L.T. 503, 515. See F.P. (1932) 48 L.Q.R. 141, F.W.M.C. (1932) 48 L.Q.R. 310; Williams (1943) 6 M.L.R. 81.
- [777.](#) *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297, 301; cf. *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284, 249; *Malozzi v Carapelli SpA* [1976] 1 Lloyd's Rep. 407; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The*

- Scaptrade*) [1981] 2 Lloyd's Rep. 425, 432; affirmed without reference to this point [1983] 2 A.C. 694; *Nile Co for the Export of Agricultural Crops v H. & J. M. Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep. 555, 587; *Paul Smith Ltd v H. & S. International Holdings* [1991] 2 Lloyd's Rep. 127, 131; *Mamidoil-Jetoil Greek Petroleum SA v Oka Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep. 76 at [53], [59]; *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 806, [2005] 2 Lloyd's Rep. 597 at [24], [26]; *Covington Marine Corp v Xiamen Shipbuilding Co Ltd* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 278 at [52].
778. *The Scaptrade*, above, n.759; *Star Steamship Society v Beogradska Plovidba (The Junior K.)* [1988] 2 Lloyd's Rep. 583. cf., in the United States, *Hoffman v Red Owl Stores Inc* 133 N.W. 2d 267 (1965).
779. *Pagnan SpA v Granaria BV* [1985] 1 Lloyd's Rep. 256, 270; affirmed [1986] 2 Lloyd's Rep. 547.
780. [1992] 2 A.C. 128; Neill (1992) 108 L.Q.R. 405.
781. Above, para.2-128.
782. [1992] 2 A.C. 128, 138; cf. *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361, 1368 (doubted on other grounds in *Att-Gen v Blake* [2001] 1 A.C. 268 at 283); *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All E.R. (Comm) 303 at 311; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 (below, para.2-150) where an alleged duty to deal with the claimants in good faith was held to be insufficiently certain to form a basis for an implied contract. See also *Shaker v VistaJet Group Holding SA* [2012] EWHC 1329 (Comm), [2012] 2 Lloyd's Rep. 93, where the unenforceability of an agreement "to use reasonable endeavours to agree or to negotiate in good faith" was based, inter alia, on the fact that a "duty to negotiate in good faith" is "inherently inconsistent with the position of a negotiating party" (at [7]).
783. For an exception, see *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] 1 All E.R. (Comm) 149 at 158 (Lloyd's bound to negotiate in good faith with its "names" on the terms of a "hardship agreement" since for this purpose it was "performing functions in the public interest within a statutory framework", so that its freedom of action was restricted).
784. See [1992] 2 A.C. 128, 136.
785. [1992] 2 A.C. 128 at 135.
786. [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964.
787. [2006] EWCA Civ 1139 at [4].
788. [2008] UKHL 55, [2008] 1 W.L.R. 1752, below paras 4-161—4-164.
789. [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [93].
790. See above, at n.766. The misrepresentation was to the effect, not that the defendants *would* negotiate with the claimants, but that they *would not* go on negotiating with third parties (to whom they proceeded to sell the property).
791. *Channel Home Centers Division of Grace Retail Corp v Grossman* 795 F. 2d 291 (1986).
792. [1992] 2 A.C. 128, 138.
793. [1992] 2 A.C. 128, 138.
794. *Scandinavian Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep. 425, 432 (and see above n.760); cf. *Star Steamships Society v Beogradska Plovidba (The Junior K.)* [1988] 2 Lloyd's Rep. 583. See also *Covington Marine Corp v Xiamen Shipping Co*

Ltd [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 745 at [52], where it was not argued that an agreement to use best endeavours to reach agreement had any greater legal effect than an agreement to agree.

[795.](#) [1992] 2 A.C. 128, 137.

[796.](#) See *Watford Electronics Ltd v Sanderson Ltd* [2001] EWCA Civ 317, [2001] 1 All E.R. (Comm) 696 at [45], and the cases discussed in para.2-137; cf. *Lambert v HTV Cymru (Wales) Ltd*, *The Times*, March 17, 1998; *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417, where the dispute seems to have been, not about the existence of the contract but about its contents (see at [18], [29]). The Court of Appeal held, by a majority, that a clause in the contract, requiring the defendant airport authority to "use all reasonable endeavours to promote" (clause 1, para.[6]) the claimant airline's services from the defendant's airport, was not too uncertain to be enforced. cf. in Scotland, *R & D Construction Group Ltd v Hallam Land Management Ltd* [2010] CSIH 96, 2011 S.L.T. 236, where agreement for the sale of land part of which the vendor expected to acquire from a third party was conditional on vendor's agreeing a price "wholly acceptable" to him with the third party and the vendor undertook to use "all reasonable endeavours" in that regard. It was held that this term was enforceable but that the vendor was not in breach of it. In contrast, see *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB), [2014] Bus L.R. (D) 11, where A and B entered into an agreement to settle a dispute over their contract, by which A had agreed to sell a vintage car to B and to recondition the car. The settlement agreement required B to use reasonable efforts to enter into a contract with C to carry out the reconditioning work. The settlement agreement between A and B was not legally binding since, although it specified the object to be attained by the contract between B and C (i.e. the reconditioning of the car), it left open the price and other terms of that contract, which envisaged future negotiation between B and C when there were "no objective criteria by which the court could evaluate whether it was reasonable or unreasonable for [B] to refuse to agree to any particular terms on offer" (at [38]). It followed that the agreement between A and B was "no better than an agreement to agree" (at [46]). Andrews J. reached this conclusion with regret since she regarded it as "obvious that this [i.e. the settlement agreement] was objectively intended by the parties to be a binding and enforceable obligation" (at [47]).

[797.](#) See *Little v Courage* (1995) 70 P. & C.R. 469 at 475; *London & Regional Investments Ltd v TBI Plc* [2002] EWCA Civ 355 at [39]; *Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd* [2006] EWHC 1341, 107 Con. L.R. 1; *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [44]. For the distinction between an undertaking to use "best" and one to use "reasonable" endeavours, see *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 Lloyd's Rep. 325 at [34]–[35].

[798.](#) Example based on *Nissho Iwai Petroleum Co Inc v Cargill International SA* [1993] 1 Lloyd's Rep. 80, where such conduct was held to amount to a breach of a party's duty to cooperate in the performance (not in the formation) of a contract. cf. *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] 1 All E.R. (Comm) 49 at 158 (implied obligation to use "best endeavours" to conclude an agreement requires the party "not unreasonably to frustrate" its conclusion); for the basis of the duty to negotiate in this case, see above, n.765).

[799.](#) Above, para.2-143.

[800.](#) *Donwin Productions Ltd v EMI Films Ltd*, *The Times*, March 9, 1984 (not cited in *Walford v Miles* [1992] 2 A.C. 128).

[801.](#) *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 at [115]–[125], distinguishing *Walford v Miles*, above para.2-143, on the ground that, in the latter case, there was "no concluded agreement since everything was subject to contract" and that there was "no express agreement to negotiate in good faith" (at [120]). In the *Petromec* case, the point was "not essential to the disposition of the appeal" (at [115]). For further proceedings in the *Petromec* case, see above, para.2-123 n.611. cf. *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] B.L.R. 265 where clause 3.5 of the contract (set out at [14]) required the parties to "co-operate with each other in good faith". On the true construction of that clause there had been no breach of it (at [120], [143]; cf. at [153]).

[802.](#)

! *Emirates Trading Agency v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [2015] 1 W.L.R. 1145 at [63]–[64].

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 7. - Certainty of Terms

Requirement of certainty

2-147

⚠ An agreement may lack contractual force because it is so vague or uncertain that no definite meaning can be given to it without adding further terms. For example, in *G. Scammell & Nephew Ltd v Ouston*, ⁸⁰³ ⚠ the House of Lords held that an agreement to acquire goods “on hire-purchase” was too vague to be enforced since there were many kinds of hire-purchase agreements in widely different terms, so that it was impossible to specify the terms on which the parties had agreed. Similar reasoning may be applied where the agreement is expressed to be subject to a condition that depends on the satisfaction of one of the parties ⁸⁰⁴; the problems arising from such provisions are discussed in para.2-163, below.

Qualifications of the requirement of certainty

2-148

The courts do not expect commercial documents to be drafted with strict legal precision. The cases provide many examples of judicial awareness of the danger that too strict an application of the requirement of certainty could result in the striking down of agreements intended by the parties to have binding force. The courts are reluctant to reach such a conclusion, particularly where the parties have acted on the agreement. ⁸⁰⁵ As Lord Wright said in *Hillas & Co Ltd v Arcos Ltd* ⁸⁰⁶:

“Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law.”

In accordance with these principles, the courts have developed a number of qualifications to the requirement of certainty; these qualifications are stated in paras 2-149—2-154, below.

Custom and trade usage

2-149

Apparent vagueness may be resolved by custom. For example, a contract to load coal at Grimsby “on the terms of the usual colliery guarantee” was upheld on proof of the terms usually contained in such guarantees at Grimsby. ⁸⁰⁷ It has similarly been held that undertaking to grant a lease of a shop “in prime position” was not too uncertain to be enforced since the phrase was commonly used by persons dealing with shop property, so that its meaning could be determined by expert evidence. ⁸⁰⁸ On the other hand, agreements “subject to war clause”, ⁸⁰⁹ “subject to strike and lock-out clause” ⁸¹⁰ and “subject to force majeure conditions” ⁸¹¹ have been held too vague, as there was no evidence in any of the cases of any customary or usual form of such clauses or conditions.

Reasonableness

2-150

In *Hillas & Co Ltd v Arcos Ltd* ⁸¹² an agreement for the sale of timber “of fair specification” was made between persons well acquainted with the timber trade. The agreement was held binding on the grounds that, in these circumstances, the standard of reasonableness could be applied to give sufficient certainty to an otherwise vague phrase, since that phrase imported an objective standard for assessing the quality of the goods to be supplied. In contrast, in *Baird Textile Holdings Ltd v Marks & Spencer Plc* ⁸¹³ the court rejected the claim of a supplier of clothing to a retail chain that there was an implied contract between them not to terminate their long-standing relationship except on reasonable notice. There were “no objective criteria by which the court could assess what would be reasonable either as to quantity or price” ⁸¹⁴; hence none of the essential terms governing the supply of the goods could be determined by such criteria. An agreement to pay a “fair” sum may also lack contractual force where it states that the principles for determining what amounts to such a sum are to be settled by further negotiations between the parties. In one such case, ⁸¹⁵ a compromise agreement provided that A should pay to B a “fair” share of certain losses suffered by B and that the parties were to draw up a list of principles by which that “fair” share was to be determined. The description of the share as a “fair” one was said to be “simply the label which the parties put on the outcome which they hoped to achieve. There was no unqualified commitment to pay a fair share.” ⁸¹⁶ The compromise agreement was therefore merely an agreement to agree and had no contractual force. ⁸¹⁷

Duty to resolve uncertainty

2-151

An agreement containing a vague phrase may be binding because one party is under a duty to resolve the uncertainty. In one case an agreement to sell goods provided for delivery “free on board ... good Danish port”. It was held that the agreement was not too vague: it amounted to a contract under which the buyer was bound to select the port of shipment. ⁸¹⁸ Where delivery of goods was to be made “free on truck” in the country of destination and no place for delivery in that country was specified in the contract, it was again held that one of the parties was under a duty to specify that place; though in this case the duty was held to be on the seller since it was he who had made all the necessary arrangements with the ship on which the goods were to be carried to that country. ⁸¹⁹ An analogous principle is illustrated by *Durham Tees Valley Airport Ltd v Bmibaby Ltd* ⁸²⁰ where the agreement provided that the defendant airline would support “a minimum £2 based aircraft operation ... operating exclusively from” the claimant’s airport. Significant losses were incurred by the airline in the performance of the agreement and it discontinued its operations from the airport. The airline argued that the agreement was too uncertain to be enforced as it specified no minimum number of flights to be undertaken under it and as many operational details (such as the number of flights and their destinations) were left to the airline’s discretion. ⁸²¹ The Court of Appeal rejected these arguments and held that the agreement was sufficiently certain to be enforced and that the airline was in breach of it. The Court reached this result by construing the airline’s obligation to operate as being one to “fly commercially” ⁸²²; by concluding that “Token flights or a complete absence of any flights (which is this case) clearly would not amount to operating the aircraft” ⁸²³; by invoking the general principle that courts were reluctant to strike down what were obviously intended to be commercial agreements ⁸²⁴; and by making the point that it was not uncommon for such agreements to give one party or the other “a large degree of discretion” as to the conduct of its operations. ⁸²⁵ This reasoning resembles, but is not identical with, that discussed in para.2-150 above, by which the standard of

reasonableness may be applied to give certainty to otherwise vague phrases. The object of the process of construction applied in the present case is, strictly speaking, to give effect to the intention of the parties, while the standard of reasonableness would impose on them an external standard; but in practice the significance of this distinction is reduced by the reference to the commercial context in which the Court construed the obligation to “operate” the aircraft.

Meaningless and self-contradictory phrases

2-152

The court will make considerable efforts to give meaning to an apparently meaningless phrase ⁸²⁶, but even where these efforts fail, the presence of such phrases does not necessarily vitiate the agreement. In *Nicolene Ltd v Simmonds* ⁸²⁷ steel bars were bought on terms which were perfectly clear except for a clause which provided that the sale was subject to “the usual conditions of acceptance”. There being no such usual conditions, it was held that the phrase was meaningless, but that this did not vitiate the whole contract: the phrase was severable and could be ignored. A self-contradictory clause can be treated in the same way. Thus where an arbitration clause provided for arbitration of “any dispute” in London and of “any other dispute” in Moscow the court disregarded the clause and determined the dispute itself. ⁸²⁸ Such cases show that the question whether the inclusion of a meaningless clause vitiates the contract, or can be ignored, depends on the importance which the parties may be considered to have attached to it. If it is simply verbiage, not intended to add anything to an otherwise complete agreement, or if it relates to a matter of relatively minor importance, it can be ignored. But if the parties intend it to govern some vital aspect of their relationship its vagueness will vitiate the entire agreement.

Conflicting provisions

2-153

An agreement is not too uncertain to have contractual force merely because of a conflict between two of its terms if, as is often the case, the conflict can be resolved in the course of the normal adjudication of a contractual dispute. In *Scammell v Dicker*, ⁸²⁹ a consent order relating to a boundary dispute was alleged to be ineffective by reason of a conflict between the words of the order and a plan annexed to it. The Court of Appeal held that the order was not vitiated by uncertainty since it was “for the parties to resolve any disagreement as to interpretation” and if they failed to do so they would “go to tribunals and find the answer”. ⁸³⁰ The uncertainty can in such cases be resolved by the ordinary processes of construction.

Vagueness in a subsidiary term

2-154

It has been held that vagueness in one of the terms of an agreement did not of itself vitiate the agreement as a whole. ⁸³¹ The underlying assumption appears to be that the vague term related only to a subsidiary point ⁸³² so that there was no practical difficulty in enforcing the rest of the agreement.

Extrinsic evidence identifying the subject matter

2-155

Such evidence may cure an element of uncertainty on the face of a document. The point may be illustrated by an hypothetical example given by Lord Scott:

“A contract for the sale of Steart Farm, if in writing, signed by the parties and stating the

price, would not lack contractual certainty provided that evidence were available to identify the agricultural unit that constituted Steart Farm.”⁸³³

^{803.}

⚠ [1941] A.C. 251, described as “a rare case of uncertainty” in *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All E.R. 838 at [41]. See also *Davies v Davies* (1887) 36 Ch. D. 359; *Kingsley & Keith Ltd v Glynn Bros. (Chemicals) Ltd* [1953] 1 Lloyd’s Rep. 211; *Judge v Crown Leisure Ltd* [2005] EWCA Civ 571, [2005] I.R.L.R. 823 at [23]; *Kunicki v Hayward* [2016] EWHC 3199 (Ch) at [152] (citing this paragraph) and [154]; and below, para.2-149 at nn. 790—792.

^{804.}

e.g. *Montreal Gas Co v Vasey* [1900] A.C. 595; *Hofflinghouse & Co Ltd v C. Trade SA (The Intra Transporter)* [1986] 2 Lloyd’s Rep. 132; *Shipping Enterprises Ltd v Eckhart & Co K G (The Nissos Samos)* [1985] 1 Lloyd’s Rep. 378, 385; *Stabilad Ltd v Stephens & Carter Ltd (No.2)* [1999] 2 All E.R. (Comm) 651, 659 (“void for uncertainty”).

^{805.}

Brown v Gould [1977] Ch. 53, 57–58; *Tito v Waddell (No.2)* [1977] Ch. 106, 314; *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 A.C. 444; *Clement v Gibb* [1996] C.L.Y. 1209; *Hanjin Shipping Co Ltd v Zenith Chartering Corp (The Mercedes Envoy)* [1995] 2 Lloyd’s Rep. 559, 564; *Hackney L.B.C. v Thompson* [2001] L. & T. Rep. 7; *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1232, 95 Con. L.R. 55; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd’s Rep. 257 at [235], approved on appeal [2010] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788, especially at [22]; *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [32]; see also *Benourad v Compass Plc* [2010] EWHC 1882 (QB) at [106(d)]; and cf. *TTMI SARL v Statoil SA (The Sibohelle)* [2011] EWHC 1150 (Comm), [2011] 2 Lloyd’s Rep. 222 at [43], [47] (where the reason why the express negotiations had failed to give rise to a contract was not want of certainty but mistake, and the conduct of the parties in performing the transaction nevertheless supported the inference that a contract had been concluded between them). See also *Dhananiv Crasnianski* [2011] EWHC 926 (Comm), [2011] 2 All E.R. (Comm) 799 at [70] (fact that work has been done under the contract a “relevant factor” but not a decisive one, so that in that case no contract had been concluded: below, para.2-194). The reluctance referred to in the text above may account for the lack of “enthusiasm” with which Dyson L.J. and Sir Robin Auld in *Schweppe v Harper* [2008] EWCA Civ 442 at [75] and [82] concluded that the agreement in that case was too uncertain to be enforced; and for Ward L.J.’s dissent in that case.

^{806.}

(1932) 147 L.T. 503, 514; cf. *Rahcassi Shipping Co v Blue Star Line* [1969] 1 Q.B. 176 (agreement for arbitration “by commercial men and not lawyers” upheld); *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] Q.B. 933; *Tropwood AG of Zug v Jade Enterprises Inc (The Tropwind)* [1981] 1 Lloyd’s Rep. 232; *Deutsche Schachtbau und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Co* [1990] 1 A.C. 295, 306; reversed on other grounds, at 329 et seq.; *Grace Shipping Inc v C.F. Sharpe (Malaysia) Pte* [1987] 1 Lloyd’s Rep. 207; *Didymi Corp v Atlantic Lines & Navigation Co Inc* [1987] 2 Lloyd’s Rep. 166; affirmed [1988] 2 Lloyd’s Rep. 108 (above, para.2-137); *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Corp (No.2)* [1990] 2 Lloyd’s Rep. 526, 546; *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd’s Rep. 445, 455; *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All E.R. 838 at [31]; *Halpern v Halpern* [2006] EWHC 603 (Comm), [2006] 2 Lloyd’s Rep. 83 at [115], affirmed on this point [2007] EWCA Civ 291, [2007] 3 All E.R. 478 at [50]; *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyd’s Rep. 68 at [54], [88] (paras 2-122 above and 2-151 below); *Astra Zeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574 (Comm) at [31]; *Trebor Bassett Holdings Ltd v ADT Fire & Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661 at [150]. See also *Fridman* (1960) 76 L.Q.R. 521.

^{807.}

Shamrock S.S. Co v Storey & Co (1899) 81 L.T. 413; cf. *Hart v Hart* (1881) 18 Ch. D. 670; *Bayham v Phillips Electronics (UK) Ltd*, *The Times*, July 19, 1995 where uncertainty in a long-term health insurance agreement was resolved by reference to circumstances existing at

the time of its formation.

- [808.](#) *Ashburn Anstalt v Arnold* [1989] Ch. 1, 27, overruled, on another ground, in *Prudential Assurance Co Ltd v London Residuary Body* [1992] A.C. 386.
- [809.](#) *Bishop & Baxter Ltd v Anglo-Eastern Trading Co* [1944] K.B. 12.
- [810.](#) *Love & Stewart Ltd v S. Instone Ltd* (1917) 33 T.L.R. 475.
- [811.](#) *British Electrical, etc., Industries v Patley Pressings Ltd* [1953] 1 W.L.R. 280.
- [812.](#) (1932) 147 L.T. 503 (and see above, para.2-137); *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 Q.B. 699; cf. *G.L.C. v Connolly* [1970] 2 Q.B. 100; *Finchbourne v Rodriguez* [1976] 3 All E.R. 581; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601; *Malcolm v Chancellor, Masters and Scholars of the University of Oxford*, *The Times*, December 19, 1990; *Hackney LBC v Thompson* [2001] L.&T. Rep. 7 (agreement to pay "the due proportion of the reasonably estimated amount" held to impose an obligation to pay a "fair and reasonable" proportion); *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep. 76 (above, para.2-122); *Scammell v Dicker* [2005] EWCA Civ 405, [2005] All E.R. 838 at [42] ("reasonably certain"); *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 at [64], above paras 2-120, 2-121, where the standard of reasonableness was invoked to deal with the failure of an agreement to specify the time of performance; *Furmans Electrical Contractors v Elecref Ltd* [2009] EWCA Civ 170 at [33], where the standard of reasonableness was used to make good the parties' failure to specify the number of hours per day for which services were to be supplied; *K G Bunkergesellschaft für Mineralöle m b h [sic] v Petroplus Marketing AG (The Mercini Lady)* [2009] EWHC 1088 (Comm), [2009] 2 All E.R. (Comm) 827 at [40], [41] (implied term not too uncertain because it made use of the standard of reasonableness; on appeal it was held, for other reasons, that no term such as that alleged could be implied: [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442). cf. the position where the terms of the agreement are such as to negative contractual intention: below, para.2-185.
- [813.](#) [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737.
- [814.](#) [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [30]; cf. *Schweppe v Harper* [2008] EWCA Civ 442 at [72] ("the concept of reasonable finance is too uncertain to be given any practical meaning"), and at [66], [80], [81]. In that case, C had agreed with D to obtain an annulment of D's bankruptcy in return for a fee of £50,000 to be paid by D. It was a "fundamental element" (at [59]) of the agreement that C should obtain the necessary finance from a third party. It was held by a majority that the agreement was too uncertain to have contractual force as the agreement did not specify the amount of the loan or the terms of repayment; and it was impossible for the court to determine these matters by applying the standard of reasonableness; and see below, para.2-172. See also *Dhanani v Crasnianski* [2011] EWHC 926, [2011] 2 All E.R. (Comm) 799 at [105] ("no objective criteria").
- [815.](#) *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 806, [2005] 2 Lloyd's Rep. 597.
- [816.](#) *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2005] EWCA Civ 806 at [24].
- [817.](#) See above, para.2-133.
- [818.](#) *David T. Boyd & Co v Louis Louca* [1973] 1 Lloyd's Rep. 209; cf. *Siew Soon Wah v Yong Tong Hong* [1973] A.C. 836; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 1 W.L.R. 591, above, para.2-119; *Palmer v East and North Herefordshire NHS Trust* [2006] EWHC 1997, [2006] Lloyd's Rep. Med. 427 where an agreement between a consultant surgeon and the defendant Trust provided for his being found a "suitable medical attachment" at another hospital. Failure to identify that hospital in the agreement did not deprive it of contractual force since the identification was a contingency to be satisfied in the performance of the contract.
- [819.](#) *Bulk Trading Corp Ltd v Zenziper Grains & Feedstuffs* [2001] 1 Lloyd's Rep. 357.

- [820.](#) [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep. 68.
- [821.](#) [2010] EWCA Civ 485 at [90].
- [822.](#) [2010] EWCA Civ 485 at [57].
- [823.](#) [2010] EWCA Civ 485 at [57].
- [824.](#) [2010] EWCA Civ 485 at [54].
- [825.](#) [2010] EWCA Civ 485 at [91].
- [826.](#) *Tropwood A.G. of Zug v Jade Enterprises Inc (The Tropwind)* [1982] 1 Lloyd's Rep. 232.
- [827.](#) [1953] 1 Q.B. 543; discussed in *Heisler v Anglo-Dal Ltd* [1954] 1 W.L.R. 1273 and applied in *Michael Richards Properties Ltd v St Saviour's* [1975] 3 All E.R. 416; see also *Slater v Raw*, *The Times*, October 15, 1977.
- [828.](#) *E. J. R. Lovelock v Exportles* [1968] 1 Lloyd's Rep. 163. cf. *Star Shipping A/S v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd's Rep. 445 where a clause for "arbitration in Beijing or London in defendant's option" was upheld.
- [829.](#) [2005] EWCA Civ 405, [2005] 3 All E.R. 838.
- [830.](#) [2005] EWCA Civ 405 at [31].
- [831.](#) *Pena v Dale* [2003] EWHC 3166 (Ch), [2004] 2 B.C.L.C. at 508 at [96].
- [832.](#) In *Pena v Dale*, above n.812, an option agreement which was otherwise clear provided that the grantor would "endeavour to issue these options ... in the most tax efficient manner". The vagueness of this term was held to be no bar to the enforcement of the agreement.
- [833.](#) *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [18]. See also *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [73] and *Alhamrani v Alhamrani* [2014] UKPC 37 at [23]–[24] where the Privy Council said that "evidence of the context or factual matrix is admissible on the question whether the agreement is ambiguous". If it is ambiguous, the court would then consider all permissible evidence, including custom, which might bear on the underlying question of what the parties intended to agree.

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Section 8. - Conditional Agreements
(a) - Classification

Introductory

2-156

An agreement is conditional if its operation depends on an event which is not certain to occur. Discussions of this topic are made difficult by the fact that in the law of contract the word "condition" bears many senses: it is "a chameleon-like word which takes on its meaning from its surroundings".⁸³⁴ At this stage, we are concerned with only one of these meanings; but to clear the ground it is necessary to draw a number of preliminary distinctions.

Contingent and promissory conditions

2-157

The word "*condition*" may refer either to an *event*, or to a *term* of a contract (as in the phrase "conditions of sale"⁸³⁵). Where "*condition*" refers to an event, that event may be one of the following.

(1)

It may refer to an occurrence which neither party undertakes to bring about. Where, for example, a contract requires A to work for B, and B to pay A £50, "if it rains tomorrow," the obligations of both parties are contingent on the happening of the specified event. This may therefore be described as a *contingent* condition.

(2)

It may refer to the performance by one party of his undertaking. Where, for example, A agrees to work for B at a weekly wage payable at the end of the week, the contract is immediately binding on both parties, but B is not liable to pay until A has performed his promise to work. Such performance is a condition of B's liability, and, as A has promised to render it, the condition may be described as *promissory*.⁸³⁶

(3)

An intermediate situation arises in the case of a unilateral contract, in which performance by the promisor becomes due on the performance by the promisee of the stipulated act (such as walking to York) or abstention (such as not smoking for a year).⁸³⁷ Since it follows from the nature of such a contract that the promisee has not promised to render the stipulated performance, the condition on which his entitlement depends⁸³⁸ is properly classified as contingent.

Our concern here is with contingent conditions.

Conditions precedent and subsequent

2-158

Contingent conditions may be precedent or subsequent.⁸³⁹ A condition is precedent if it provides that the contract is not to be binding until the specified event occurs. It is subsequent if it provides that a previously binding contract is to determine on the occurrence of the specified event: e.g. where A contracts to pay an allowance to B until B marries.⁸⁴⁰ A provision entitling a party to terminate a contract on the occurrence or non-occurrence of a specified event⁸⁴¹ would likewise amount to, or give rise to, a condition subsequent.

^{834.} *Skips A/S Nordheim v Petrofina SA (The Varenna)* [1984] Q.B. 599, 618.

^{835.} *Property and Bloodstock Ltd v Emerton* [1968] Ch. 94, 118.

^{836.} For the distinction between *promissory* and *contingent* condition see Chalmers, *Sale of Goods*, 18th edn (1981), App.2, Note A; *Roadworks (1952) Ltd v Charman* [1994] 2 Lloyd's Rep. 99, 103; *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209, 215, 218. The discussion in para.2–148 of the 30th edition of this book (para.2–157 of this edition) is cited with apparent approval in *UK Power GmbH v Kuok Oils and Grains Pte* [2009] EWHC 1940, [2009] 2 Lloyd's Rep. at [14]; see also at [15], [22]; it was there held that stipulations to requiring (1) a buyer of goods to open a transferable letter of credit and (2) the seller to provide a "Proof of Product" certificate were promissory, as opposed to contingent, conditions. Similarly, in *Vitol SA v Conoil Plc* [2009] EWHC 1144 (Comm), [2009] 2 Lloyd's Rep. 466 a contract of sale required a buyer to pay by letter of credit and provided that the seller was not obliged to discharge the goods before receipt of the letter; and it was held that the issue of the letter of credit was not "a condition precedent to the contract becoming enforceable" (at [16]). In the terminology of paras 2-157 and 2-158 of the text above, it was a promissory, not a contingent, condition.

^{837.} See above, para.2-082.

^{838.} e.g. *Soulsbury v Soulsbury* [2007] EWCA Civ 969 at [50]; above, para.2-084; below n.821.

^{839.} Conditions precedent are also sometimes called "suspensive", and conditions subsequent "resolutive" conditions: see Treitel, *Remedies for Breach of Contract* (1988) 262–263. In *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 580 a condition there under discussion was said to be "a true condition subsequent or suspensive condition". "Subsequent" here seems to be a misprint for "precedent". Conversely, in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 1, [2007] 2 A.C. 353 a time charter contained a war clause by which each party was to have a right to cancel if war broke out between specified countries. This clause was described at [59], [74] and [82] as a "suspensive" condition. With great respect, it is submitted that a clause of this kind (entitling parties to bring contractual obligations to an end) is more properly described as resolutive. For difficulties in drawing the distinction between the two types of condition, see below n.821, para.2-162, n.834 and para.2-161 at nn.832, 833.

^{840.} cf. *Brown v Knowsley B.C.* [1986] I.R.L.R. 102 (appointment to "last only as long as sufficient funds were provided" from specified sources); (semble) *Gyllenhammar & Partners International v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403 (contract to "become null and void" if certain consents were not obtained) and *Jameson v CEBG* [2000] 1 A.C. 455 at 477 (settlement of tort claim immediately binding but subject to implied resolutive condition that it was to become void if the agreed amount was not paid); *Covington Marine Corp v Xiamen Shipbuilding Industry Corp* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748 at [49] (contract to be

“automatically rescinded” if parties to a shipbuilding contract could not reach agreement within 20 days as to the supplier of the main engine). The distinction between conditions precedent and subsequent was criticised by Holmes (*The Common Law* (1881), 371); for discussion of this criticism, see Treitel, *Remedies for Breach of Contract* (1988), 263–264. English authority recognises that the distinction is by no means always clear cut: see para.2-161 below at n.833. In *Soulsbury v Soulsbury* [2007] EWCA Civ 969, above, para.2-084, H promised W to leave her £100,000 if W (1) did not enforce or seek to enforce a maintenance order (obtained in divorce proceedings) against him during their joint lives and (2) she survived H (at [10]). These conditions were described as “subsequent” (at [22], where the second is said simply to be the death of H, without any reference to W’s surviving H). Since H’s estate did not become liable for the £100,000 until both conditions had been satisfied, it might seem that they should more properly have been classified as *precedent*. Their description as “subsequent” may reflect the facts that, once W had begun the stipulated forbearance, H could no longer revoke his promise (above, para.2-084) and that, if W had, after having begun to forbear, *then* sought to enforce the order, she would have lost any right to *damages* in respect of any purported revocation by H which she might have had (before her change of course) by virtue of her earlier forbearance (see above, para.2-091). But her right to *payment of the £100,000* as an agreed sum would not have accrued until both of the above conditions had been fully satisfied. The starting point for assessing damages would no doubt be the £100,000; but that sum would have to be discounted: e.g. (if the action were brought during the parties’ joint lives), by the risk of W’s not surviving H and by the factor of accelerated payment.

- [841.](#) See the further provision in the contract in the *Vitol* case (above, para.2-157 n.817) giving the seller the right to terminate the contract if the letter of credit were not made operative by a specified date.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 8. - Conditional Agreements

(b) - Degrees of Obligation

Effects of agreements subject to contingent conditions precedent: in general

2-159

Where an agreement is subject to a contingent condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by him ⁸⁴²: for example, a seller is not bound to deliver and a buyer is not bound to pay. Nor, in such a case, does either party undertake that the condition will occur. But an agreement subject to such a condition may impose some degree of obligation on the parties or on one of them. Whether it has this effect, and if so what degree of obligation is imposed, depends on the true construction of the term specifying condition. ⁸⁴³ Various possible degrees of obligation are discussed in paras 2-160—2-164 below.

Unrestricted right to withdraw

2-160

One possibility is that, before the event occurs, each party is free to withdraw from the agreement. In *Pym v Campbell* ⁸⁴⁴ an agreement for the sale of a patent was executed, but the parties at the same time agreed that it should not “be the agreement” unless a third party approved of the invention. He did not approve, and it was held that the buyer was not liable for refusing to perform. The written agreement was “not an agreement at all”. ⁸⁴⁵ If this is taken literally, either party could have withdrawn even before the third party had given his opinion.

Restricted right to withdraw

2-161

A second possibility is that, before the event occurs, the main obligations have not accrued; but that, so long as the event can still occur, one (or both) of the parties cannot withdraw. ⁸⁴⁶ Thus in *Smith v Butler* ⁸⁴⁷ A bought land from B on condition that a loan to B (secured by a mortgage on the premises) would be transferred to A. ⁸⁴⁸ It was held that A could not withdraw before the time fixed for completion: he was bound to wait until then to see whether B could arrange the transfer. However, if it becomes clear that the condition has not occurred, or that it can no longer occur, within the time specified in the contract, ⁸⁴⁹ the parties will be under no further obligations under the contract. In such a case, the effect of the non-occurrence of the condition is that the parties are “no longer bound” ⁸⁵⁰ by the contract, or that the contract is “discharged”. ⁸⁵¹ What the parties have called a “condition precedent” can thus operate as, or have the effect of, a condition subsequent. ⁸⁵²

Duty not to prevent occurrence of the event

2-162

A third possibility is that, before the event occurs, the main obligations have not accrued; but that in the meantime neither party must do anything to prevent the occurrence of that event. Thus in *Mackay v Dick* ⁸⁵³ an excavating machine was sold on condition that it could excavate at a specified rate on the buyer's property. The buyer's refusal to provide facilities for a proper trial was held to be a breach. Similarly, the seller would have been in breach, had he refused to subject the machine to the proper test. A party's refusal to perform an implied obligation to co-operate with the other has been held to be actionable on the same principle. ⁸⁵⁴ That principle is further illustrated by a case ⁸⁵⁵ in which a professional footballer was transferred for a fee, part of which was to be paid only after he had scored 20 goals. Before he had done so, the new club dropped him from their first team, and they were held to be in breach as they had not given the player a reasonable opportunity to score the 20 goals. The duty not to prevent the occurrence of the condition has been explained as resting on an implied term and this explanation limits the scope of the duty in a number of ways. For example, the implied term may be only to the effect that a party will not *deliberately* prevent the occurrence of the condition ⁸⁵⁶, or (even more narrowly) that he will not *wrongfully* do so. ⁸⁵⁷ The latter type of implication may allow a party to engage in certain kinds of deliberate prevention but not in others: for example, it may allow a company which has promised an employee the opportunity of earning a bonus to deprive him of that opportunity by going out of business, but not, in general, by simply dismissing him, before the bonus has become due ⁸⁵⁸; but this general rule may be displaced by an express term of the contract: e.g. by one providing that the employee "must be employed by the [employer] in order to receive the bonus". ⁸⁵⁹

Condition of "satisfaction"

2-163

The possibility of excluding the implied term discussed in para.2-162 above by an express contrary provision ⁸⁶⁰ is further illustrated by a provision making the operation of a contract depend on the "satisfaction" of one of the parties with the subject-matter or other aspects relating to the other's performance. ⁸⁶¹ Thus it has been held that there was no contract where a house was bought "subject to satisfactory mortgage" ⁸⁶²; and where a boat was bought "subject to satisfactory survey" ⁸⁶³ it was held that the buyer was not bound if he expressed his dissatisfaction, ⁸⁶⁴ in spite of the fact that such expression was a deliberate act on his part which prevented the occurrence of the condition. The same is true where goods are bought on approval and the buyer does not approve them, ⁸⁶⁵ and where an offer of employment is made "subject to satisfactory references", and the prospective employer does not regard the references as satisfactory. ⁸⁶⁶ There is some apparent conflict in the authorities on the question whether the law imposes any restriction on the freedom of action of the party on whose satisfaction the operation of the contract depends. In one case ⁸⁶⁷ a proposed royalty agreement relating to the use by a manufacturer of an invention was "subject to detailed evaluation of production and marketing feasibility" by the manufacturer. It was held that his discretion whether to enter into the contract was "unfettered by any obligation to act reasonably or in good faith" ⁸⁶⁸ and that, as his satisfaction had not been communicated ⁸⁶⁹ to the other party, the agreement had not acquired contractual force. On the other hand, where a ship was sold "subject to satisfactory completion of two trial voyages" it was said that such a stipulation was to be construed as "subject to bona fides". ⁸⁷⁰ The distinction between the two lines of cases turns, ultimately, on the construction of the agreement. Even if this requires the discretion to be exercised in good faith, it does not follow that it must be exercised reasonably; the matter may be left to the relevant party's "subjective decision". ⁸⁷¹ It has also been held that the party on whose satisfaction the operation of the contract depends must at least provide facilities for, or not impede, the inspection referred to in the agreement. ⁸⁷² Of course if the result of the inspection is unsatisfactory, the principal obligation of the contract will not take effect. ⁸⁷³

Duty of reasonable diligence to bring about the event

2-164

A fourth possibility is that, before the event occurs, the main obligations do not accrue but that one of

the parties undertakes to use reasonable efforts to bring the event about (without absolutely undertaking that his efforts will succeed). This construction was applied, for instance, where land was sold subject to the condition that the purchaser should obtain planning permission to use the land as a transport depot: he was bound to make reasonable efforts to obtain the permission, but he was free from liability when those efforts failed.⁸⁷⁴ Similarly, where goods are sold “subject to export (or import) licence”, the party whose duty it is to obtain the licence⁸⁷⁵ does not prima facie promise absolutely that a licence will be obtained⁸⁷⁶; but only undertakes to make reasonable efforts to that end.⁸⁷⁷ The principal obligations to buy and sell will not take effect if no licence is obtained⁸⁷⁸; but if the party who should have made reasonable efforts has failed to do so he will be liable in damages,⁸⁷⁹ unless he can show that any such efforts, which he should have made would (if made) have necessarily been unsuccessful.⁸⁸⁰ The same principles have been applied where an agreement was made “subject to the approval of the court”; and where an agreement was made to assign a lease which could be assigned only with the consent of the landlord. In such cases the requisite approval or consent must be sought; but the main obligations do not accrue until the approval or consent is given,⁸⁸¹ and if it is refused the principal obligation will not take effect.⁸⁸²

Principal and subsidiary obligations

2-165

It will be seen that, in cases falling within the categories discussed in paras 2-161—2-164 above, a distinction must be drawn between two types of obligation: the principal obligation of each party (e.g. to buy and sell) and a subsidiary obligation, i.e. one not to withdraw, not to prevent occurrence of the condition, or to make reasonable efforts to bring it about. One view is that the party who fails to perform the subsidiary obligation is to be treated as if the condition had occurred; and that he is then liable on the principal obligation. Thus in *Mackay v Dick*⁸⁸³ the buyer was held liable *for the price*; but there was no discussion as to the remedy. In principle it seems wrong to hold him so liable, for such a result ignores the possibility that, in that case, the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided. It is submitted that the correct result in cases of this kind is to award *damages* for breach of the subsidiary obligation: in assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach.⁸⁸⁴ To hold the party in breach liable for the full performance promised by him, on the fiction that the condition had occurred, seems to introduce into this branch of the law a punitive element that is inappropriate to a contractual action. The most recent authority rightly holds that such a doctrine of “fictional fulfilment” of a condition does not form part of English law.⁸⁸⁵

Waiver of condition

2-166

Where a condition is inserted entirely for the benefit of one party, that party may waive the condition. If he does so, he can then sue⁸⁸⁶ and be sued⁸⁸⁷ on the contract as if the condition had occurred. Obviously this rule does not apply to cases falling within the category of cases discussed in para.2-160 above, in which there is no contract at all before the condition occurs. Nor can the party for whose benefit the condition was inserted waive it (so as to enforce the contract) after the other party has duly exercised a right, conferred by one of its other terms, to terminate the contract.⁸⁸⁸

^{842.} In *Schweppe v Harper* [2008] EWCA Civ 442 Dyson L.J. at [64] referred to the text above (in a previous edition of this book) with apparent approval.

^{843.} For special difficulties where the condition precedent is implied, see *Bentworth Finance Ltd v Lubert* [1968] 1 Q.B. 680; *Carnegie* 31 M.L.R. 78.

^{844.} (1856) 6 E. & B. 370.

845. (1856) 6 E. & B. 370 at 374.
846. A fortiori, a party cannot withdraw after the event has actually occurred. This was the position in *McGahon v Crest Nicholson Regeneration Ltd* [2010] EWCA Civ 842, [2010] 2 E.G.L.R. 84 where a contract gave either party the right to rescind if a specified event had not occurred by June 1. After that time, one of the parties gave a notice to rescind but at the time of the notice the event had occurred. It was held that the contract no longer allowed such a notice to be given after the specified event had occurred.
847. [1900] 1 Q.B. 694, cf. *Felixstowe Dock & Ry Co v British Transport Docks Bd* [1976] 2 Lloyd's Rep. 656; *Alan Estates Ltd v W. G. Stores Ltd* [1982] Ch. 511, 520; *Spectra International Plc v Tiscali UK Ltd* [2002] EWHC 2084 (Comm) at [119]. See also *Lomas v JFB Firth Rixon Inc* [2012] EWCA Civ 419, [2012] 2 All E.R. (Comm) 1076 at [29]–[30] accepting the view of Austin J. in *Simms v TXU Electricity Ltd* [2003] NSWSC 1169, (2003) 204 A.L.R. 659 at [12] that, where a “payment obligation” was subject to a condition precedent, “it might be said (with only approximate accuracy) that the payment obligation is ‘suspended’ while the condition remains unfulfilled ...”; cf. *Gold Group Properties v BDW Properties Ltd* [2010] EWHC 323, [2010] B.L.R. 235 at [58]: “a *binding* contract which *suspends* some or all of the obligations of one or both parties pending fulfilment of the condition” (italics supplied).
848. On agreements “subject to finance,” see Coote, 40 Conv. N.S. 37; Furmston, 3 O.J.L.S. 438, discussing *Meehan v Jones* (1982) 149 C.L.R. 571.
849. There is some judicial support for the view that if a conditional contract (of professional indemnity insurance) specified no time by or within which the condition (to which the insurer's liability was subject) must occur, then the condition would have to be satisfied within a reasonable time: see *Beazley Underwriting Ltd v Travellers Companies Inc* [2011] EWHC 1520 (Comm), [2012] 1 All E.R. (Comm) 1241 at [185]; though, as the same passage goes on to point out, “[t]hat would leave the assured in a somewhat precarious position”.
850. *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep. 418, 428–429; affirmed on other grounds [1999] 1 Lloyd's Rep. 483; *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209, 215.
851. *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209 at 218.
852. *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209 at 221, 224. And see n.834 below.
853. (1881) 6 App. Cas. 251. The condition is described as subsequent in *Colley v Overseas Exporters* [1921] 3 K.B. 302, 308. cf. also *Shipping Corp of India v Naviera Letasa* [1976] 1 Lloyd's Rep. 132 and *C.I.A. Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep. 598; *South West Trains Ltd v Wightman*, *The Times*, January 14, 1998. The “principle in *Mackay v Dick*” would not apply if the parties had not reached agreement on the matter alleged to have been prevented: see *Covington Marine Corp v Xiamen Shipbuilding Industry Co* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748 at [56] (where the actual decision was that such agreement had been reached). For exclusion of the duty by express contrary provision, see below, para.2-163.
854. *Hudson Bay Apparel Brands LLC v Umbro International Ltd* [2009] EWHC 2861 (Ch), [2010] E.T.M.R. 15 at [119], [128], [136] and [140].
855. *Bournemouth & Boscombe Athletic F.C. v Manchester United F.C.*, *The Times*, May 22, 1980. cf. *CEL Group Ltd v Nedlloyd Lines UK Ltd* [2003] EWCA Civ 1716, [2004] 1 All E.R. (Comm) 689, where the contract was not in terms conditional but the court applied a similar principle to that stated in the text above by virtue of the rule stated in para.14-015 below.
856. See *Blake & Co v Sohn* [1969] 1 W.L.R. 1412.
857. See *Thompson v ASDA-MFI Group Plc* [1988] Ch. 241. A party would not act “wrongfully” for

the present purpose merely by reason of having failed to use its best endeavours to reach agreement on matters left outstanding: see the *Covington* case, above n.834, at [56].

- [858.](#) Example based on *Thompson v ASDA-MFI Group Plc*, above.
- [859.](#) *Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350, [2011] I.R.L.R. 163 at [43], [45]–[50].
- [860.](#) See *Micklefield v S.A.C. Technology Ltd* [1990] 1 W.L.R. 1002; cf. *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep. 483; *Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350, [2011] I.R.L.R. 163; and see below, para.2-185.
- [861.](#) This sentence (in a previous edition of this book) is cited with approval in *Schweppe v Harper* [2008] EWCA Civ 442 at [70].
- [862.](#) *Lee-Parker v Izett (No.2)* [1975] 1 W.L.R. 775; distinguished in *Janmohammed v Hassam*, *The Times*, June 10, 1976.
- [863.](#) *Astra Trust Ltd v Adams & Williams* [1969] 1 Lloyd's Rep. 81 doubted in *Varverakis v Compagnia de Navegacion Artico SA (The Merak)* [1976] 2 Lloyd's Rep. 250, 254 and in *Ee v Kahar* (1979) 40 P. & C.R. 223 (as to which see below, n.853).
- [864.](#) But if the buyer declared his satisfaction the seller would be bound even though the survey was not objectively satisfactory: *Graham v Pitkin* [1992] 1 W.L.R. 403, 405.
- [865.](#) cf. Sale of Goods Act 1979 s.18 r.4.
- [866.](#) *Wishart v National Association of Citizens' Advice Bureaux* [1990] I.C.R. 794.
- [867.](#) *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651.
- [868.](#) *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651, 662.
- [869.](#) For the requirement of communication see *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651, 660; the requirement may be satisfied by conduct from which satisfaction can be inferred, e.g. where a buyer of goods on approval retains them without notifying rejection for more than the stipulated or a reasonable time: Sale of Goods Act 1979 s.18 r.4(b).
- [870.](#) *Albion Sugar Co v William Tankers (The John S. Darbyshire)* [1977] 2 Lloyd's Rep. 457, 464; cf. *BV Oliehandel Jongkind v Coastal International Ltd* [1983] 2 Lloyd's Rep. 463; *The Nissos Samos* [1985] 1 Lloyd's Rep. 378, 385; cf. *Star Steamship Society v Beogradska Plovidba (The Junior K)* [1988] 2 Lloyd's Rep. 583, 589 (where the words were held to negative contractual intention). See also *El Awadi v Bank of Credit & Commerce International SA* [1990] 1 Q.B. 606, 619; and, in an analogous context, *Abu Dhabi National Tanker Co v Product Star Shipping Co (The Product Star (No.2))* [1993] 1 Lloyd's Rep. 397, 404; *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151, [2007] 2 All E.R. (Comm) 825 at [42]–[45], [70].
- [871.](#) *Stabilad Ltd v Stephens & Carter Ltd (No.2)* [1999] 2 All E.R. (Comm) 651 at 659; *Jani-King (GB) Ltd v Pula Enterprises* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 457 at [35]–[36]; cf. *Schweppe v Harper* [2008] EWCA Civ 442 at [71]–[72]; *Humphreys v Norilsk Nickel International (UK) Ltd* [2010] EWHC 1867 (QB), [2010] I.R.L.R. 976 at [38].
- [872.](#) *Varverakis v Compagnia de Navegacion Artico SA (The Merak)* [1976] 2 Lloyd's Rep. 250; cf. *Ee v Kahar* (1979) 40 P. & C.R. 223 (where the sale was simply “subject to survey”—omitting the word “satisfactory”—thus falling, it is submitted, within the principle of *Mackay v Dick*, above n.834).
- [873.](#) As in *Albion Sugar Co v Williams Tankers (The John S. Darbyshire)* [1977] 2 Lloyd's Rep. 457.
- [874.](#) *Hargreaves Transport Ltd v Lynch* [1969] 1 W.L.R. 215 (condition not satisfied); *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch. 424 (similar condition satisfied); cf. *Fisher v*

- Tomatousos* [1991] 2 E.G.L.R. 204; *Jolley v Carmel Ltd* [2000] 2 E.G.L.R. 153 (buyer who was required by the contract to make reasonable efforts to get planning permission under no duty to get it within a reasonable time). cf. *Tesco Stores Ltd v Gibson* (1970) 214 E.G. 835 (no obligation on purchaser to apply for planning permission).
875. As to which party has this duty, see *H. O. Brandt & Co v H. N. Morris & Co* [1917] 2 K.B. 784; *AV Pound & Co v M. W. Hardy & Co* [1956] A.C. 588; Bridge, *Benjamin's Sale of Goods* 8th edn (2010), paras 18–352—18–355.
876. The prima facie rule may be excluded by express words which, on their true construction, impose an absolute duty; e.g. *Peter Cassidy Seed Co Ltd v Osuustukkukauppa* [1957] 1 W.L.R. 273; *C. Czarnikow Ltd v Centrale Handlu Zagranicznego "Rolimpex"* [1979] A.C. 351, 371; *Congimex Companhia Geral, etc., SARL v Tradax Export SA* [1983] 1 Lloyd's Rep. 250; *Pagnan SpA v Tradax Ocean Transport SA* [1987] 3 All E.R. 565; Yates and Carter, 1 J.C.L. 57. See also *B.S. & N. Ltd (BVI) v Micado Shipping Ltd (The Seaflower)* [2000] 2 Lloyd's Rep. 37, a charterparty case in which the issue was whether failure to perform a "guarantee" that the shipowner would obtain a third party's approval amounted to a repudiation. A negative answer was given to this question, but it was held in further proceedings that the "guarantee" was a promissory condition, so that failure by the shipowner to obtain the approval justified rescission by the charterer: [2001] 1 Lloyd's Rep. 341. There was no issue as to the standard of the owner's duty, but it seems to have been assumed that the duty was strict (i.e. not merely one of diligence).
877. *Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd* [1917] 2 K.B. 679; *Coloniale Import-Export v Loumidis & Sons* [1978] 2 Lloyd's Rep. 560; *Overseas Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep. 608; *Gamerco SA v I.C.M./Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226, 1231. Where the contract is expressly subject to the approval of a public authority, there may not even be a duty to make reasonable efforts to secure that approval: see *Gyllenhammar Partners International v Sour Brodegradevna Industria* [1989] 2 Lloyd's Rep. 403. For the standard of duty, see generally Bridge, paras 18–356—18–374.
878. *Charles H. Windschuegl Ltd v Alexander Pickering & Co Ltd* (1950) 84 Ll.L. Rep. 89, 92–93; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497, 501; cf. the cases on sales of goods "to arrive" discussed in Bridge, paras 21–023—21–028.
879. e.g. *Malik v C.E.T.A.* [1974] 1 Lloyd's Rep. 279; *Agroexport v Cie. Européenne de Céréales* [1974] 1 Lloyd's Rep. 499.
880. See Bridge, para.18–363; *Overseas Buyers Ltd v Granadex SA*, above, n.858 at 612.
881. *Smallman v Smallman* [1972] Fam. 25. Contrast *Soulsbury v Soulsbury* [2007] EWCA Civ 969, where the agreement, though subject to the conditions described in para.2-158 n.821 above, was not subject to any further condition of approval by the court, and so became enforceable when "the events upon which payment depended came to be fulfilled" (at [46]).
882. *Shires v Brock* (1977) 247 E.G. 127.
883. (1881) 6 App. Cas. 251, above, para.2-161.
884. *Bournemouth & Boscombe Athletic F.C. v Manchester United F.C., The Times*, May 22, 1980; cf. *The Blankenstein* [1985] 1 W.L.R. 435; *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] Q.B. 290; *George Moundreas & Co SA v Navimpex Centrala Navala* [1985] 2 Lloyd's Rep. 515; *Orient Overseas Management & Finance Ltd v File Shipping Co Ltd (The Energy Progress)* [1993] 1 Lloyd's Rep. 355, 358.
885. *Thompson v ASDA-MFI Group Plc* [1988] Ch. 241, 266 (where the condition was said at 251 to be subsequent); and see *Little v Courage Ltd* (1995) 70 P. & C.R. 469, 474. In *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 Lord Sumption S.C.J. (dissenting) refers at [131] to: "the doctrine of deemed performance endorsed by the House of Lords in *Mackay v Dick* (1881) 6 App. Cas. 251, according to which a party who is prevented by the non-co-operation of the counter party from satisfying a condition precedent to his right to

receive remuneration may be deemed to have earned it notwithstanding the condition". But he refers to that doctrine only to make the point that "the courts have never applied [the doctrine] to contracts of employment" ([2012] UKSC 63 at [131]); and his attention appears not to have been drawn to the rejection of the doctrine by the authorities cited in n.686 to para.2-165, in the text of which paragraph the doctrine is referred to as one of "fictional fulfilment".

[886.](#) *Wood Preservation Ltd v Prior* [1969] 1 W.L.R. 1077; cf. *Heron Garages Properties Ltd v Moss* [1974] 1 W.L.R. 148.

[887.](#) *McKillop v McMullan* [1979] N.I. 85.

[888.](#) *Irwin v Wilson* [2011] EWHC 326 (Ch), [2011] 2 P. & C.R. 8.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 9. - Contractual Intention

General

2-167

In a number of situations, to be discussed in paras 2-168—2-197 below, it has been held that an agreement, though supported by consideration, ⁸⁸⁹ was not binding as a contract ⁸⁹⁰ because it was made without any intention of creating legal relations. ⁸⁹¹

Burden of proof: express agreements

2-168



In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations. ⁸⁹² The onus of proving that there was no such intention “is on the party who asserts that no legal effect is intended, and the onus is a heavy one”. ⁸⁹³ In deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance on it. ⁸⁹⁴

Burden of proof: agreements inferred from conduct

2-169


⚠ The rule as to burden of proof stated in para.2-168 above applies where the parties had entered into an express agreement, whether written or oral. ⁸⁹⁵ Claims or defences are, however, sometimes based on the allegation that parties between whom there was no express agreement had so conducted themselves in relation to each other that an *implied* contract was to be inferred from their conduct; and in a number of cases of this kind the allegation has been rejected on the ground that there was no contractual intention. ⁸⁹⁶ Such cases illustrate the judicial attitude that “contracts are not lightly to be implied” and that the courts must (in cases of this kind) be able “to conclude with confidence that ... the parties intended to create contractual relations”. ⁸⁹⁷ Thus, the burden of proof on this issue appears, in cases of implied contracts, to be on the proponent of the contract, contrary to the rule which applies to express agreements regulating commercial relationships. In *Modahl v British Athletics Federation*, ⁸⁹⁸ the burden was held to have been discharged so that a contract came into existence between an athlete and the Federation, under whose rules the athlete had for a long time competed. The rules of the Federation had contractual force by reason of the “continuous long-term relationship based on a programme and rules couched in language of a contractual character and purporting to impose mutual rights and obligations.” ⁸⁹⁹ Likewise, in *Re MF Global UK*


Ltd (In Special Administration) ⁹⁰⁰ ⚠ the court implied a contract between two companies in administration, pursuant to which one company paid the expenses of staff seconded to a second company within the same group. The established relationship between the companies was only explicable in the particular circumstances on the basis that it had a contractual foundation. In contrast, the burden of proof was not discharged in *Assuranceforeningen Gard Gjensidig v International Oil*



Pollution Compensation Fund ⁹⁰¹  where, following a serious oil spill from an insured ship, the insurer asserted a contract with an international fund, set up to compensate for damage caused by oil pollution, to indemnify the insurer in respect of aspects of its liability. On the facts, it was impossible to construe the international fund's communications as making the offer alleged expressly or impliedly, let alone clearly and unequivocally. ⁹⁰² 

Intention judged objectively

2-170

 In deciding issues of contractual intention, the courts normally apply an objective test ⁹⁰³: for example, where the sale of a house is *not* "subject to contract", ⁹⁰⁴ both parties are likely to be bound even though one of them subjectively believed that he would not be bound until the usual exchange of contracts had taken place. ⁹⁰⁵ In *Edmonds v Lawson*, ⁹⁰⁶ the Court of Appeal similarly applied the objective test to hold that the requirement of contractual intention was satisfied where a pupil barrister accepted an offer of pupillage with a set of chambers. The resulting contract ⁹⁰⁷ was between the pupil and all the members of the chambers—not between the pupil and the individual members of the

chambers who acted as her pupil masters. In *New Media Holding Co LLC v Kuznetsov* ⁹⁰⁸  the court found an intention to create legal relations in respect of a "Term Sheet" signed by both parties. On the one hand: the language of the document was brief and did not mention consideration; the document was prepared in a casual and informal way; further formalities were required; and the rights transferred were not capable of immediate enforcement. On the other hand: the parties were experienced and sophisticated businessmen; the document contained clear express terms; the language was consistent with a legally binding agreement; and the "Term Sheet" was consistent with an intention that this be part of a package agreement (with other terms, including the consideration, to be dealt with elsewhere) and with the parties' pre-existing relationship, which itself raised a strong presumption that the parties intended to be legally bound. Where there has been substantial performance, courts are especially reluctant to reach the unrealistic conclusion that the parties lacked

intention to be legally bound. ⁹⁰⁹  The objective test is, however, here (as elsewhere) ⁹¹⁰  subject to the limitation that it does not apply in favour of a party who knows the truth. Thus, in the house sale example given above, the party who did not intend to be bound would not be bound if his state of mind was actually known to the other party. ⁹¹¹ Nor could a party who did not in fact intend to be bound invoke the objective test so as to bind the other party to the contract ⁹¹²: to permit this would pervert the purpose of the objective test, which is to protect a party who has relied on the objective appearance of consent from the prejudice which he would suffer if the other party could escape liability on the ground that he had no real intention to be bound. The objective test, moreover, merely prevents a party from relying on his *uncommunicated* belief as to the binding force of the agreement. The test therefore does not apply where the parties have expressed their actual intention in the document alleged to constitute the contract: the question whether they intended the document to have contractual force then becomes one "of construction of the documents as a whole what effect is to be given to such a statement" ⁹¹³; and the general rule in cases of this kind is that a party who has signed the document is then bound by its terms, as so construed. ⁹¹⁴

This general rule is however subject to two exceptions. First, where the express terms of the document are a "sham", ⁹¹⁵ in the sense of being designed by one party to give the appearance that the relationship created by the contract differs from the reality of that relationship, so as to deprive the other party of some protection or benefit given by law to a class of persons to which that other party belongs (e.g. as tenants or as employees). Thus, an agreement may take effect as a lease even though it is expressed by the lessor to take effect only as a licence ⁹¹⁶; and an agreement may take effect as a contract of employment even though (contrary to the reality of the relationship created by it) it described the party who is in truth the other's employee as being an independent contractor and not an employee. ⁹¹⁷ Second, an agreement, may, on its true construction, be of a different character from the way in which it has been characterised. ⁹¹⁸ Thus, where "the parties may have thought that they were creating a tenancy" ⁹¹⁹ but their "agreement is incapable of taking effect as a tenancy for some old and technical reason of property law", ⁹²⁰ then there is "no reason for not holding that they have agreed a contractual licence" ⁹²¹ if applying the objective test, that is what "they are likely to have

intended". ⁹²²

Intention expressly negated

2-171

The agreement may contain an express provision negating contractual intention. ⁹²³ For example, in *Rose & Frank Co v J.R. Crompton & Bros Ltd* ⁹²⁴ an agency agreement provided:

"This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement ... but it is only a definite expression and record of the purpose and intention of the ... parties concerned, to which they each honourably pledge themselves."

It was held that this "honour clause" negated contractual intention. Similarly agreements for the sale of land are generally made "subject to contract". These words negate contractual intention, ⁹²⁵ so that the parties are not normally bound until formal contracts are exchanged. ⁹²⁶ It is a crucial part of this process of "exchange" that the parties should intend by it to bring a legally binding contract into existence. ⁹²⁷ Football pool coupons also commonly contained words expressly negating contractual intention. ⁹²⁸

Whether a particular phrase expressly negates contractual intention is a question of construction. ⁹²⁹ In *Edwards v Skyways Ltd* ⁹³⁰ employers promised to make a dismissed employee an "ex gratia payment". It was held that these words did not negate contractual intention but amounted merely to a denial of a preexisting legal liability to make the payment. ⁹³¹ Contractual intention was, similarly, not negated where an arbitration clause in a reinsurance contract provided that "this treaty shall be interpreted as an honourable engagement rather than as a legal obligation ...". The contract as a whole was clearly intended to be binding; and the purpose of the words quoted was merely to free the arbitrator "to some extent from strict legal rules" ⁹³² in interpreting the agreement. Again, in *The Mercedes Envoy* ⁹³³ a shipowner during negotiations for a charterparty said "we are fixed in good faith". It was held that the words "in good faith" did not negate contractual intention: if they had any effect, it amounted merely to a "collateral understanding" ⁹³⁴ that account should be taken of damage to the vessel, of which both shipowner and charterer were aware.

Intention impliedly negated

2-172

In *Baird Textile Holdings Ltd v Marks & Spencer Plc* ⁹³⁵ the claimants had for some 30 years been a principal supplier of clothing to the defendants, a leading retail chain. When the defendants terminated the arrangement with effect from the end of the then current production season, the claimants sought damages, basing their claim on, inter alia, ⁹³⁶ an alleged implied contract not to terminate the arrangement except on reasonable notice of three years. The claim was rejected because of "the absence of any intention to create legal relations". ⁹³⁷ One factor ⁹³⁸ on which this conclusion was based was that the defendants had (as the claimants themselves had alleged in their points of claim) ⁹³⁹ deliberately abstained from entering into a long-term contractual relationship with the claimants in order to maintain the flexibility of the de facto long-term commercial relationship between the parties. ⁹⁴⁰ It followed that the claimants must be taken to have accepted the risk inherent in such a relationship "without specific contractual protection". ⁹⁴¹ Contractual retention was, again, impliedly negated in *Cobbe v Yeoman's Row Management Ltd* ⁹⁴² where an agreement "in principle" for the redevelopment and disposal of residential property left other aspects of the scheme to be settled by further negotiations between the parties. It was held that the agreement "in principle" lacked contractual force since, until those outstanding matters had been settled and embodied in a formal agreement between the parties, each regarded the other as bound in honour only. ⁹⁴³

Statements inducing a contract

2-173

A statement inducing a contract may be a “mere puff” if the court considers that it was not seriously meant and that this should have been obvious to the person to whom it was made. In *Weeks v Tybald*, ⁹⁴⁴ for example, the defendant “affirmed and published that he would give £100 to him that should marry his daughter with his consent”. The court held that it was “not reasonable that the defendant should be bound by such general words spoken to excite suitors”. Similarly, in *Lambert v Lewis*, ⁹⁴⁵ a manufacturer stated in promotional literature that his product was “foolproof” and that it “required no maintenance”. These statements did not give rise to a contract between the manufacturer and a dealer (who had bought the product from an intermediary) as they were “not intended to be, nor were they, acted on as being express warranties”. ⁹⁴⁶

2-174

Other statements which induce persons to enter into contracts have some effect in law, but exactly what that effect is often turns on whether they are “mere representations” or have contractual force. The distinction between these categories turns on the test of contractual intention. In cases concerning the effect of such statements, the test of intention generally determines the *contents* of a contract, the *existence* of which is not in doubt. But where the inducing statement for some reason cannot take effect as a term of the main contract it may, nevertheless, amount to a collateral contract; and whether it has this effect again depends on the test of contractual intention. For example, in *Heilbut, Symons & Co v Buckleton* ⁹⁴⁷ the claimant applied for shares in a company after a conversation with the defendants’ manager, which led the claimant to believe that the company (which the defendants were “bringing out”) was a rubber company. It was not a rubber company, and the claimant alleged that the defendants had warranted that it was a rubber company. It was held that nothing said by the manager was intended to have the effect of a collateral contract. Lord Moulton said:

“Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn.” ⁹⁴⁸

It follows that an oral statement made in the course of negotiations will not take effect as collateral contract where the terms of the main contract show that the parties did *not* intend the statement to have such effect. This was, for example, the position where the main contract contained an “entire agreement” clause: this showed that statements made in the course of negotiations were to “have no contractual force”. ⁹⁴⁹ Similarly, where a party during negotiations for a lease made a statement of its intention as to its future conduct under the lease, but the negotiations were then continued and the final agreement was inconsistent with the statement, it was held that these circumstances negated contractual intention with respect to the statement, so that it could not take effect as a collateral contract. ⁹⁵⁰

Statements inducing contracts with consumers

2-175

Under the Sale of Goods Act 1979 a commercial seller of goods may be liable to a buyer who deals as consumer if the goods lack a quality claimed for them in “public statements on the *specific* characteristics of the goods made about them by the seller, the producer or his representative in advertising or labelling.” ⁹⁵¹ Similar provisions apply to contracts for the supply of goods other than contracts of sale. ⁹⁵² The legislation supporting these requirements is now replaced by the Consumer Rights Act 2015 ⁹⁵³ which imposes analogous liability for statements inducing the contract ⁹⁵⁴, including for “any public statement about ... *specific* characteristics” of the subject-matter of the contract. ⁹⁵⁵

Guarantees given to consumers

2-176

The Sale and Supply of Goods to Consumers Regulations 2002 ⁹⁵⁶ provide that, where goods are sold or supplied to a consumer and are offered with a “consumer guarantee”, that guarantee “takes effect as a contractual obligation owed by the guarantor”. ⁹⁵⁷ It seems to take effect by virtue of the Regulations, without any separate requirement of contractual intention. This is replaced ⁹⁵⁸ by a similar provision contained in s.30 of the Consumer Rights Act 2015, which applies where there is “(a) a contract to supply goods” and “(b) a guarantee in relation to the goods”, ⁹⁵⁹ i.e. an undertaking by the “trader or producer” of the goods. Such a guarantee “takes effect ... as a contractual obligation owed by the guarantor” “under the conditions set out in the guarantee statement or in any associated advertising”. ⁹⁶⁰

Social agreements

2-177

Many social arrangements do not amount to contracts because they are not intended to be legally binding.

“The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality.” ⁹⁶¹

Similarly it has been held that the winner of a competition held by a golf club could not sue for his prize where:

“no one concerned with that competition ever intended that there should be any legal results flowing from the conditions posted and the acceptance by the competitor of those conditions” ⁹⁶²

that the rules of a competition organised by a “jalopy club” for charitable purposes did not have contractual force ⁹⁶³; that “car pool” and similar arrangements between friends or neighbours did not amount to contracts even though one party contributed to the running costs of the other’s vehicle ⁹⁶⁴; that an agreement between members of a group of friends relating to musical performances by the group was not intended to have contractual effect, ⁹⁶⁵ and that the provision of free residential accommodation for close friends did not amount to a contract as it was an act of bounty, done without any intention to enter into legal relations. ⁹⁶⁶ On the other hand, contractual intention was found in an agreement between an employer and employee to play the lottery and share any winnings. ⁹⁶⁷

Domestic agreements between spouses

2-178

For the same reason, many domestic arrangements between spouses lack contractual force. In *Balfour v Balfour* ⁹⁶⁸ a husband who worked abroad promised to pay an allowance of £30 per month to his wife, who had to stay in England on medical grounds. The wife’s attempt to enforce this promise by action failed for two reasons: she had not provided any consideration, and the parties did not intend the arrangement to be legally binding. On the second ground alone, most domestic arrangements between husband and wife are not contracts. Atkin L.J. said:

“Those agreements, or many of them, do not result in contracts at all ... even though there may be what as between other parties would constitute consideration for the agreement ... They are not contracts ... because the parties did not intend that they should be attended by legal consequences ... Agreements such as these are outside the realm of contracts altogether.”⁹⁶⁹

It has been said that the facts of *Balfour v Balfour* “stretched the doctrine to its limits”⁹⁷⁰; but the doctrine itself has not been judicially questioned and the cases provide many other instances of its application.⁹⁷¹ The doctrine does not, of course, prevent a husband from making a binding contract with his wife. For example, a husband can be his wife’s tenant.⁹⁷² Binding separation agreements are often made when husband and wife agree to live apart.⁹⁷³ And where a man before marriage promised his future wife to leave her a house if she married him she was able to enforce the promise although it was made informally and in affectionate terms.⁹⁷⁴

Domestic agreements between civil partners

2-179

The authorities relating to the effects of domestic agreements between spouses, discussed in para.2-178 above, could, it is submitted, be applied by analogy to such agreements between persons of the same sex who had entered into a civil partnership under the Civil Partnership Act 2004.⁹⁷⁵ The Act is silent on the point but present submission derives support from the fact that it treats civil partnerships as analogous to marriages for many legal purposes, including (in particular) statutory provisions relating to the legal effects of agreements between the parties⁹⁷⁶ or for the benefit of one of them.⁹⁷⁷

Domestic agreements between other cohabitants

2-180

Issues of contractual intention can similarly arise where a couple make an agreement with regard to a house in which they live together in a quasi-marital relationship without being married or having entered into a civil partnership.⁹⁷⁸ Where, for example, a man and a woman so cohabited, it was said to be “part of the bargain between the parties expressed or to be implied that the [woman] should contribute her labour towards the reparation of the house in which she was to have some beneficial interest.”⁹⁷⁹ This “bargain” was enforceable, either by way of contract⁹⁸⁰ or by way of constructive trust.⁹⁸¹ Formal requirements (imposed in 1989) for contracts for the creation of interests in land⁹⁸² make it unlikely⁹⁸³ that such an arrangement could now take effect as such a contract, but they would not prevent it from taking effect by way of constructive trust⁹⁸⁴ or of proprietary estoppel.⁹⁸⁵ Even where (in a case of this kind) the woman did nothing to increase the value of the house (and so had no “proprietary interest in the property”⁹⁸⁶) the man’s promise that the house should continue to be available for her and the couple’s children was held to be enforceable as a contractual licence as she had acted in reliance on the promise by moving out of her rent-controlled flat in reliance on the promise.⁹⁸⁷ But in another case,⁹⁸⁸ in which there was no such element of reliance, it was held that the provision by a married man of a house for his mistress did not give rise to a legally binding promise that she should be allowed to stay in the house. Even when such a promise can be established, it would (whether or not the parties were spouses or civil partners) be more difficult to show that some less important promise, e.g. as to the amount of money to be provided by way of a dress or housekeeping allowance, was intended to have contractual effect.

Pre-nuptial agreements

2-181

Until quite recently pre-nuptial and post-nuptial agreements (agreements that determine the financial consequences of divorce where no divorce was actually planned) were void as a matter of contract

law ⁹⁸⁹; they were found to be contrary to public policy, due to their potential to encourage or make it easier for parties to divorce. In *Radmacher v Granatino* ⁹⁹⁰ the Supreme Court held that henceforth:

“the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.” ⁹⁹¹

Their Lordships added that: ⁹⁹² “It is, of course, important that each party should intend that the agreement should be effective”; it may not have been right to infer from such an intention in the past because parties:

“may have been advised that such agreements were void under English law and likely to carry little or no weight. That will no longer be the case ... Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it.”

Other shared households

2-182

Where adult members of a family (other than husband and wife, persons living together as such or civil partners) share a common household, the financial terms on which they do so may well be intended to have contractual effect. This was for example held to be the position where a young couple were induced to sell their house, and to move in with their elderly relations, by the latter's promise to leave them a share of the proposed joint home. The argument that this promise was not intended to be legally binding was rejected as the young couple would not have taken the important step of selling their own house on the faith of a merely social arrangement. ⁹⁹³ But while the common household was a going concern the parties must have made many arrangements about its day-to-day management which were not intended to be legally binding. In cases of this kind, it may often be clear that there is some contract, but the terms of the arrangement may be so imprecise that it is hard to say just what obligation it imposes. For example, in *Hussey v Palmer* ⁹⁹⁴ a lady spent £600 on having a room added to her son-in-law's house, on the understanding that she could live there for the rest of her life. When she left voluntarily, about a year later, it was held that there was no contract of loan in respect of the £600 ⁹⁹⁵; but it seems likely that there was a contract to allow her to live in the room for the rest of her life.

2-183

An agreement between persons who share a common household may be a contract if it has nothing to do with the routine management of the household. Thus in *Simpkins v Pays* ⁹⁹⁶ three ladies who lived in the same house took part in a fashion competition run by a newspaper. They agreed to send in their entries on one coupon and to share the prize which any such entry might win; and the agreement to share was held to be legally binding.

Parents and children

2-184

Similar issues of contractual intention can arise from promises between parents and children. An informal promise by a parent to pay a child an allowance during study is not normally a contract, though it may become one if, for example, it is part of a bargain made to induce the child to give up some occupation so as to enter on some particular course of study. ⁹⁹⁷ Similarly, there is not normally

a contract where a mother agrees to nurse her child who has fallen ill or been injured, even though she has to give up her work to do so. ⁹⁹⁸ Conversely, it has been held that the gift of a flat by a mother to her daughter on condition that the daughter should look after the mother there did not amount to a contract because it was not intended to have contractual force. ⁹⁹⁹ On the other hand, where a mother bought a house as a residence for her son and daughter-in-law on the terms that they should pay her £7 per week to pay off the purchase price, this was held to amount to a contractual licence which the mother could not revoke so long as either of the young couple kept up the payments. ¹⁰⁰⁰

Agreements giving discretion to one party whether to perform

2-185

An agreement may consist of mutual promises one of which gives a very wide discretion to one party. In such a case the discretionary promise may be too vague to constitute consideration for the other party's promise which may therefore be unenforceable. ¹⁰⁰¹ But if the other party has actually performed (so that there can be no question that *he* has provided consideration), the further question may arise whether the discretionary promise can be enforced; and this raises an issue of contractual intention. In *Taylor v Brewer* ¹⁰⁰² the claimant agreed to do work for a committee who resolved that he should receive "such remuneration ... as should be deemed right". His claim for a reasonable remuneration for work done failed: the promise to pay was "merely an engagement of honour". ¹⁰⁰³ This case is now more often distinguished than followed, ¹⁰⁰⁴ but its reasoning would still be applied if the wording made it clear that the promise was not intended to be legally binding. ¹⁰⁰⁵ A fortiori, there is no contract where performance by *each* party was left to that party's discretion. ¹⁰⁰⁶ Where, however, an agreement is clearly intended to have contractual effect, there is judicial support for the view that a discretion conferred by it on one party cannot "however widely worded ... be exercised for purposes contrary to those of the instrument by which it is conferred". ¹⁰⁰⁷ The court may also be able to control the exercise of such a contractual discretion by holding that it must be exercised "rationally and in good faith" ¹⁰⁰⁸; but, if these requirements are satisfied, there is no further requirement that the exercise of the discretion must be reasonable. ¹⁰⁰⁹

Even where an agreement does not, from its inception, impose any contractual obligation on either party, such obligations may arise from the subsequent conduct of the parties in pursuance of it. This was the position where a local authority engaged the claimant as home tutor for pupils who were unable to attend school. ¹⁰¹⁰ The arrangement did not bind the claimant to accept, or the authority to offer, any pupil but once the claimant had agreed to accept a particular pupil, she was obliged to fulfil her commitment to that pupil and the authority was bound to provide work in relation to that pupil until the engagement in relation to him had run its course. Thus a series of contracts arose in relation to each pupil offered to, and accepted by, the claimant, even though the original arrangement in pursuance of which the pupils were sent had no contractual force.

Agreements giving discretion to rescind

2-186

An agreement may give one party a discretion to rescind. That party will not be bound if his promise means "I will only perform if I do not change my mind". But the power to rescind may only be inserted as a safeguard in certain eventualities which are not exhaustively stated, for example, where a contract for the sale of land entitles the vendor to rescind if the purchaser persists in some requisition or objection which the vendor is "unable or unwilling to satisfy". In such a case there is a contract and the court will control the exercise of the power to rescind by insisting that the vendor must not rescind "arbitrarily, or capriciously, or unreasonably. Much less, can he act in bad faith". ¹⁰¹¹

Collective agreements

2-187

The terms of collective agreements between trade unions and employers (or employers' associations)

may be incorporated in individual employment contracts and so become binding on the parties to those contracts. ¹⁰¹² But the general common law view was that such collective agreements were not legally binding between the parties to them. The Trade Union and Labour Relations (Consolidation) Act 1992 goes further in providing that a collective agreement ¹⁰¹³ is “conclusively presumed not to have been intended by the parties to be a legally enforceable contract” unless it is in writing and expressly provides the contrary (in which case the agreement is conclusively presumed to have been intended by the parties to be a legally enforceable contract). ¹⁰¹⁴ To displace the presumption that a collective agreement is not intended to be a legally binding contract, the agreement must provide that it was intended to be *legally* binding. The presumption is not displaced by a statement that the parties shall be “bound by the agreement” for this may mean that they are bound in honour only. ¹⁰¹⁵

Free travel passes

2-188

There are conflicting decisions on the question whether the issue and acceptance of a free travel pass amounts to a contract. In *Wilkie v L.P.T.B.* ¹⁰¹⁶ it was held that such a pass issued by a transport undertaking to one of its own employees did not amount to a contract. But the contrary conclusion was reached in *Gore v Van der Lann* ¹⁰¹⁷ where the pass was issued to an old age pensioner. This conclusion was based on the ground that an application for the pass had been made on a form couched in contractual language; and *Wilkie's* case was distinguished on the ground that the pass there was issued to the employee “as a matter of course ... as one of the privileges attaching to his employment”. ¹⁰¹⁸ But as the pass in *Gore's* case was issued expressly on the “understanding” that it constituted only a licence subject to conditions, the distinction seems, with respect, to be a tenuous one.

Statements of governmental policy

2-189

In a case ¹⁰¹⁹ arising out of the First World War a statement was made, during the war, on behalf of the Government, to the effect that a certain neutral ship would be allowed to leave a British port if specified conditions were met. It was held that the statement did not amount to a contract: it was “merely an expression of intention to act in a particular way in a certain event”. ¹⁰²⁰

Agreements giving effect to pre-existing rights

2-190

A number of cases support the view that an arrangement which is believed simply to give effect to preexisting contractual rights is not a contract because the parties had no intention to enter into a *new* contract ¹⁰²¹; this may be true even where the contract giving rise to those rights had been discharged, so long as the parties believed that it was still in existence. ¹⁰²² But other cases show that contractual intention is not negated where the conduct of the parties makes it clear that they intended not merely to give effect to their earlier contract but also to enter into a new contract containing additional terms ¹⁰²³; or merely because the conduct of one party to the alleged new contract consisted of his performance of a contract between him and a third party. ¹⁰²⁴

Nature of relationship between the parties: clergy

2-191

Contractual intention may sometimes be negated by the nature of the relationship between the parties. ¹⁰²⁵ This view was, for example, taken in a number of cases in which it was held that there was no contract between a minister of the church (or between a person holding a corresponding appointment in a similar religious institution) and the church (or other similar institution); the reason

given for this conclusion was that the relationship was not one “in which the parties intended to create legal relations between themselves so as to make the agreement enforceable in the courts”.¹⁰²⁶ But in *Percy v Board of National Mission of the Church of Scotland*,¹⁰²⁷ the House of Lords held that the appointment of Ms Percy as an associate minister of the Church of Scotland had given rise to a “contract of employment”¹⁰²⁸ for the purpose of the statutory prohibition against sex discrimination in such a contract. One view is that *Percy*’s case marks a change in the judicial approach to the question of contractual intention in cases of this kind. This view is supported by statements of Lord Nicholls in that case that “in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so”¹⁰²⁹; and that in the context of statutory protection of employees it was “time to recognise that employment arrangements between the church and its ministers should not lightly be taken as intended to have no legal effect.”¹⁰³⁰ This is particularly so in respect of “arrangements which on their face were intended to give rise to legal obligations”¹⁰³¹ such as the offer and acceptance of employment, specifying in some detail the rights and obligations of the parties.¹⁰³² There is therefore no longer any presumption that, in cases of the kind discussed in this paragraph, there is no intention to create legal relations.¹⁰³³ On the other hand, it was accepted in *Percy*’s case that “many arrangements ... in church matters” were such that “viewed objectively ... the parties [could] not be taken to have intended to enter into a legally binding contract” because of the “breadth and looseness [of the arrangements] and the circumstances in which they were undertaken”.¹⁰³⁴ In *President of the Methodist Conference v Preston*, the Supreme Court¹⁰³⁵ (reversing the Court of Appeal)¹⁰³⁶ held (by a majority, Lady Hale dissenting) that a minister of the Methodist Church could not prosecute a claim for unfair dismissal against the Church¹⁰³⁷ as she had not worked for the Church under a “contract of service”.¹⁰³⁸ Lord Sumption (with whose leading judgment Lords Wilson and Carnwath agreed) adopted a new approach to this problem. He said that:

“The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister.”¹⁰³⁹

In the particular case, having regard to the constitution of the Methodist Church as contained in its Deed of Union and its standing orders, the rights and duties of its ministers arose “entirely from their status in the constitution of the Church and not from any contract” unless “some special arrangement is made with a particular minister”.¹⁰⁴⁰ Lord Sumption pointed, in particular, to:

“the lifelong commitment of the minister, the exclusion of any right of unilateral resignation and the characterisation of the stipend as maintenance and support.”¹⁰⁴¹

In these circumstances, and in the absence of any special arrangements, the requirement of “contractual intention”¹⁰⁴² was not satisfied. *Percy*’s case can be distinguished on the basis that it relates to a sex discrimination claim rather than a claim for unfair dismissal, the statutory requirements for which are expressed in different terms.¹⁰⁴³ Consistently, it was held in *E v English Province of our Lady of Charity*¹⁰⁴⁴ that the relationship between a Roman Catholic priest and the Diocesan Bishop who had appointed him was such as to give rise to the possibility of the Bishop’s being vicariously liable for the priest’s torts. It was said that the facts that there was no formal contract, no offer and acceptance, no terms and conditions, and no provision for payment of wages did not negative this possibility, though they might “have relevance in a different context”.¹⁰⁴⁵ Affirming this decision on appeal,¹⁰⁴⁶ Ward L.J. discussed the authorities on the question whether there is a contract of service between a minister of religion and the Church (or other body) that has appointed him or her.¹⁰⁴⁷ He concluded that there was “no contract of service in this case” as the appointment of the priest by the Bishop “was made without any intention to create any legal relationship between them”.¹⁰⁴⁸ Davies L.J. (concurring) found the employment cases “of relatively limited significance”¹⁰⁴⁹ in the vicarious liability context before the court. *E*’s case was extensively discussed in *Various Claimants v Catholic Child Welfare Society*¹⁰⁵⁰ where the Supreme Court held that the Institute of the Brothers of the Christian Schools was vicariously liable for acts of abuse of children committed by the Institute’s lay brothers who had acted as teachers in those schools but who were not in any contractual relations with the Institute. There is no reference to either of these two vicarious liability cases in the judgments of the Supreme Court in *President of the Methodist Conference v Prescott*¹⁰⁵¹ discussed in this paragraph.

Civil servants

2-192

At one time, it was thought that the legal relationship between the Crown and its civil servants was not contractual because the Crown did not, when the relationship was entered into, have the necessary contractual intention.¹⁰⁵² But it was said in one of the cases which supported that view that there was evidence that the Crown was reconsidering its position on the point¹⁰⁵³; and it has since been held¹⁰⁵⁴ that the requirement of contractual intention was satisfied in spite of the fact that the terms of appointment stated that “a civil servant does not have a contract of employment” but had rather “a letter of appointment”. These words were not sufficient to turn a relationship which, apart from them, had all the characteristics of a contract into one which was binding in honour only. For the purposes of Pt 5 of the Equality Act 2010 “employment” means (inter alia) “Crown employment”.¹⁰⁵⁵

Police constables

2-193

It has been said that a police constable is a person who “holds an office and is not therefore strictly an employee”¹⁰⁵⁶; and that there is “no contract between a police officer and a chief constable”.¹⁰⁵⁷ But it does not follow that the relationship is binding in honour only: the resulting relationship is “closely analogous to a contract of employment”¹⁰⁵⁸ so that duties analogous to those arising out of such a contract may be owed to the constable. For the purposes of Pt 5 of the Equality Act 2010, “holding the office of constable is to be treated as employment ...”.¹⁰⁵⁹

Vague agreements

2-194

Another factor relevant to the issue of contractual intention is the degree of precision with which the agreement is expressed. In one case it was held that a husband's promise to let his deserted wife stay in the matrimonial home had no contractual force because it was not “intended by him, or understood by her, to have any contractual basis or effect”.¹⁰⁶⁰ The promise was too vague: it did not state for how long or on what terms the wife could stay in the house.¹⁰⁶¹ So, too, the use of deliberately vague language was held to negative contractual intention where a property developer reached an “understanding” with a firm of solicitors to employ them in connection with a proposed development, but neither side entered into a definite commitment.¹⁰⁶² For the same reason, “letters of intent”¹⁰⁶³ or “letters of comfort”¹⁰⁶⁴ may lack the force of legally binding contracts.¹⁰⁶⁵ The assumption in all these cases was that the parties had reached agreement, and in them lack of contractual intention prevented that agreement from having legal effect. Vagueness may also be a ground for concluding that the parties had never reached agreement at all.¹⁰⁶⁶ This is a separate issue from that of contractual intention, which strictly speaking concerns only the *effect* of an agreement which is first shown to exist.¹⁰⁶⁷ On the one hand, the parties may agree on terms that are sufficiently certain but deprive that agreement of contractual force by express words, as in the “subject to contract” cases discussed earlier in this chapter.¹⁰⁶⁸ On the other hand, an agreement may satisfy the requirement of contractual intention, yet be too vague to enforce. An example, of the latter situation is *Dhanani v Crasnianski*.¹⁰⁶⁹ There, Ramsay J. held that an agreement to set up a private equity fund satisfied the requirement of contractual intention¹⁰⁷⁰ but nevertheless lacked contractual force because it was “in essence an agreement to agree”¹⁰⁷¹ on terms which were “essential for such an agreement to be enforced”¹⁰⁷² and “[w]ithout such further agreement the fund could not be set up”,¹⁰⁷³ there being “no objective criteria”¹⁰⁷⁴ by which the outstanding points could be resolved. The view that contractual intention and certainty are separate requirements is further supported by the reasoning of *Barbudev v Eurocom Cable Management Bulgaria EOOD*,¹⁰⁷⁵ where the issue was whether a “side letter” to a contract for the acquisition of shares in a company, gave the claimant (a major shareholder in the company) the right to acquire shares in the purchase company on terms to be agreed. The Court of Appeal held that the side letter was intended to create legal relations,¹⁰⁷⁶ but that it did not give rise to a legally binding contract entitling the claimant to acquire

the shares in the purchaser company since it was no more than an agreement to agree, ¹⁰⁷⁷ and also since many of the essential terms of the alleged contract had not been agreed. ¹⁰⁷⁸ While the issues of contractual intention and vagueness are conceptually distinct, they may overlap in borderline cases ¹⁰⁷⁹; the question whether an agreement exists will depend on the degree of vagueness or on whether the vagueness can be resolved, e.g. by applying the standard of reasonableness. In one case “the absence of any intention to create legal relations” ¹⁰⁸⁰ was said to have been a ground for holding that no agreement ever came into existence. Thus, contractual intention may be negated on the ground of vagueness where the claim is based, not on an express agreement, but on one alleged to be implied from conduct. ¹⁰⁸¹

Statements made in jest or anger

2-195

Contractual intention may be negated by the fact that the statement is made in jest or anger, at least if this fact is obvious to the person to whom the statement is made. ¹⁰⁸² Thus in *Licences Insurance Corporation v Lawson* ¹⁰⁸³ the defendant was a director of Company A and of Company B. Company A held shares in Company B and resolved, in the defendant’s absence, to sell them. At a later meeting this resolution was rescinded after a heated discussion, during which the defendant said that he would make good any loss which Company A might suffer if it kept the shares. It was held that the defendant was not liable on this undertaking. Nobody at the meeting regarded it as a contract; it was not recorded as such in the minute book; and the defendant’s fellow-directors at most thought that he was bound in honour.

Other cases

2-196

The cases in which there is no intention to create legal relations cannot be exhaustively classified. Contractual intention may, for example, be negated by evidence that “the agreement was a goodwill agreement ... made without any intention of creating legal relations”, ¹⁰⁸⁴ that it was a sham, made with “no intention ... to create bona fide legal relations”, ¹⁰⁸⁵ that it formed part of a course of conduct that was “just an act or a role-play”, ¹⁰⁸⁶ and that the parties had not yet completed the contractual negotiations. ¹⁰⁸⁷ Many other disparate factors can lead to the same conclusion: for example, where an agreement was made that a landlord would not enforce an order for possession against a tenant who had fallen into arrears with her rent, it was held that this agreement did not create a new tenancy as the parties “plainly did not [so] intend” ¹⁰⁸⁸; the agreement merely had the effect of turning the tenant into a “tolerated trespasser”. ¹⁰⁸⁹

2-197

The cases on this topic, ¹⁰⁹⁰ and in particular those discussed in paras 2-194 to 2-1958 above, show that the question of contractual intention is, in the last resort, one of fact ¹⁰⁹¹, and in doubtful cases its resolution depends, in particular, on the incidence of the burden of proof and on the objective test which generally determines the issue. These points have already been discussed ¹⁰⁹²; they help to explain two controversial decisions, in each of which there was a difference of judicial opinion on the issue of contractual intention.

2-198

The first is *Esso Petroleum Ltd v Commissioners of Customs and Excise*. ¹⁰⁹³ Esso supplied garages with tokens called “World Cup coins,” instructing them to give away one coin with every four gallons of petrol sold. The scheme was advertised by Esso and also on posters displayed by garages. By a majority of four to one, the House of Lords held that there was no “sale” of the coins; but that majority was equally divided on the question whether there was any contract at all with regard to the coins. Those who thought that there was a contract ¹⁰⁹⁴ relied on the incidence of the burden of proof, and on the argument that “Esso envisaged a bargain of some sort between the garage proprietor and the motorist”. ¹⁰⁹⁵ On the other hand, Lords Dilhorne and Russell relied on the language of the

advertisements (in which the coins were said to be “going free”), and on the minimal value of the “coins”, as negating contractual intention.

2-199

The second case is *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*.¹⁰⁹⁶ The representative of a firm of forwarding agents told a customer (with whom the firm had long dealt) that his goods would henceforth be packed in containers, and that these would be carried under deck. About a year later, one such container was carried on deck and lost. At first instance,¹⁰⁹⁷ Kerr J. held that the promise was not intended to be legally binding since it was made in the course of a courtesy call, not related to any particular transaction, and indefinite with regard to its future duration. The Court of Appeal, however, held¹⁰⁹⁸ that the promise did have contractual force, relying principally on the importance attached by the customer to the carriage of his goods under deck, and on the fact that he would not have agreed to the new mode of carriage in containers but for the promise. The case is no doubt a borderline one. While the objective test prevents the promisor from relying on his subjective intention not to enter into a contractual undertaking, it should equally prevent the promisee's subjective intention (if not known to the promisor) from being decisive. The decision is explicable if it must have been clear to the promisor that, but for his promise, the promisee would not have agreed to the new mode of carriage in containers.



^{889.} *R. v Civil Service Appeal Board Ex p. Bruce* [1988] 3 All E.R. 686, 693, 698; cf. *Re Beaumont* [1980] Ch. 444, 453: consideration may be provided “under a contract or otherwise”.

^{890.} For enforcement on other grounds, see *John Fox v Bannister King & Rigbeys* [1988] Q.B. 925, 928 (court's jurisdiction to enforce honourable conduct on the part of solicitors); *Xydhias v Xydhias* [1999] 2 All E.R. 386, 394 (compromise of claim for ancillary relief in divorce proceedings).

^{891.} For recent statements of the requirement to create legal relations, see *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [30], [59]; below, para.2-169. See also *Zakhem International Construction Ltd v Nippon Kohan KK* [1987] 2 Lloyd's Rep. 596. For a denial of the requirement, see Williston, *Contracts*, para.21; cf. Tuck, 21 Can. Bar Rev. 123 (1943); Shatwell (1954) 1 Sydney L.R. at 293; Unger (1956) 19 M.L.R. 96; Hepple [1970] C.L.J. 122; Hedley (1985) 50 J.L.S. 391. There is also said to be a requirement of “mutuality”: see *Simpkins v Pays* [1955] 1 W.L.R. 975, 979; *Rajbenback v Mamon* [1955] 1 Q.B. 283, 286; but this expression here refers to consideration rather than to contractual intention: see *Lees v Whitcombe* (1828) 5 Bing. 34; *Sykes v Dixon* (1839) 9 Ad. & El. 693; *Westhead v Sproson* (1861) 6 H. & N. 728; Treitel (1961) 77 L.Q.R. 83.

^{892.} Certain regulated agreements under the Consumer Credit Act 1974 must contain a signature in a “signature box” warning the signer to sign the agreement “only if you want to be legally bound by its terms”: Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553), as amended by Consumer Credit (Agreements) (Amendment) Regulations 2004 (SI 2004/1482) reg.2. For amendment of the definition of a “regulated” consumer credit agreement, see Consumer Credit Act 2006 s.2.

^{893.} *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349, 355; *Bahamas Oil Refining Co v Kristiansands Tankrederei A/S (The Polyduke)* [1978] 1 Lloyd's Rep. 211; *Financial Techniques (Planning Services) Ltd v Hughes* [1981] I.R.L.R. 32; *G.A.F.L.A.C. v Tanter (The Zephyr)* [1985] 2 Lloyd's Rep. 529, 537 (disapproving [1984] 1 Lloyd's Rep. 58, 63–64); *Yani Haryanto v E.D. & F. Man (Sugar) Ltd* [1986] 2 Lloyd's Rep. 44; *Orion Insurance Plc v Sphere Drake Insurance Plc* [1992] 1 Lloyd's Rep. 239 at 263, where the burden was discharged; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2003] 1 Lloyd's Rep. 1 at [159]; cf. *Coastal Bermuda Petroleum Ltd v VTT Vulcan Petroleum SA (The Marine Star) (No.2)* [1994] 2 Lloyd's Rep. 629, 632, reversed on other grounds [1996] 2 Lloyd's Rep. 383. See also *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 at [79], indicating that this rule applies both where the alleged contract is a bilateral one, and where it is a unilateral one “at least where the parties are already in a contractual relationship when the unilateral promise is made” (at [80]).

- [894.](#) cf. above, para.2-148; *Kingswood Estate Co v Anderson* [1963] 2 Q.B. 169; *South West Water Authority v Palmer* (1982) 263 E.G. 438; *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(d)]; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 at [21], citing *Trentham v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25, 27.
- [895.](#) *Bottrill v Harling* [2015] EWCA Civ 564 at [14]–[16], [19]–[21], the Court of Appeal held that in deciding whether an oral agreement was made it is entirely acceptable to consider how the parties conducted themselves.
- [896.](#) *Hispanica de Petroleos SA v Vencedora Oceana Navegacion SA (The Kapetan Markos N.L.)* (No.2) [1987] 2 Lloyd's Rep. 323; *The Aramis* [1989] 1 Lloyd's Rep. 213; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311; in some of these cases rights and liabilities under the shipping documents would now arise by virtue of Carriage of Goods by Sea Act 1924 ss.2 and 3. Part of the ground covered by these sections of the 1924 Act will, if the Rotterdam Rules (below, para.18-036) are given the force of law in the United Kingdom, be covered by arts 57 and 58 of those Rules, so that it is likely that the 1924 Act will, in that event, have to be amended. The scope of arts 57 and 58 is significantly narrower than that of ss.2 and 3 of the 1924 Act: see, for example, para.18-054 below.
- [897.](#) *Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 W.L.R. 1195, 1202; cf. *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [20], [21], [30], [62] where the argument that there was an implied contract was rejected for the reasons given in para.2-172 below. The argument was likewise rejected in *West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, (2006) 92 B.M.L.R. 179 at [43], [48] (below, para.18-004) and *Cairns v Visteon UK Ltd* [2007] I.R.L.R. 175 at [18], [23] on the ground that in these two cases there was no “necessity” for any such implication; and see below, para.18-005. For other cases in which it was held that it was not “necessary” to imply a contract, see *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [17]; *Commissioners for Her Majesty's Revenue and Customs v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [38], where there was no such “necessity” because both parties believed (though mistakenly: see below, para.4-036 n.228) that their arrangement was binding as an acknowledgement within Limitation Act 1980 s.29(5); *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's Rep. 69 at [9]; cf. *C N Associates v Holbeton Ltd* [2011] EWHC 43 (TCC), [2011] B.L.R. 261. Contrast *Goshaw Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 All E.R. (Comm) 501 at [66], apparently rejecting the argument that there was no implied contract.
- [898.](#) [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192; cf. recognition of the distinction, for the purpose of burden of proof, between express and implied agreements, drawn in paras 2-168 and 2-169 above, in *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [61]; and *J D Cleverly Ltd v Family Finance Ltd* [2010] EWCA Civ 1477, [2011] R.T.R. 22 at [28]–[32], where the proponent of the contract failed to discharge the burden as the conduct in question was not “consistent only” (at [36]) with an intention to enter into contractual relations; see also the *CN Associates* case, above n.877, at [36] and the *Classic Maritime* case, above n.877, at [9] and [14]. And see *Re MF Global UK Ltd (In Special Administration)* [2015] EWHC 883 (Ch); [2015] Pens. L.R. 405 at [56]–[58] where an implied contract was found between companies in a group; one employed staff and seconded them to another which paid the associated costs, notwithstanding the absence of any express agreement between them as to the provision of staff.
- [899.](#) [2001] EWCA Civ 1447 at [109], cf. at [52]. Jonathan Parker L.J. dissented on this point. For discussion of factors which led to the conclusion that the requirement of contractual intention had been satisfied in *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (QB), see that case [134] et seq., [2013] EWCA Civ 394 at [89], n.880. The case was one of express agreement, not one of agreement inferred from conduct.
- [900.](#)  [2016] EWCA Civ 569.
- [901.](#)  [2014] EWHC 3369 (Comm).

902.

⚠[2014] EWHC 3369 at [102], [110], [114] and [123].

903.

See *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 579; *Bowerman v Association of British Travel Agents* [1995] N.L.J. 1815; *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306 at 327; *London Baggage (Charing Cross v Railtrack Plc)* [2000] E.G.C.S. 57; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), 1 Lloyd's Rep. 475 at [223], [224] and [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 at [17] (affirming the decision below); *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [45], [46]; *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(b)]; *Dhanani v Crasnianski* [2011] EWHC 926 (Comm), [2011] 2 All E.R. (Comm) 799 at [80], [88] ("objectively assessed"); *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] EWHC 1560 (Comm), [2011] 2 All E.R. (Comm) 951 at [92]–[94], affirmed [2012] EWCA Civ 548, where the objective test is stated at [30]. For a statement of the objective test of contractual intention, see also *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576, above para.2-121, where an oral acceptance of a "firm" offer (also made orally) was held to give rise to a contract although at the stage of that acceptance many important points remained unresolved; this was also the position in the *RTS* case, above: see at [61]; cf. the *Benourad* case above, at [106(f)] and above, para.2-121 at n.603. And see *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 at [61]: the Court of Appeal enforced the employer's promise to their employees to maintain a "guaranteed minimum bonus pool" from which discretionary bonuses payable under the contracts of employment were to be distributed "no matter what" (at [22]). The Court relied, in particular, on the facts that it was made "in the context of a pre-existing legal relationship" (i.e. of employer and employee); that the promise was originally that of the employer's Chief Executive Officer; that it was made as "part of a vitally important strategy to retain staff"; that it "related to pay, the most fundamental obligation under the employment contract"; and that by its terms "the promise assured staff that the fund was guaranteed come what may" (at [89]). cf. *Crowden v Aldridge* [1993] 1 W.L.R. 433, applying the objective test of intention to produce legal consequences to a noncontractual direction to executors in favour of a third party. Quaere whether, in the absence of reliance on the direction, the policy which justifies the objective test in a contractual context extends to the situation which arose in this case.

904.

Above, para.2-125.

905.

Tweddell v Henderson [1975] 1 W.L.R. 1496; *Storer v Manchester City Council* [1974] 1 W.L.R. 1403, 1408.

906.

[2000] Q.B. 501.

907.

For the consideration moving from the pupil, see below, para.4-039.

908.

⚠[2016] EWHC 360 (QB).

909.

⚠*Purton (t/a Richwood Interiors) v Kilker Projects Ltd* [2015] EWHC 2624 (TCC) at [7].

910.

⚠Above, para.2-004. In contrast, no intention to be bound was concluded in *Price v Euro Car Parks Ltd* [2015] EWHC 3253 (QB) where the claimant put a business proposal and sent an "In Principle Heads of Agreement" that neither signed, to the defendant. The defendant never accepted any offer made by the claimant; it merely allowed the claimant to go ahead (at his own risk) to research his business proposal. Moreover, the "In Principle Heads of Agreement" was too indefinite. Nor was there intention to be bound in *Burgess v Lejonvarn* [2016] EWHC 40 (TCC), [2016] T.C.L.R. 3 (affirmed [2017] EWCA Civ 254: see below, para.4-199), where an architect, for no fee, had found a contractor to landscape her friends' garden with a view to her providing subsequent design input for consideration. There was no contract to project manage the landscaping because the written discussions were simply too inchoate, there was no intention to be legally bound and there had been no consideration.

- [911.](#) *Pateman v Pay* (1974) 263 E.G. 467; *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 at [86] where the requirement of contractual intention was satisfied: see n.879.
- [912.](#) *Lark v Outhwaite* [1991] 2 Lloyd's Rep. 132, 141.
- [913.](#) *R. v Lord Chancellor's Department Ex p. Nangle* [1991] I.C.R. 743, 751.
- [914.](#) See *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394; below, para.13-002.
- [915.](#) For use of this expression in the present context, see *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] I.C.R. 1157 at [23].
- [916.](#) *Street v Mountford* [1985] A.C. 809; *A. G. Securities v Vaughan* [1990] 1 A.C. 417.
- [917.](#) *Autoclenz* case, above n.890; and see Davies (2009) 38 I.L.J. 318, cited with approval in that case at [38].
- [918.](#) See e.g. *Ogwr BC v Dykes* [1989] 1 W.L.R. 295; *Bruton v Quadrant Housing Trust* [1997] N.L.J. 1385. For the two-stage process used to decide questions of characterisation, see *Agnew v Commissioners of Inland Revenue* [2001] UKPC 28, [2001] A.C. 170 at [32].
- [919.](#) *Mexfield Housing Co-operative Ltd v Berisford* [2011] UKSC 52, [2012] 1 All E.R. 1393.
- [920.](#) *Mexfield Housing Co-operative Ltd v Berisford* [2011] UKSC 52 at [62]. The actual decision in that case was that the agreement did give rise to a tenancy (though not on the terms agreed by the parties), so that it was not strictly necessary to decide the point made in the text above: [2011] UKSC 52 at [58].
- [921.](#) *Mexfield Housing Co-operative Ltd v Berisford* [2011] UKSC 52 at [63], [95], [102], [108], [120].
- [922.](#) *Mexfield Housing Co-operative Ltd v Berisford* [2011] UKSC 52 at [67].
- [923.](#) e.g. *Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446 at [27].
- [924.](#) [1925] A.C. 445; affirming [1923] 2 K.B. 261; *County Ltd v Girozentrale Securities* [1996] 3 All E.R. 834; *M&P Steelcraft Ltd v Ellis* [2008] I.R.L.R. 355, below, para.2-191.
- [925.](#) They can have the same effect in other types of agreement: see *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274, *The Times*, June 12, 2003.
- [926.](#) Above, paras 2-125, 2-126; *Rose & Frank Co v J.R. Crompton & Bros Ltd* [1923] 2 K.B. 261, 294; *Ali v Ahmed* (1996) 71 P. & C.R. D39.
- [927.](#) *Commission for the New Towns v Cooper (G.B.) Ltd* [1995] Ch. 259, 295.
- [928.](#) See *Jones v Vernons Pools Ltd* [1938] 2 All E.R. 626; *Appleson v Littlewood Ltd* [1939] 1 All E.R. 464; *Guest v Empire Pools* (1964) 108 S.J. 98. In Scotland, it has been argued that such honour clauses in football coupons may be unreasonable and hence ineffective: *Ferguson v Littlewoods Pools* 1997 S.L.T. 309, 314–315.
- [929.](#) *R. v Lord Chancellor's Department Ex p. Nangle* [1991] I.C.R. 743; above, para.2-170.
- [930.](#) [1964] 1 W.L.R. 349. It was admitted that there was consideration moving from the employee.
- [931.](#) cf. *Glaxosmithkline UK Ltd v Department of Health* [2007] EWHC 1470, [2007] 2 All E.R. (Comm) 1140, where a “voluntary” scheme agreed between the Department and members of the pharmaceutical industry, containing “mandatory provisions” (at [13]), was held to have contractual force.

- [932.](#) *Home Insurance Co Ltd v Administratia Asigurarilor* [1983] 2 Lloyd's Rep. 674, 677; *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1989] 1 Lloyd's Rep. 473.
- [933.](#) *Hanjin Shipping Co Ltd v Zenith Chartering Corp (The Mercedes Envoy)* [1995] 2 Lloyd's Rep. 559.
- [934.](#) *Hanjin Shipping Co Ltd v Zenith Chartering Corp (The Mercedes Envoy)* [1995] 2 Lloyd's Rep. 559 at 564.
- [935.](#) [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737.
- [936.](#) For the alternative basis of the claim on the ground of estoppel, see below, para.4-099.
- [937.](#) *Baird* case, above n.910, at [30], [47], [69].
- [938.](#) For another such factor, see below, para.2-194.
- [939.](#) *Baird* case, above n.910, at [10], [46], [73].
- [940.](#) *Baird* case, above n.910, at [30], [47], [73], [74]; cf. *Alstom Transport v Tilson* [2010] EWCA Civ 1308, [2010] I.R.L.R. 169 at [50] (no implied contract where one party had actually refused to enter into an express contract with the other).
- [941.](#) *Baird* case, above n.910 at [76]. For somewhat similar reasoning, see *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392, [2011] 1 Lloyd's Rep. 123 (oral assurances given by borrower to lender held not to be legally binding since to give them contractual force would have defeated their commercial objective, which made it "important that they should *not* have legal effect" (at [143])).
- [942.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752.
- [943.](#) [2008] UKHL 55 at [7], [71].
- [944.](#) (1605) *Noy* 11; cf. *Dalrymple v Dalrymple* (1811) 2 Hag.Con. 54, 105.
- [945.](#) [1982] A.C. 225 affirmed so far as the manufacturer's liability was concerned, but on other grounds at 271.
- [946.](#) [1982] A.C. 225, 262; contrast *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 Q.B. 256 and *Bowerman v Association of British Travel Agents* [1995] N.L.J. 1815, above, para.2-015.
- [947.](#) [1913] A.C. 30 criticised by Atiyah, *The Rise and Fall of Freedom of Contract*, p.772; but followed by the House of Lords in *IBA v EMI Electronics Ltd* (1980) 14 Build. L.R. 1; cf. *Strover v Harrington* [1988] Ch. 390, 410; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 581. The Regulations referred to in para.2-176 below would not apply on facts such as those of any of the cases cited in this note.
- [948.](#) [1913] A.C. 30, 47; *Unit Construction Co Ltd v Liverpool Corp* (1972) 221 E.G. 459; *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (The Kapetan Markos NL)* [1987] 2 Lloyd's Rep. 323, 332.
- [949.](#) *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep. 611 at 614; cf. *White v Bristol Rugby Club Ltd* [2002] I.R.L.R. 2004.
- [950.](#) *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, [2007] NLJ 1263.
- [951.](#) Under s.14(2D) of the Sale of Goods Act 1979, as inserted by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.3, implementing Directive 1999/44/EC. Statements such as those made in *Lambert v Lewis*, above, would probably not be sufficiently

“specific” for this purpose. See above, para.2-017.

- [952.](#) See Supply of Goods and Services Act 1982 s.4(2B), as inserted by reg.7 of the Regulations cited above and Supply of Goods (Implied Terms) Act 1973 s.10(2D) as inserted by reg.13 of those Regulations.
- [953.](#) The 2015 Act applies to contracts made on or after October 1, 2015. The Sale and Supply of Goods to Consumers Regulation 2002 (SI 2002/3045) are revoked (2015 Act s.60 and Sch.1 para.53); Sale of Goods Act 1979 s.14(2D) is omitted (2015 Act s.60, Sch.1 para.27; s.14(2D) is comprised in Pt 5A of the 1979 Act); the Supply of Goods and Services Act 1982 s.4(2B) is omitted (2015 Act s.60 and Sch.1 para.40); (4) the Supply of Goods (Implied Terms) Act 1973 s.10(2D) is omitted (2015 Act s.60 and Sch.1 para.3(2)).
- [954.](#) See ss.9(5) and (6), 11(4), 12(2), 34(5) and (6), 37(2), 50(1)(a) and 50(3) of the Consumer Rights Act 2015.
- [955.](#) Consumer Rights Act 2015 ss.9(5) and 34(5) resemble the present s.14(2D) of the Sale of Goods Act 1979.
- [956.](#) SI 2002/3045.
- [957.](#) SI 2002/3045 reg.15(1); for the definition of “consumer guarantee” see reg.2. In the present context, it is significant that this definition refers to such a guarantee as an “*undertaking*”; cf. the reference, in the definition in reg.2 of “consumer” to “*contracts governed by these Regulations*”.
- [958.](#) See s.60 and Sch.1 para.53 Consumer Rights Act 2015. The Act applies to contracts made on or after October 1, 2015.
- [959.](#) See s.30(1) Consumer Rights Act 2015; “guarantee” is defined in s.30(2).
- [960.](#) Consumer Rights Act 2015 s.30(3). And see above, para.2-017. In contrast, the Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), which include a “commercial guarantee” in the lists of information which the trader is required by reg.9(1) and Sch.1 para.(h) and regs 10(1) and 13(1) and Sch.2 para.(q) to make available to the consumer, contain no equivalent phrase stipulating that a commercial guarantee “takes effect as a contractual obligation owed by the guarantor”. This is because the 2013 Regulations are concerned with ensuring that the consumer is informed about any commercial guarantee and not with its enforceability. Therefore the 2013 Regulations do not attempt to provide a legal basis for the liability of the producer to the consumer. The 2015 Act also provides that, where the trader is required by the 2013 Regulations to provide information to the consumer, the information so provided “is to be treated as included as a term of the contract” (see Consumer Rights Act 2015 ss.12(2) (goods), 37(2) (digital content), 50(3) (services)). Where it is the trader itself that gives the guarantee, these provisions seem merely to make it quite clear that what is undertaken by the trader in the guarantee forms a term of the contract for supply or services with the consumer. Where the information given by the trader relates to a commercial guarantee offered by the producer, and the information given is incorrect, the consumer will have the more limited remedy of recovering from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods: ss.19(2), 42(4); or, in the cases of a services contract, a price reduction (s.54(4)). See further below, paras 38-458—38-488, 38-504—38-523, 38-530—38-544.
- [961.](#) *Balfour v Balfour* [1919] 2 K.B. 571, 578; *Rose & Frank Co v J.R. Crompton & Bros Ltd* [1923] 2 K.B. 261, 293; *Wyatt v Kreglinger & Fernau* [1933] 1 K.B. 793, 806.
- [962.](#) *Lens v Devonshire Club, The Times, December 4, 1914*; referred to in *Wyatt*’s case, above n.936, from which the quotation in the text is taken.
- [963.](#) *White v Blackmore* [1972] 2 Q.B. 651.
- [964.](#) *Coward v M.I.B.* [1963] 1 Q.B. 259; overruled, but not on the issue of contractual intention, in

- Albert v M.I.B.* [1972] A.C. 301; *Buckpitt v Oates* [1968] 1 All E.R. 1145, criticised on this point by Karsten (1969) 32 M.L.R. 88. The actual decisions are obsolete by reason of Road Traffic Act 1988 ss.145, 149; cf. also s.150; but an issue of contractual intention might still arise if one party to such an arrangement simply failed to turn up at the agreed time. For another context in which sharing of expenses did not give rise to an inference of contractual intention, see *Monmouth C. v Marlog*, *The Times*, May 4, 1994.
965. *Hadley v Kemp* [1999] E.M.L.R. 589; *McPhail v Bourne* [2008] EWHC 1235.
966. *Heslop v Burns* [1974] 1 W.L.R. 1241; cf. *Horrocks v Forray* [1976] 1 W.L.R. 230.
967. *Kucukkoylu v Ozcan* [2014] EWHC 1972.
968. [1919] 2 K.B. 571. cf. *Gould v Gould* [1970] 1 Q.B. 275, where there was a division of opinion on the issue of contractual intention, the majority holding that there was no such intention where a husband on leaving his wife promised to pay her £15 per week so long as he could manage it. And see generally Ingman [1970] J.B.L. 109.
969. *Balfour v Balfour*, above n.943 at 578: it would clearly be undesirable to enforce such agreements in accordance with their original terms, however much the position of the parties had changed.
970. *Pettitt v Pettitt* [1970] A.C. 777, 816.
971. e.g. *Gage v King* [1961] 1 Q.B. 188; *Spellman v Spellman* [1961] 1 W.L.R. 921; cf. *Re Beaumont (dec'd)* [1980] Ch. 444, 453; cf. *Lloyds Bank Plc v Rosset* [1991] A.C. 107.
972. *Pearce v Merriman* [1904] 1 K.B. 80; cf. *Morris v Tarrant* [1971] 2 Q.B. 143.
973. e.g. *Merritt v Merritt* [1970] 1 W.L.R. 1211; cf. *Tanner v Tanner* [1975] 1 W.L.R. 1346 as explained in *Horrocks v Forray* [1976] 1 W.L.R. 230; *Re Windle* [1975] 1 W.L.R. 1628 (doubted in *Re Kumar* [1993] 1 W.L.R. 224); contrast *Vaughan v Vaughan* [1953] 1 Q.B. 762 (below, para.2-194).
974. *Synge v Synge* [1894] 1 Q.B. 466, cf. *Jennings v Brown* (1842) 9 M. & W. 496 (promise to discarded mistress).
975. Civil Partnership Act 2004 s.1.
976. Civil Partnership Act 2004 ss.1, 73.
977. Civil Partnership Act 2004 ss.1, 70.
978. Either because they have chosen not to enter into such a partnership or because, not being of the same sex, they were not eligible to do so: see Civil Partnership Act 2004 s.1(1).
979. *Eves v Eves* [1975] 1 W.L.R. 1338, 1345.
980. *Eves v Eves*, above n.954, per Browne L.J. and Brightman J.
981. *Eves v Eves* [1975] 1 W.L.R. 1338 at 1342, per Lord Denning, M.R.; for this basis of liability, see *Grant v Edwards* [1986] Ch. 638; cf. *Lloyds Bank Plc v Rosset* [1991] A.C. 107, 129, *Burns v Burns* [1984] Ch. 317; Lowe and Smith (1984) 47 M.L.R. 341; Dewar, 735.
982. Law of Property (Miscellaneous Provisions) Act 1989 s.2; below, para.5-011.
983. cf. *Taylor v Dickens* [1998] F.L.R. 806, 819; the reasoning of this case was doubted, but not on the issue of contractual intention, in *Gillett v Holt* [2001] Ch. 210, 227; s.2(1) of the 1989 Act (above, n.957) requires the contract to be made in writing incorporating all its “expressly agreed” terms in a document (or documents, where contracts are exchanged), and if the

- promise in *Eves v Eves* (above, at n.954) was indeed implied, it could be argued that there were no “expressly agreed” terms.
- [984.](#) The formal requirements imposed by the 1989 Act (above n.957) do not apply to “the creation or operation of ... constructive trusts”: s.2(5).
- [985.](#) See below, para.4-142.
- [986.](#) *Tanner v Tanner* [1975] 1 W.L.R. 1346, 1351.
- [987.](#) *Tanner v Tanner*, above.
- [988.](#) *Horrocks v Forray* [1976] 1 W.L.R. 320; cf. *Coombes v Smith* [1986] 1 W.L.R. 808; *Windeler v Whitehall* [1990] 2 F.L.R. 505.
- [989.](#) *Cocksedge v Cocksedge* (1844) 14 Sim 244; 13 L.J. Ch. 384; *H v W* (1857) 3 K & J 382.
- [990.](#) *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534.
- [991.](#) [2010] UKSC 42 at [75] per Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Collins of Mapesbury, Lord Kerr of Tonaghmore JJSC; Baroness Hale of Richmond dissenting. And see Law Commission report, Matrimonial Property Needs and Agreements (Law Com No.343) 2014.
- [992.](#) [2010] UKSC 42 at [70].
- [993.](#) *Parker v Clark* [1960] 1 W.L.R. 286; cf. *Schaefer v Schuhman* [1972] A.C. 572; Lee (1972) 88 L.Q.R. 320; *Tanner v Tanner* [1975] 1 W.L.R. 1346; *Nunn v Dalrymple*, *The Times*, August 3, 1989.
- [994.](#) [1972] 1 W.L.R. 1286.
- [995.](#) But she recovered the £600 on equitable grounds; below, para.4-141; cf. *Re Sharpe* [1980] 1 W.L.R. 219, where there was both a loan and an equitable right in the lender; *Briggs v Rowan* [1991] E.G.C.S. 6.
- [996.](#) [1955] 1 W.L.R. 975.
- [997.](#) See *Jones v Padavatton* [1969] 1 W.L.R. 328, 333; cf. *Shadwell v Shadwell* (1860) 9 C.B.(N.S.) 159; below, para.4-074.
- [998.](#) If there is very clear evidence of contractual intention there may be a binding contract, as in *Haggar v de Placido* [1972] 1 W.L.R. 716. But in practice such “contracts” were made only as devices to enable the value of the mother’s services to be recovered from a tortfeasor who had injured the child, and for this purpose they are now unnecessary: *Donnelly v Joyce* [1974] Q.B. 454.
- [999.](#) *Ellis v Chief Adjudication Officer* [1998] 1 F.L.R. 184, 188.
- [1000.](#) *Hardwick v Johnson* [1978] 1 W.L.R. 683, per Roskill and Browne L.JJ.; Lord Denning, M.R. thought that there was no contract but reached the same conclusion on other grounds; cf. *Collier v Hollingshead* (1984) 272 E.G. 941.
- [1001.](#) Below, para.4-025; *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651 at 659-660.
- [1002.](#) (1813) 1 M. & S. 290; cf. *Shallcross v Wright* (1850) 12 Beav. 558; *Roberts v Smith* (1859) 28 L.J. Ex. 164; *Robinson & Commissioners of Customs & Excise*, *The Times*, April 28, 2000.

- [1003.](#) (1813) 1 M. & S. 290, 291.
- [1004.](#) Vol.II, para.40-079; cf. *Re Brand's Estate* [1936] 3 All E.R. 374.
- [1005.](#) cf. *Re Richmond Gate Property Co Ltd* [1965] 1 W.L.R. 335.
- [1006.](#) *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042; contrast *Franks v Reuters Ltd* [2003] EWCA Civ 417, *The Times*, April 23, 2003.
- [1007.](#) *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408 at 460, per Lord Cooke, giving this as an alternative ground for the decision while also accepting the “implied term” reasoning of the majority.
- [1008.](#) *Horkulak v Cantor Fitzgerald Ltd* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [48] (discretionary bonus on dismissal), cf. at [46]; contrast *Keen v Commerzbank AG* [2006] EWCA Civ 1536, [2007] I.C.R. 623, where an employer’s “very wide discretion” in relation to a bonus had not “been exercised irrationally” (at [59], [60]).
- [1009.](#) *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd’s Rep. IR 221 at [35]–[36]; *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 457 at [33]–[34].
- [1010.](#) *Prater v Cornwall CC* [2006] EWCA Civ 102, [2006] I.C.R. 731.
- [1011.](#) *Selkirk v Romar Investments Ltd* [1963] 1 W.L.R. 1415, 1422; cf. the authorities on agreements subject to a condition depending on the “satisfaction” of one party, discussed above, para.2-163. A contract term giving a wide discretion to one party may be subject to the requirement of reasonableness under Unfair Contract Terms Act 1977 s.3(2)(b)(ii), or may not be binding on a consumer under Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), especially Sch.2 para.1(c). In the cases of agreements subject to the “satisfaction” of one party, there is *no* general rule requiring that party to act in good faith or reasonably: see *Stabilad Ltd v Stephens & Carter Ltd* [1999] 2 All E.R. (Comm) 651 at 622, above, para.2-163 such agreements can be distinguished from contracts which give one party a discretion to rescind since the exercise of such a discretion deprives the other party of rights under an existing contract, while in the “satisfaction” cases there is no such contract unless the party’s satisfaction is communicated to the other. Similar reasoning serves to distinguish a contractual discretion to rescind (here under discussion) from a contractual discretion of the kind discussed in para.2-185 above at n.983.
- [1012.](#) *Robertson v British Gas Corp* [1983] I.C.R. 351; *Marley v Forward Trust Group* [1986] I.C.R. 891; cf. *N.C.B. v N.U.M.* [1986] I.C.R. 736. Contrast *Kaur v MG Rover Group Ltd* [2004] EWCA Civ 1507, [2005] I.C.R. 625, where a term to the effect that there would be no compulsory redundancies was held not to have been incorporated in individual employment contracts as it was not intended to constitute a binding contractual commitment; and *Malone v British Airways Plc* [2010] EWCA Civ 1225, [2011] I.R.L.R. 32, where agreements were intended to be made with employees collectively and to be binding in honour only (at [58], [62]) and so were not legally binding between the employers and individual employees. And see below, para.14-022, Vol.II, para.40-050.
- [1013.](#) As defined by s.178(1) and (2) of the 1992 Act.
- [1014.](#) s.179(1) and (2); *Universe Tankships Inc v International Transport Workers’ Federation (The Universe Sentinel)* [1983] A.C. 366, 380; *Monterosso Shipping Co Ltd v International Transport Workers’ Federation (The Rosso)* [1982] 2 Lloyd’s Rep. 120; *N.C.B. v N.U.M.* [1986] I.C.R. 736; cf. *Cheall v A.P.E.X.* [1983] A.C. 180, 189 (inter-union agreement). Provisions making collective agreements legally binding were said in *Commission of the European Communities v United Kingdom* [1984] I.C.R. 192, 195 to be very rare.
- [1015.](#) *N.C.B. v N.U.M.* [1986] I.C.R. 736; cf. *Malone v British Airways Plc*, above n.987, where, since the collective agreement was intended to be binding in honour only (at [58], [61]), it was not legally binding even between the employers and the union.

- [1016.](#) [1947] 1 All E.R. 258.
- [1017.](#) [1967] 2 Q.B. 31; Odgers (1970) 86 L.Q.R. 69.
- [1018.](#) [1967] 2 Q.B. at 41.
- [1019.](#) *Rederiaktiebolaget Amphitrite v R.* [1921] 3 K.B. 500.
- [1020.](#) *Rederiaktiebolaget Amphitrite v R.* [1921] 3 K.B. 500 at 503; see further below, paras 11-007—11-009.
- [1021.](#) *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, 558; the actual decision was affirmed on other grounds [1961] Ch. 105, while dicta in the decision at first instance were disapproved, on a point not here under discussion, in *Bolton MBC v Torrington* [2003] EWCA Civ 1634, [2004] Ch. 66; cf. *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] A.C. 207; *The Aramis* [1989] 1 Lloyd's Rep. 213; Treitel; [1989] L.M.C.L.Q. 162; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311; *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2002] EWCA Civ 1068, [2002] 2 Lloyd's Rep. 487 at [63].
- [1022.](#) *G.F. Sharp & Co v McMillan* [1998] I.R.L.R. 632.
- [1023.](#) *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep. 238, 241-242; cf. the *Stirling* case, below para.2-196 n.1063, where it was accepted that a new contract was created by virtue of a subsequent agreement increasing the monthly rent.
- [1024.](#) *Pyrene v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402; *A.M. Satterthwaite & Co Ltd v New Zealand Shipping Co Ltd (The Eurymedon)* [1975] A.C. 514; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No.2)* [1990] 2 Lloyd's Rep. 395 (so far as it relates to BP's claim). cf. *Halifax Building Society v Edell* [1992] Ch. 436, discussed below, para.18-016.
- [1025.](#) See, in addition to the cases discussed in this and the two following paragraphs, *M&P Steelcraft Ltd v Ellis* [2008] I.R.L.R. 355 (relationship between a prisoner and a company for which he had worked under a work placement scheme organised by the Prison Service and recorded in a tripartite agreement stating that the agreement was not intended to create legally enforceable rights *held* not to have contractual force).
- [1026.](#) *President of the Methodist Conference v Parfit* [1984] Q.B. 368 at 378; approved in *Davies v Presbyterian Church of Wales* [1986] 1 W.L.R. 323 (no contract of employment between pastor and Presbyterian church); Woolman (1986) 102 L.Q.R. at 356; *Santok Sing v Guru Nanak Gurdwara* [1990] I.C.R. 309; *Birmingham Mosque Trust v Alawi* [1992] I.C.R. 435; *Diocese of Southwark v Coker* [1998] I.C.R. 140.
- [1027.](#) [2005] UKHL 73, [2006] 2 A.C. 28.
- [1028.](#) Within Sex Discrimination Act 1975 s.82(1). This Act is repealed by Equality Act 2010 s.211(2) and Sch.27 Pt 1, subject to exceptions and transitional provisions which need not be discussed here. For sex discrimination, see now s.11 of the 2010 Act; for references to employment in that Act, see (e.g.) ss.42(1), 83(1).
- [1029.](#) *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73 at [25], [151].
- [1030.](#) [2005] UKHL 73 at [26].
- [1031.](#) [2005] UKHL 73, [2006] 2 A.C. 28 at [23].
- [1032.](#) [2005] UKHL 73 at [24]; cf. at [112] and [137]; and see the authorities cited in n.999 above.
- [1033.](#) *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, [2008] I.C.R. 282 at [53],

- [63], [66].
- [1034.](#) [2005] UKHL 73 at [23].
- [1035.](#) [2013] UKSC 29, [2013] 2 A.C. 163.
- [1036.](#) [2011] EWCA Civ 1581, [2012] 2 All E.R. 934.
- [1037.](#) Under s.94 of the Employment Rights Act 1996.
- [1038.](#) Within s.230 of the Employment Rights Act 1996.
- [1039.](#) [2013] UKSC 29 at [26].
- [1040.](#) [2013] UKSC 29 at [11] and [920].
- [1041.](#) [2013] UKSC 29 at [20], see also at [19] for this characterisation.
- [1042.](#) [2013] UKSC 29 at [26] see also Lord Hope's concurring judgment at [32].
- [1043.](#) Employment Rights Act 1996 ss.94(1), 230(1) and (2).
- [1044.](#) [2011] EWHC 2871 (QB), [2012] 1 All E.R. 723.
- [1045.](#) [2011] EWHC 2871 (QB) at [28], [30], [36].
- [1046.](#) [2012] EWCA Civ 938, [2012] 4 All E.R. 1152.
- [1047.](#) [2012] EWCA Civ 938 at [24]–[28].
- [1048.](#) [2012] EWCA Civ 938 at [29]–[30].
- [1049.](#) [2012] EWCA Civ 938 at [119].
- [1050.](#) [2012] UKSC 56, [2013] 2 A.C. 1 at [4], [56] and [57].
- [1051.](#) [2013] UKSC 29.
- [1052.](#) *R. v Civil Service Appeal Board Ex p. Bruce* [1988] I.C.R. 649; affirmed on other grounds [1989] I.C.R. 171; *Mclaren v Home Office*, *The Times*, May 18, 1989.
- [1053.](#) *R. v Civil Service Appeal Board Ex p. Bruce* 1988] I.C.R. 649 at 659.
- [1054.](#) *R. v Lord Chancellor's Department Ex p. Nangle* [1991] I.C.R. 743; cf. Trade Union and Labour Relations (Consolidation) Act 1992 ss.62(7), 245: "deemed [for certain purposes] to constitute a contract."
- [1055.](#) s.83(2)(b); it is not entirely clear from the structure of s.83(2) whether the words in s.83(2)(a) quoted in n.1034 below apply for the purpose of s.83(2)(b).
- [1056.](#) *White v Chief Constable of the South Yorkshire Police* [1999] A.C. 455 at 481. cf. *Essex Strategic Health Authority v David-John* [2003] Lloyd's Rep. Med. 586 (relationship between general practitioner and Health Authority not contractual).
- [1057.](#) *White v Chief Constable of the South Yorkshire Police* [1999] A.C. 455 at 497.
- [1058.](#) *White v Chief Constable of the South Yorkshire Police* [1999] A.C. 455 at 497; see also *Waters v Commissioner of Police to the Metropolis* [2000] 1 W.L.R. 1607, 1616.
- [1059.](#) s.42(1); employment in Pt 5 of the 2010 Act means (inter alia) "employment under a contract of

employment”: s.83(2)(a).

- [1060.](#) *Vaughan v Vaughan* [1953] 1 Q.B. 762, 765; cf. *Booker v Palmer* [1942] 2 All E.R. 674; *Horrocks v Forray* [1976] 1 W.L.R. 230; *Windeler v Whitehall* [1990] 2 F.L.R. 505.
- [1061.](#) cf. *Jones v Padavatton* [1969] 1 W.L.R. 328; and see *Gould v Gould* [1970] 1 Q.B. 275; *Layton v Morris*, *The Times*, December 11, 1985.
- [1062.](#) *J.H. Milner & Son v Percy Bilton Ltd* [1966] 1 W.L.R. 1582.
- [1063.](#) Above, para.2-132.
- [1064.](#) *Kleinwort Benson Ltd v Malaysian Mining Corp* [1989] 1 W.L.R. 379; see also *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595, above para.2-132 (where a “letter of comfort” was held to have given rise to a legally binding contract, though that contract had later been discharged).
- [1065.](#) cf. *Snelling v John G. Snelling Ltd* [1973] 1 Q.B. 87, 93; *Montreal Gas Co v Vasey* [1900] A.C. 595; *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504; cf. *Turiff Construction Ltd v Regalia Knitting Mills* (1971) 222 E.G. 169 (letter of intent held to be a collateral contract to pay for preliminary work); *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC), 119 Con. L.R. 32 (binding letter of intent: above, para.2-132). *Wilson Smithett & Cope (Sugar) Ltd v Bangladesh Sugar Industries Ltd* [1986] 1 Lloyd's Rep. 378 (letter of intent held to be an acceptance).
- [1066.](#) Above, para.2-147.
- [1067.](#) See *Re Goodchild* [1997] 1 W.L.R. 1216 where it is said at 1226 that one of the parties to alleged mutual wills “regarded the arrangement as irrevocable, but ... [the other] did not”; cf. *Taylor v Dickens* [1998] 1 F.L.R. 806 (the reasoning of this case is doubted, but not on the issue of contractual intention, in *Gillett v Holt* [2001] Ch. 210). See also *Judge v Crown Leisure Ltd* [2005] EWCA Civ 571, [2005] I.R.L.R. 823 (above, para.2-147) at [23], distinguishing between the two issues; and *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 at [152], [170] and [171], where certainty and intention to create legal relations were treated as separate requirements, both of which were satisfied. See also below at n.1052.
- [1068.](#) Above, paras 2-125, 2-171. The terms of such agreements may be elaborated in considerable detail, but contractual intention is generally negated until the requirement of “exchange of contracts” (above, para.2-125) is satisfied.
- [1069.](#) *Dhanani v Crasnianski* [2011] EWHC 926 (Comm), [2011] 2 All E.R. (Comm) 799.
- [1070.](#) At [75], [80], [81], [89].
- [1071.](#) [2011] EWHC 926 (Comm) at [95]; see above para.2-143 for such agreements.
- [1072.](#) [2011] EWHC 926 (Comm) at [105].
- [1073.](#) [2011] EWHC 926 (Comm) at [94].
- [1074.](#) [2011] EWHC 926 (Comm) at [104]; for similar reasoning, see *Shaker v VistaJet Group Holding SA* [2012] EWHC 1329 (Comm), [2012] 2 Lloyd's Rep. 93 at [7], where an “agreement to use reasonable endeavours to agree” was held to be unenforceable because there were “no objective criteria by which the court can decide whether a party has acted unreasonably” (i.e. in relation to those endeavours); for such criteria, cf. above, paras 2-125, 2-135, 2-150.
- [1075.](#) [2012] EWCA Civ 548.
- [1076.](#) [2012] EWCA Civ 548 at [37].

- [1077.](#) [2012] EWCA Civ 548 at [44].
- [1078.](#) [2012] EWCA Civ 548 at [52].
- [1079.](#) This view is supported by passages in *Judge v Crown Leisure Ltd*, above n.1042 at [9] and [24]. For another borderline case, see *Monovan Construction Ltd v Davenport* [2006] EWHC 1094, 108 Con. L.R. 15 where an agreement to do building work for a “provisional guide price” of £100,000 failed to specify the exact scope of the work and was said not to be legally enforceable as it was not intended to have contractual effect (at [17]).
- [1080.](#) *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737 at [30]; and see above, paras 2-150, 2-172.
- [1081.](#) As in the *Baird* case, n.1055 above.
- [1082.](#) So that he cannot rely on the objective test: see above, para.2-170.
- [1083.](#) (1896) 12 T.L.R. 501.
- [1084.](#) *Orion Ins. Co Plc v Sphere Drake Ins. Plc* [1990] 1 Lloyd's Rep. 465, 505; affirmed (by a majority) [1990] 1 Lloyd's Rep. 239; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311; cf. *County Ltd v Girozentrale Securities Ltd* [1996] 3 All E.R. 834, 837; *Clarke v Nationwide Anglia Building Society* (1998) 76 P. & C.R. D5.
- [1085.](#) *Glatzer & Warwick Shipping Co v Bradstone Ltd (The Ocean Enterprise)* [1997] 1 Lloyd's Rep. 449, 484; *Hitch v Stone* [2001] EWCA Civ 63; [2001] S.T.C. 214; contrast *Ashby v Kilduff* [2009] EWHC 2034, [2010] 3 F.C.R. 80, where the argument that the agreement was a sham failed on the facts. The question whether an agreement was a “sham” may also arise for the purpose of determining, not whether a contract has come into existence, but the nature of the legal relationship created by a contract, the existence of which is not in dispute: e.g. whether one party to the contract is the other's tenant or employee. For discussion of such possibilities, see above, para.2-170.
- [1086.](#) *Sutton v Mishcon Reya* [2003] EWHC 3166 (Ch), [2004] Fam. Law 247 at [26].
- [1087.](#) *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306, 329; *Jackson v Thakrar* [2007] EWHC 271 (TCC), [2007] B.P.I.R. 167.
- [1088.](#) *Burrows v Brent LBC* [1996] 1 W.L.R. 1448, 1454; cf. *Stirling v Leadenhall Residential 2 Ltd* [2001] EWCA Civ 1011, [2001] 3 All E.R. 645: agreement as to rate at which payments under a court order for rent arrears were to be made held not to give rise to a new tenancy.
- [1089.](#) *Burrows* case, above n.1063, at 1455; for discussion of this case, see *Knowsley Housing Trust v White* [2008] UKHL 70, [2009] 1 A.C. 636, where Lord Neuberger at [79] described the status of a “tolerated trespasser” as a “conceptually peculiar, even oxymoronic” one.
- [1090.](#) Above, paras 2-167 et seq.
- [1091.](#) See *Zakhem International Construction Ltd v Nippon Kohan KK* [1987] 2 Lloyd's Rep. 596.
- [1092.](#) Above, paras 2-168—2-171.
- [1093.](#) [1976] 1 W.L.R. 1; Atiyah (1976) 39 M.L.R. 335.
- [1094.](#) Lords Simon and Wilberforce. Lord Fraser, who dissented on the main issue, took the same view.
- [1095.](#) [1976] 1 W.L.R. 1, 6.
- [1096.](#) [1976] 1 W.L.R. 1078; Adams (1977) 40 M.L.R. 227.

[1097.](#) [1975] 1 Lloyd's Rep. 162.

[1098.](#) [1976] 1 W.L.R. 1078; cited with apparent approval of the outcome in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451, [2003] 1 All E.R. (Comm) 801 at [19], [40].

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Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 10. - Liability When Negotiations Do Not Produce A Contract

General

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Contracts of any complexity are likely to be negotiated through a series of communications with one side responding to the other's proposals. The starting point in English law is that, until the contract is concluded, either party is free to decide not to contract and to withdraw from further negotiations without incurring any liability. This position upholds freedom of contract (which includes freedom *from* contract), and assumes that parties must take the risk that negotiations may fail to yield an enforceable contract. However, such a position may, in some cases, come into tension with considerations of good faith and fair dealing; for example, when the party refusing to proceed with the negotiations or claiming that the agreement reached lacks contractual force has induced the other party to believe that a contract will be concluded, and perhaps even to commence its performance. Many European continental civil law systems recognise a duty to negotiate in good faith. ¹⁰⁹⁹ The Draft Common Frame of Reference ¹¹⁰⁰ states that: "A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing". Likewise, the UNIDROIT Principles of International Commercial Contracts, ¹¹⁰¹ state that while "[a] party is free to negotiate and is not liable for failure to reach an agreement", he is "liable for the losses caused to the other party" if he "negotiates or breaks off negotiations in bad faith"; and "[i]t is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party."

Piecemeal approach

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In contrast, English law imposes no general duty to negotiate in good faith. ¹¹⁰² However, this is not to suggest that there is a bright line dividing liability when a contract has been concluded, and no liability before that point. For that would overlook the diverse range of doctrines and principles that can be deployed by the courts to deal with contraventions of good faith and fair dealing in the pre-contractual period. As Bingham L.J. observed in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* ¹¹⁰³ :

"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 and 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 ... At one level they are concerned with a question of pure contractual analysis ... At another level they are concerned with a

somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound.”

These “piecemeal solutions” are discussed in greater detail elsewhere in these two volumes and references will be made to them. They are brought together in this section to show how and to what extent the common law, in effect, implements a notion of good faith and fair dealing in the pre-contractual period.

[1099.](#) Italian Codice Civile art.1337 and s.311(2) of the German Bürgerliches Gesetzbuch both impose the obligation of good faith during contract negotiations. And see above, paras 1-042 and 1-043.

[1100.](#) Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (2009), art.II-3:301(1); cf. O. Lando and H. Beale, *Principles of European Contract Law (Parts I and II)* (2000) art.2:301.

[1101.](#) art.2.1.15 UPICC.

[1102.](#) See above, para.1-039.

[1103.](#) [1989] Q.B. 433; [1988] 2 W.L.R. 615.

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(a) - Main Agreements “Perfectured” by the Court

Objectivity and fault

2-202

Contracts are premised on the agreement of the parties. But, while the common law adopts the objective test to agreement (the appearance of agreement is sufficient), ¹¹⁰⁴ continental European civil law systems purport to adopt a subjective approach. Accordingly, there may be no contract if one party no longer intended to enter it, ¹¹⁰⁵ or the contract may be avoided, if the expression of agreement is tainted by mistake so that the mistaken party did not intend to enter that particular contract, despite appearances. ¹¹⁰⁶ However, in some civilian systems the notion of fault in the contracting process seems to have developed as a counter-weight to the requirement of subjective assent. ¹¹⁰⁷ Thus, for example, according to §122 BGB, the mistaken party must compensate the other party for their reliance loss unless they knew or ought to have known of the mistake. ¹¹⁰⁸ The notion of culpa in contrahendo (fault in the conclusion of a contract) formally entered the BGB as a general principle in 2001 (§311) and deals with a number of circumstances that do not arise in English law because the objective approach means that there will simply be contractual liability. English law has also developed many other techniques to “perfect” an otherwise imperfect agreement.

Incomplete or vague agreements

2-203

Where the parties have reached agreement one party may allege that, for various reasons, the agreement lacks contractual force because the agreement is incomplete, ¹¹⁰⁹ is subject to formal execution of a contract, ¹¹¹⁰ is too vague, ¹¹¹¹ or lacks contractual intent. ¹¹¹² The common law has many ways of countering a party’s unmeritorious attempt to withdraw from concluding a contract or to refute the existence of an enforceable contract, especially where the other party has engaged in significant acts of reliance on the existence of an enforceable contract. In addition, statute has now imposed duties of information on traders making distance contracts, off-premises contracts and some other (“on-premises”) contracts with consumers. ¹¹¹³

Overcoming incomplete agreement

2-204

Incomplete agreements may be cured by a statutory or common law implied term based on the standard of reasonableness, ¹¹¹⁴ so long as the agreement did not anticipate further agreement on the matter. ¹¹¹⁵ However, even where the agreement anticipates further terms “to be agreed”, the court may still give legal effect to it if there is evidence that the parties intended to be bound, for example, because both parties have acted on the basis that the agreement was binding. ¹¹¹⁶ The matter left to

be resolved may be regarded as subsidiary and so not to negative contractual intention, or may be resolved by reference to any criteria or machinery set out in the agreement, ¹¹¹⁷ unless the criteria is too uncertain or the machinery fails and cannot be cured because it is other than “subsidiary and inessential”. ¹¹¹⁸

Duty to negotiate outstanding details

2-205

Although the common law recognises no duty to negotiate in good faith ¹¹¹⁹ in order to conclude a contract, where a contract has been concluded ¹¹²⁰ because the parties have agreed on all essential points, the court may, in respect of other points left open, enforce any express term to negotiate in good faith, imply a term that they are to do so, or imply a term based on the standard of reasonableness. ¹¹²¹ That is, the court may proceed on the basis that the parties intended to be bound at once in spite of the fact that further significant terms were to be agreed later and that even their failure to reach such agreement would not invalidate the contract, unless without such agreement, it was unworkable or too uncertain to be enforced.

Overcoming vague agreement

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Aside from the ordinary process of construction, ¹¹²² apparent vagueness in the terms agreed may be resolved by custom or trade usage, ¹¹²³ by the standard of reasonableness if the words used imported an objective standard of assessment, ¹¹²⁴ by requiring one party to resolve the vagueness, ¹¹²⁵ by severing or ignoring meaningless or self-contradictory phrases, ¹¹²⁶ or by reference to extrinsic evidence. ¹¹²⁷

Restraint on exercise of discretion

2-207

An agreement that confers a wide discretion on one or both parties may be too uncertain to enforce. However, where the agreement is clearly intended to have contractual effect, there is judicial support for the view that a discretion conferred by it on one party cannot “however widely worded ... be exercised for purposes contrary to those of the instrument by which it is conferred”. ¹¹²⁸ The court may also be able to control the exercise of contractual discretions by holding that the party exercising the discretion must act “rationally and in good faith” ¹¹²⁹ and not “arbitrarily, or capriciously, or unreasonably. Much less, can he act in bad faith”. ¹¹³⁰ Thus, the agreement is rendered sufficiently certain to enforce.

Agreement subject to execution of formal document

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An agreement that is made subject to the execution of a formal document may nevertheless be accorded legal force. The court may find, in the circumstances: ¹¹³¹ that such a document is intended only as a solemn record of an already complete and binding agreement; or that while the main agreement lacks contractual force, nevertheless, a separate preliminary or interim contract had come into existence at an earlier stage, e.g. when one party begins to render services requested by the other, so that under this contract the former party will be entitled to a reasonable remuneration for those services ¹¹³²; or that while the agreement originally lacked contractual force, it has acquired such force by reason of supervening events, e.g. where subsequent events have occurred whereby the non-executing party is estopped by relying on his non-execution; or that the non-executing party has waived the requirement of formal execution; or that the words “subject to contract” are meaningless and can be severed ¹¹³³; or that there was a binding provisional agreement until it is

superseded by the formal agreement. ¹¹³⁴ Where the parties have begun to act on an agreement before it has contractual force and the agreement subsequently acquires such force, the resulting contract may be regarded as expressly or impliedly having retrospective effect so as to apply to work done or goods supplied before it was actually made. ¹¹³⁵

Other conditional agreements

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Where an agreement is subject to a contingent condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by him. Nevertheless, such an agreement may, on its true construction, impose some degree of obligation on the parties or on one of them. ¹¹³⁶ The agreement may: restrict the right of one (or both) of the parties from withdrawing before the occurrence of the condition, so long as it can still occur ¹¹³⁷; impose a duty on both parties not to do anything to prevent the occurrence of the condition ¹¹³⁸; or impose a duty on one of the parties to use reasonable efforts to bring the condition about. ¹¹³⁹ Where the operation of the contract depends on the “satisfaction” of one of the parties with the subject-matter or other aspects relating to the other’s performance, the court may construe the term as “subject to bona fides”. ¹¹⁴⁰ Where a condition is inserted entirely for the benefit of one party, the court may find that that party has waived the condition, so that the contract is binding as if the condition had been satisfied. ¹¹⁴¹

Letters of intent

2-210

Where commercial parties to a transaction issue or exchange “letters of intent” on which they act pending the preparation of formal contracts, or issue a “letter of comfort”, such letters may, as a matter of construction, be held to bind the parties. The courts will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. The fact that the parties envisage that the letter is to be superseded by a later, more formal, contractual document does not, of itself, prevent the letter from taking effect as a contract. ¹¹⁴²

Contractual intention

2-211

A party may seek to escape an otherwise valid contract by alleging that an agreement was made without any intention of creating legal relations. In the case of ordinary commercial transactions, such an intention is presumed; a heavy onus is placed on the party who asserts that no legal effect is intended. The courts will be influenced by the importance of the agreement to the parties, and by the fact that one or both parties have acted in reliance on it. ¹¹⁴³ Whether any words apparently negating contractual intention has that effect is a question of construction. ¹¹⁴⁴ In contrast, most agreements made in the social or familial context are presumed to be attended by no intention to be legally bound. ¹¹⁴⁵ However, this presumption may be rebutted on the facts of the individual case. ¹¹⁴⁶ Where a couple make an agreement with regard to a house in which they live together in a quasi-marital relationship without being married or having entered into a civil partnership, the agreement may be enforced by way of contract, constructive trust, proprietary estoppel or contractual license. ¹¹⁴⁷

¹¹⁰⁴. See above, para.2-004.

¹¹⁰⁵. Thus in Cass. Civ. 17 December 1958, nD.1959.1.33, the French Cour de cassation seems to assume that an offer to sell a house could no longer be accepted after the house had been sold

to a third person, even though the offeror had not informed the offeree of the sale.

[1106.](#) §119 BGB art.1109 Code Civile.

[1107.](#) Thus it suggested that the offeror in the French case cited in n.1080 might be liable under art.1382 C.C. (delictual liability) for his failure to inform the offeree that the house was no longer available: see H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law* (2010), 269.

[1108.](#) This article of the BGB is not based directly on the notion of culpa in contrahendo, since it is not based on fault on the part of the mistaken party, but it seems to reflect a similar idea.

[1109.](#) See above, paras 2-119, 2-133.

[1110.](#) See above, para.2-123.

[1111.](#) See above, para.2-147.

[1112.](#) See above, para.2-067.

[1113.](#) See below, paras 38-055—38-144.

[1114.](#) See above, paras 2-120—2-121.

[1115.](#) See above, para.2-133.

[1116.](#) See above, paras 2-135—2-136.

[1117.](#) See above, paras 2-137—2-139.

[1118.](#) *Re Malpas* [1985] Ch. 42, 50; cf. *Tito v Waddell (No.2)* [1877] Ch. 106, 314; *Didymi Corp v Atlantic Lines & Navigation Co Ltd* [1988] 2 Lloyd's Rep. 108, 115.

[1119.](#) See above, para.1-039.

[1120.](#) *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 at [115]–[125], distinguishing *Walford v Miles*, above para.2-143, on the ground that, in the latter case, there was “no concluded agreement since everything was subject to contract” and that there was “no express agreement to negotiate in good faith” (at [120]). In the *Petromec* case, the point was “not essential to the disposition of the appeal” (at [115]). For further proceedings in the *Petromec* case, see above, para.2-123 n.611. cf. *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] B.L.R. 265 where clause 3.5 of the contract (set out at [14]) required the parties to “co-operate with each other in good faith”. On the true construction of that clause there had been no breach of it (at [120], [143]; cf. at [153]).

[1121.](#) See above, paras 2-122, 2-146.

[1122.](#) See below, Ch.13, sections 3–4, paras 13-041—13-136.

[1123.](#) See above, para.2-149.

[1124.](#) See above, para.2-150.

[1125.](#) See above, para.2-151.

[1126.](#) See above, paras 2-152, 2-154.

[1127.](#) See above, para.2-155.

- [1128.](#) *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408 at 460, per Lord Cooke, giving this as an alternative ground for the decision while also accepting the “implied term” reasoning of the majority.
- [1129.](#) *Horkulak v Cantor Fitzgerald Ltd* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [48] (discretionary bonus on dismissal); cf. at [46]; contrast *Keen v Commerzbank AG* [2006] EWCA Civ 1536, [2007] I.C.R. 623, where an employer’s “very wide discretion” in relation to a bonus had not “been exercised irrationally” (at [59], [60]). And see above, paras 1-054 and 2-185 to 2-186.
- [1130.](#) *Selkirk v Romar Investments Ltd* [1963] 1 W.L.R. 1415, 1422. And see above, para.2-163.
- [1131.](#) See above, para.2-123.
- [1132.](#) *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [61]; cf. at [84].
- [1133.](#) See above, para.2-129.
- [1134.](#) See above, para.2-130.
- [1135.](#) See above, para.2-131.
- [1136.](#) See above, para.2-159.
- [1137.](#) See above, para.2-161.
- [1138.](#) See above, para.2-162.
- [1139.](#) See above, para.2-164.
- [1140.](#) See above, para.2-163.
- [1141.](#) See above, para.2-166.
- [1142.](#) See above, para.2-132.
- [1143.](#) See above, para.2-168.
- [1144.](#) See above, para.2-171.
- [1145.](#) See above, para.2-177.
- [1146.](#) See above, paras 2-178—2-184.
- [1147.](#) See above, para.2-180 and below, paras 2-219 and 2-220.

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(b) - Negotiations Broken Off But Preliminary Agreement Exists

No main contract but ancillary contract

2-212

We have seen that even if the parties do not successfully conclude a contract on the main subject matter of their negotiations (because their agreement is subject to formal execution or other condition), they may have made a preliminary or collateral contract that the court will enforce, or the courts may impose such an ancillary contract.¹¹⁴⁸ Likewise, even where the parties have not reached agreement on the main subject matter of negotiations, the courts may enforce the parties' express agreed preliminary or collateral contract, or the courts may impose one, to uphold the integrity of the negotiation process.

No duty to negotiate in good faith

2-213

In *Walford v Miles*¹¹⁴⁹ the House of Lords refused to imply a duty to negotiate in good faith (a "lock-in" agreement) because, as Lord Ackner stated, "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 negotiations ... [and] ... unworkable in practice."¹¹⁵⁰ Hence, an express term requiring negotiations in good faith is also unenforceable. However, the defendant's promise to terminate negotiations with any third party amounted to a misrepresentation for which an award of £700 for wasted expenditure was given and this was not challenged on appeal.

Lock-out agreements

2-214

The parties' freedom of action in the negotiation period may be restricted by a preliminary or collateral contract. One instance of this is a "lock out" agreement¹¹⁵¹ whereby one party undertakes to the other not to negotiate a contract with a third party in respect of a particular subject matter. The "lock out" agreement must be sufficiently certain as to duration. This was not the case in *Walford v Miles*¹¹⁵² because the agreement failed to specify the time for which the vendor's freedom to negotiate with third parties was to be restricted. In contrast, a promise not to negotiate with third parties for two weeks was sufficiently certain to enforce in *Pitt v PHH Asset Management Ltd.*¹¹⁵³

Collateral contract

2-215

The courts have been prepared to find other collateral contracts to preserve the integrity of the negotiation process. For example, a refusal to accept the highest bid in an auction will generally attract no liability.¹¹⁵⁴ But where the auction is “without reserve”, it has been held that the *auctioneer* is liable on a collateral contract between him and the highest bidder that the sale will be without reserve.¹¹⁵⁵ Likewise, an invitation to tender does not bind the party inviting the tender to accept the highest (or lowest, as the case may be) tender. But if the latter does so bind himself, the invitation for tenders may be regarded *either* as itself an offer *or* as an invitation to submit offers coupled with an undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the highest offer to buy (or lowest offer to sell, etc.) is communicated.¹¹⁵⁶ Along the same lines, in *Blackpool and Fylde Aero Club Ltd v Blackpool BC*,¹¹⁵⁷ where an invitation to tender was sent by a local authority to seven selected parties stating that tenders submitted after a specified deadline would not be considered, it was held that the authority was contractually bound to consider (though not to accept) a tender submitted before the deadline. Where, before the main contract has been concluded, one party has embarked on preliminary work or performance of the main agreement, the court may find a collateral contract to the effect that such work would be paid for.¹¹⁵⁸

^{1148.} See above paras 2-208—2-209.

^{1149.} [1992] 2 A.C. 128, 138; *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 at [10]. See above para.2-143.

^{1150.} [1992] 2 A.C. 128, 138. The agreement was also held to be unenforceable on the grounds of uncertainty, see above, paras 2-143—2-145.

^{1151.} See above para.2-128.

^{1152.} [1992] 2 A.C. 128. See further para.2-143.

^{1153.} *Pitt v PHH Asset Management Ltd* [1994] 1 W.L.R. 327; cf. *Tye v House* [1997] 2 E.G.L.R. 171.

^{1154.} Because the putting up of property for auction is generally only an invitation to treat, the offer coming from the bidder which the auctioneer is free to accept or reject, see above para.2-019.

^{1155.} See above, para.2-020.

^{1156.} See above, para.2-022.

^{1157.} [1990] 1 W.L.R. 25. No decision was reached on the quantum of damages.

^{1158.} See above, paras 2-208, 2-210, 2-212.

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Part 2 - Formation of Contract

Chapter 2 - The Agreement

Section 10. - Liability When Negotiations Do Not Produce A Contract

(c) - Negotiations Broken Off Without Preliminary Agreements

Fraud, negligent misrepresentation and non-disclosure

2-216

The award for misrepresentation in *Walford v Miles* ¹¹⁵⁹ shows that English law recognises a duty of good faith in contract negotiation at least to the extent that parties are made liable for damages for deceit ¹¹⁶⁰ and negligent misrepresentation. ¹¹⁶¹ Even if no contract is ultimately concluded, a party may be liable for misleading the other party by giving careless advice as to the probable outcome of the negotiations. For example, in *Box v Midland Bank Ltd* ¹¹⁶² the plaintiff sought a large loan from his bankers; the bank manager told the plaintiff that the approval of head office would be required, but led the plaintiff to believe that this was a mere formality. When head office refused the plaintiff's loan application, Lloyd J. awarded £5,000 as loss suffered, in the form of an extended overdraft, in reliance on the negligent statement. The question is whether the law recognises a more onerous duty of good faith in the form of a duty to have regard to the legitimate interests of the other party by making disclosure of facts that are material to the transaction. The answer is no, unless: the contract is *uberrimae fidei*, ¹¹⁶³ the parties are in a fiduciary relationship ¹¹⁶⁴ or a relationship of trust and confidence, ¹¹⁶⁵ the failure to disclose some fact distorts a positive representation, ¹¹⁶⁶ or statute requires specific disclosure. ¹¹⁶⁷ The general picture is summarised by Rix L.J. in *ING Bank NV v Ros Roca SA* ¹¹⁶⁸.

"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."

Manufacturer's statements that induce purchase of goods

2-217

A person who purchases goods in reliance on statements in a manufacturer's promotional literature is not, *for that reason alone*, entitled to claim for any loss occasioned by the manufacturer's misrepresentation. ¹¹⁶⁹ But if the manufacturer knows both the purchaser's identity and his purposes, the purchaser may have an action in deceit or negligent misrepresentation, ¹¹⁷⁰ or the information given by the manufacturer may constitute a contractual warranty. ¹¹⁷¹ Where goods are sold or supplied to a consumer with a "consumer guarantee", the consumer guarantee "takes effect ... as a

contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and associated advertising". ¹¹⁷²

Quantum meruit

2-218

Where work has been done in anticipation of a contract that does not eventuate, the remedy of quantum meruit (the reasonable value of the services provided) may be awarded, provided that the services were requested or acquiesced in by the recipient and provided that the claimant did not take the risk of being reimbursed only if a contract was concluded. The court may also impose an obligation on the recipient of a benefit if he has behaved unconscionably in declining to pay for it. ¹¹⁷³ In *Cobbe v Yeomans Row Management Ltd* ¹¹⁷⁴ Mummery L.J. said that "Under English law there is no general duty to negotiate in good faith"; but he added that there were "plenty of other ways of dealing with particular problems of unacceptable conduct occurring in the course of negotiations without unduly hampering the ability of the parties to negotiate their own bargains without the intervention of the courts." ¹¹⁷⁵ In the *Cobbe* case itself, quantum meruit was awarded to the party prejudiced by the other party's "unattractive" ¹¹⁷⁶ conduct in withdrawing from the agreement, which required further negotiations to acquire contractual force.

Constructive trust

2-219

⚠ An oral agreement for the sale of land is enforceable in equity under a constructive trust despite not being in writing where both parties had considered it to be immediately binding upon them, and where the prospective buyer had then acted to his detriment in reliance upon it. ¹¹⁷⁷ ⚠ Where an agreement for the joint acquisition of property lacks contractual force for want of execution of a formal document and one of the parties then acquires the property in his own name, he may be liable to hold a share of that property for the other party by virtue of a constructive trust. ¹¹⁷⁸

Proprietary estoppel

2-220

Courts may deploy the doctrine of proprietary estoppel ¹¹⁷⁹ to circumvent the absence of the execution of a formal document where a plaintiff has done acts in reliance on the defendant's promise that he (the claimant) has, or that he will acquire, rights in or over the defendant's land. There must be:

"clarity as to what it is that the object of the estoppel [i.e. the defendant] is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat." ¹¹⁸⁰

Neither of these requirements were satisfied in *Cobbe v Yeoman's Row Management Ltd* ¹¹⁸¹ since the "agreement in principle", was, as the plaintiff knew, incomplete and binding in honour only, so that he could not allege that the defendant was bound by it; and since the plaintiff was not asserting any expectation that he would acquire a proprietary right. ¹¹⁸² Likewise, in another case, ¹¹⁸³ although it was accepted that proprietary estoppel should also apply to intellectual property rights, it did not arise on the facts since the claimant knew that the parties were not in agreement and the defendant made no representation that the contract would be concluded. In contrast, the claim for proprietary estoppel was upheld in *Thorner v Major* ¹¹⁸⁴ where the plaintiff had worked for 29 years without pay in reliance on his uncle's assurance that he would inherit the land.

Overcoming failure to comply with formal requirements regarding land

2-221

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 Act declares to be void any agreement for the acquisition of an interest in land that does not comply with the requisite formalities prescribed by the section. ¹¹⁸⁵ Subsection (5) expressly makes an exception for resulting, implied or constructive trusts. ¹¹⁸⁶ Despite the absence of any express saving provision in s.2 in respect of the doctrine of estoppel, there is support for allowing the doctrine to modify or counteract the effect of s.2. ¹¹⁸⁷ The doctrine of promissory estoppel, owing to its defensive nature, cannot create a new cause of action in substitution for the contractual action denied for want of formality. ¹¹⁸⁸ However, the Law Commission, in its work towards the 1989 Act, saw proprietary estoppel as a particularly attractive technique for the avoidance of injustice caused by a rigid adherence to the new formality rules. ¹¹⁸⁹ Nevertheless, the judicial view on the appropriateness of recourse to proprietary estoppel where an agreement between the parties is void for failure of the formal requirements of s.2 has been mixed. ¹¹⁹⁰ In particular, Lord Scott has expressed the view in *Cobbe v Yeoman's Row Management Ltd* that "proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void", ¹¹⁹¹ although this may be confined to the commercial context where, moreover, "the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property" or where "further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified" or where "the parties did not expect their agreement to be immediately binding". ¹¹⁹²

Promissory estoppel in other jurisdictions


2-222

Where one party has made a promise or representation to the other party that he will not enforce his strict legal rights against the other, and this has induced reliance by the latter party, the former party will not be able to resile from his promise or representation if to do so would be inequitable. ¹¹⁹³ The English doctrine of promissory or equitable estoppel can only prevent the promisor from fully enforcing his previous rights against the promisee; it cannot confer new or additional rights on the promisee. Thus, the doctrine is said to act defensively, and not offensively; it is a "shield, but not as a sword". However, other common law jurisdictions have allowed the doctrine of promissory estoppel to create new rights ¹¹⁹⁴ and so may operate where negotiations for a contract break down. In the United States, a promise that can be reasonably expected to induce, and does induce, reliance "is binding if injustice can be avoided only by enforcement of the promise" although enforcement of the promise is not automatic, for the remedy "may be limited as justice requires". ¹¹⁹⁵ Likewise, a line of Australian cases supports the view that promises or representations that lack contractual force (for want of consideration or of contractual intention), may nevertheless be enforced via promissory estoppel. In *Waltons Stores (Interstate) Ltd v Maher*, ¹¹⁹⁶ a prospective lessor of business premises (A), did demolition and building work on the premises at the request of the prospective lessee (B) while the agreement for the lease was still subject to contract. A did so on the assumption, encouraged by B, that a binding contract would be concluded. When B withdrew from the agreement, B was estopped from denying that a contract had come into existence. On these facts, proprietary estoppel would not have availed A because the work was done on A's (rather than on B's) land and a quantum meruit claim would not have been available because B was not unjustly enriched by A's work.

¹¹⁵⁹. [1992] 2 A.C. 128, and see above, para.2-213.

¹¹⁶⁰. See below, paras 7-047—7-073.

¹¹⁶¹. See below paras 7-074, 7-086—7-091. And see para.7-093 on the special relationship required to give rise to a duty of care between parties negotiating a contract.

- [1162.](#) [1979] 2 Lloyd's Rep. 391, on appeal (as to costs only) [1981] 1 Lloyd's Rep. 434. And see below, para.7-095.
- [1163.](#) See below, paras 7-155—7-180.
- [1164.](#) See below, paras 7-087—7-088.
- [1165.](#) See below, paras 8-075—8-089.
- [1166.](#) See below, paras 7-020—7-021.
- [1167.](#) See e.g. para.7-169.
- [1168.](#) [2011] EWCA Civ 353, [2011] All E.R. (D) 39 (Apr) at [92].
- [1169.](#) *Lambert v Lewis* [1982] A.C. 225; this issue was not discussed on appeal to the House of Lords. And see below, para.7-094.
- [1170.](#) See above, para.2-216, below, para.7-094, and further, paras 7-085—7-086.
- [1171.](#) *Shanklin Pier v Detel Products Ltd* [1951] 2 K.B. 854; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 Q.B. 170.
- [1172.](#) Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.15(1). This is replaced by s.30 of the Consumer Rights Act 2015. This section applies where there is "(a) a contract to supply goods" and "(b) a guarantee in relation to the goods" (s.30(1); "guarantee" is defined in s.30(2)). Section 30(3) goes on to provide that such a guarantee "takes effect ... as a contractual obligation owed by the guarantor". And see above, paras 2-017, 2-176.
- [1173.](#) See below, para.29-077.
- [1174.](#) [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964; see below, para.4-167.
- [1175.](#) [2006] EWCA Civ 1139 at [4].
- [1176.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [93].
- [1177.](#)  *Matchmove Ltd v Dowding* [2016] EWCA Civ 1233; see below, paras 4-142 and 5-040.
- [1178.](#) See above, para.2-123.
- [1179.](#) See below, paras 4-139—4-180.
- [1180.](#) *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28].
- [1181.](#) *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [28].
- [1182.](#) See below, para.4-149.
- [1183.](#) *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch) at [61]–[64], [66], [72]–[73].
- [1184.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776.
- [1185.](#) See below, paras 5-013—5-039.
- [1186.](#) See below, para.5-040.
- [1187.](#) *McCausland v Duncan Lawrie Ltd* [1997] 1 W.L.R. 38 at 45, 50; *Yaxley v Gotts* [2000] Ch. 162, at 174. And, see below, para.5-041.

- [1188.](#) cf. below, paras 2-222, 4-086 et seq., especially para.4-099, and para.5-042. Neither can estoppel by convention circumvent the requirements of s.2 of the 1989 Act, see below, para.5-043.
- [1189.](#) Law Com. No.164 (1987), para.5.5.
- [1190.](#) See below, paras 5-044—5-048.
- [1191.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [29].
- [1192.](#) *Herbert v Doyle* [2010] EWCA Civ 1095, [2010] N.P.C. 100 at [57].
- [1193.](#) See below, paras 4-086—4-106.
- [1194.](#) See below, para.4-107.
- [1195.](#) Restatement, Contracts §90 and Restatement 2d, Contracts §90.
- [1196.](#) (1988) 164 C.L.R. 387. See below, para.4-107.