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Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 17 - Joint Obligations [1]

Introductory: definitions

17-001

Several liability arises when two or more persons make separate promises to another, whether by the same instrument or by different instruments. Thus if A and B covenant with C that they will each pay him £100, each is liable to pay £100 [2]; their promises are cumulative and payment by one does not discharge the other. [3]

17-002

Joint liability arises when two or more persons jointly promise to do the same thing. There is only one obligation, [4] and consequently, performance by one discharges the others. Joint liability is subject to a number of strict and technical rules of law which are discussed in the paragraphs that follow.

17-003

Joint and several liability arises when two or more persons in the same instrument jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors. It is like joint liability in that the co-promisors are not cumulatively liable, so that performance by one discharges all; but it is free from most of the technical rules governing joint liability.

17-004

It should be emphasised that the above definitions—and the treatment in this chapter—focus on the standard *contractual* situations where the issues of several, joint, or joint and several liability arise. Particularly in mind is where the contractual liability is to pay an agreed sum (that is, a debt). Cutting across those definitions is joint and several liability in its traditional "tort" sense [5] of wrongdoers acting independently to cause the same damage to the same claimant: and a wrongdoer for these purposes can include a contract-breaker as well as a tortfeasor. [6] So if the same loss is caused to C by D1's breach of contract and D2's tort, D1 and D2 are jointly and severally liable to C. [7] This will mean that D1 and D2 are each liable for the whole of C's loss albeit that, if one defendant pays a disproportionate sum to the other, contribution can be recovered from the other defendant under the Civil Liability (Contribution) Act 1978.

Creation of joint liability

17-005

The presumption is that a promise made by two or more persons is joint so that express words are necessary to make it joint and several. [8] There are one or two special cases in which equity treats as joint and several an obligation which at law is joint, but they do not cover much ground and are of slight importance in the law of contract. [9] The liability of partners for partnership debts is a good

example of joint liability, but it differs from the ordinary case of joint liability in that the estate of a deceased partner is liable for partnership debts (after satisfaction of personal debts) if the firm is unable to satisfy them itself. [10] So also the liability of two or more acceptors, drawers or indorsers of a bill of exchange to the holder thereof is joint. [11] In the case of promissory notes the liability is joint, or joint and several, according to the "tenor" of the note [12]; but if the note runs "I promise to pay" and is signed by two or more persons the liability is joint and several. [13] In the absence of words of severance, the liability of principal debtor and surety on a single promise is joint, but if there is not one single promise the general rule is that the liability is several. [14] Consequently the liability of a principal debtor and surety is prima facie joint and several. [15]

Words of severance

17-006

As to what constitute words of severance, the cases run to fine distinctions. Thus if A and B promise for themselves or either of them that they will pay £100, the promise is joint and several. But if they promise for themselves that they or either of them will pay £100 the promise is merely joint. [16] This is so even if they promise for themselves their executors and administrators [17]: for the reference to personal representatives is taken to mean the representatives of the survivor.

Contract by person with himself

17-007

At common law a joint contract between A and B on the one hand and B (or B and C) on the other was void, because a man cannot contract with himself. [18] This rule was altered (with retrospective effect) by s.82 of the Law of Property Act 1925, which provides that any agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced as if it had been made with the other person or persons alone.

Minors

17-008

A joint promise by an adult and a minor is binding on the adult though it may be unenforceable against or voidable by the minor. [19] A guarantee given by an adult of an obligation undertaken by a minor is not unenforceable against the adult merely because the principal obligation is unenforceable against or is repudiated by the minor. [20]

Joinder of parties

17-009

Since a joint promise creates only one obligation, the common law rule was that all the promisors who were still alive had to be joined as defendants to the action. [21] There were a number of exceptions to this rule which are detailed below; and since 1959 it has not applied to actions in the county court. [22] The rule does not appear to have been affected by the Civil Liability (Contribution) Act 1978, although that Act (as noted below, para.17–015) has abolished the related common law rule that an action against a joint contractor served to bar any other proceedings against another joint contractor. But the Civil Procedure Rules have been amended since the commencement of the 1978 Act. By Civil Procedure Rules 1998 r.19.2(2), the court may, on its own initiative, or on the application of an existing party or a person who wishes to become a party, order a person to be added as a new party if:

> "(a) … it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings: or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

17-010

Under the modern law, therefore, failure to join a party in the first instance can no longer be visited by any sanctions, except as to costs [23]; all that can happen is that the court may direct that he be joined. As stated above, the common law rule was that all joint contractors had to be joined as defendants but there were exceptions to this rule. There was no need to join one who was a discharged bankrupt, [24] or a person outside the jurisdiction, [25] or a minor as regards whom the contract was void or voidable, [26] or a person protected by the Limitation Act 1980, [27] or a member of a firm of common carriers, [28] or an undisclosed sleeping partner, [29] or an active partner where the defendant represented himself as being the sole contracting party. [30]

Joinder of joint and several promisors

17-011

If the obligation is joint and several the claimant has always been able to sue all the promisors together or such one of them separately as he thinks fit. [31] But the court's control over procedural matters now means that even in these cases joinder of another co-defendant may be directed where desirable. [32]

Death of a joint contractor

17-012

If one joint contractor dies, his obligation ceases and the whole obligation passes to the survivors or survivor and not to his personal representatives. [33] When the last surviving joint contractor dies, the obligation passes to his personal representatives because once there is only a single debtor, the obligation necessarily becomes several. [34] There is one exception to the rule that the personal representatives of one of a number of joint contractors are not liable: though partners are jointly liable for partnership debts, the estate of a deceased partner is also severally liable, subject, however, to the prior payment of his separate debts. [35]

Death of joint and several contractor

17-013

If one joint and several contractor dies, his several liability passes to his personal representatives. [36]

Discharge by performance

17-014

Payment of the debt by any one of a number of joint or joint and several debtors operates as a discharge of all, for in neither case is the obligation cumulative. [37]

Judgment against one joint debtor

17-015

At common law, the general rule was that a judgment against one joint debtor operated to bar an action against the others, even though the judgment was not satisfied. [38] This was explained on the ground that the debt was merged in the judgment, and also on the ground that joint debtors had a right to be sued together: but neither ground was satisfactory, and the rule was capable of working hardship. The rule applied to a judgment obtained by consent, [39] even if the defendant subsequently consented to the claimant's application to set aside the judgment in order that the claimant could sue another joint contractor. [40] The rule has now been abrogated by section 3 of the Civil Liability (Contribution) Act 1978. [41] This section applies to joint contractors generally, and is not confined to joint debtors. [42]

Judgment against one joint and several debtor

17-016

When the liability is joint and several, a judgment against one debtor did not, even at common law, bar a several action against another. [43] But satisfaction of the judgment did so, for the obligation was not cumulative; hence payment by one, whether before or after judgment, discharged the others. At common law, it seems that a joint judgment against all the joint and several debtors, if unsatisfied, did not bar a several action against one of them [44]; nor did an unsatisfied several judgment against one bar a joint action against the others. [45] But these rules are of little importance now, having regard to the general words of s.3 of the Act of 1978.

Release, accord and satisfaction and covenant not to sue

17-017

The discharge of one joint debtor by a release in a deed [46] or by accord and satisfaction [47] discharges all, in accordance with the general principle that joint liability creates only one obligation [48]; and the same is true, illogical though it may seem, if one joint and several debtor is so discharged. [49] On the other hand, a covenant not to sue one joint or joint and several debtor does not discharge the others, [50] though it may leave the covenantee liable to pay contribution to the other debtors, [51] and thus deprive the covenant of some of its apparent effect. [52]

17-018

The courts generally construe a release as a covenant not to sue if it contains an indication of intention that the other debtors are not to be discharged. [53] Moreover, even an accord and satisfaction with one joint or joint and several debtor will not discharge the others if the agreement, expressly or impliedly, provides that the creditor's rights against them shall be preserved. [54]

17-019

The distinction between a release and a covenant not to sue rests on the intention of the parties. A release involves total destruction of the debt or claim; a covenant not to sue implies that the creditor undertakes not to take proceedings against the debtor in question (the covenantee) while not necessarily abandoning his rights against any other party liable. In this context the term "covenant" does not bear its traditional meaning of a promise in a deed, but extends to any promise.

17-020

In practice the difficulty normally arises from the fact that, in making the agreement, the parties have overlooked the position of co-debtors, and it is not clear whether the creditor intends to reserve his rights against them or not. [55] If the agreement appears from its words to be a release and there are no words reserving rights against the other debtors, nor anything in the circumstances to rebut the prima

facie meaning of words used, the agreement will release all the debtors [56]; but it would seem that the courts lean in favour of other debtors not being discharged by construing the agreement as a covenant not to sue or as a release but subject to an implied reservation of rights against other debtors. [57]

Sureties

17-021

Some special rules apply to joint or joint and several debtors who are sureties. For instance, an agreement to give time to a principal debtor without the consent of a surety discharges the surety unless there is an express reservation of rights against the surety [58]; but an agreement to give time to one co-debtor without the consent of the other does not discharge them [59] unless they are sureties. These special rules as to sureties are fully discussed elsewhere in this work. [60]

Material alteration

17-022

As will be seen, [61] if a material alteration is made in a specialty or any other contractual document without the consent of the promisor, whether by the promisee or (possibly) by a stranger, when the document is in the custody of the promisee or his agent, such alteration discharges the promisor from all liability thereon. [62] The same rule applies to a contract entered into by joint or joint and several contractors. [63] There is no authority on the question whether a material alteration which discharges one operates also to discharge them all.

Debtor becoming executor or administrator

17-023

Where a debtor becomes executor or administrator of the estate of his creditor, the debt is extinguished, but the debtor may be accountable for the amount of the debt, [64] unless the creditor intended by appointing him as executor, to discharge the debt. [65] Although this rule is now statutory, previous authorities holding that co-debtors were necessarily discharged in these circumstances seem unaffected. [66] This result, however, does not prevent the executor or administrator from recovering contribution under the principle stated in para.17-027. [67] In the converse case where the creditor becomes executor to his debtor, the debt is not discharged unless the executor proves the will and has assets out of which he can pay the debt by means of his right of retainer. [68]

Bankruptcy

17-024

The discharge in bankruptcy of one joint or joint and several debtor does not discharge the others. [69]

Voluntary arrangements with creditors

17-025

Whether a voluntary arrangement with creditors entered into by an insolvent co-debtor, pursuant to the Insolvency Act 1986, does or does not discharge other co-debtors, who are not parties to the voluntary arrangement, will depend on the term of the voluntary arrangement. [70]

Limitation Act 1980

17-026

An acknowledgment or part payment of a debt or other liquidated pecuniary claim made by one joint debtor does not take a case out of the Limitation Act 1980 as regards the others, [71] unless: (1) it is made with their authority as agent for them [72]; or (2) a part payment (not an acknowledgment) is made before the expiration of the limitation period. [73] The reason for the second exception is that a part payment made before the expiration of the period enures for the advantage of all the joint debtors, hence it is thought fair that they should share the disadvantage too. [74] The rules appear to be the same for joint and several debtors as they are for joint debtors.

Contribution between joint debtors

17-027

Joint and joint and several debtors have a restitutionary right of contribution among themselves: that is to say, if one has paid more than his share of the debt, he can recover the excess from the others in equal shares, subject to any agreement to the contrary. [75] In the absence of agreement to the contrary each co-debtor is liable for an equal share of the debt or obligation. [76] This right is statutory in cases where a county court judgment against one joint debtor has been satisfied. [77] The right of contribution is independent of any present right of the principal creditor. Thus one co-debtor can recover contribution from another although the principal creditor's right to recover from that other debtor has become statute-barred. [78] Again, the right to contribution may be enforced against the personal representatives of a deceased joint debtor, [79] even though (as we have seen) [80] they would not be liable to the creditor. (There is an exception to this rule in the case of lessees who are joint tenants: if one dies, the survivor cannot claim contribution in respect of rent from the personal representatives of the deceased lessee. [81]) If one joint or joint and several debtor is insolvent, the loss resulting from his insolvency is spread equally among the solvent debtors. [82]

17-028

It is a condition precedent to the right to recover contribution that the claimant should have been liable to pay the whole debt [83] and should have paid more than his share of it. [84] If he merely pays his share and no more, he has no present right to contribution: but he will acquire such right as soon as anything happens in the future which discharges the debt and thus brings it about that he has paid more than his share, for instance if the debt should become statute-barred. [85] Moreover, a surety against whom the principal creditor has obtained judgment for the full amount of the debt, but who has paid nothing in respect of that judgment, can obtain a prospective order directing a co-surety, on payment by the surety of his own share of the debt, to indemnify him against further liability, or (if the principal creditor is a party to the action) an order directing the co-surety to pay his proportion to the principal creditor. [86] A surety suing his co-sureties for contribution must join as defendants all those who are liable to make contribution, unless one of them is insolvent or there is some other good reason why he should not be joined. [87]

Contribution between persons liable in respect of the same damage

17-029

The rules stated in paras 17-027—17-028, above, only apply to co-debtors, i.e. persons liable in respect of the same *debt*. [88] Where two or more persons are liable in respect of the same *damage*, the position is now regulated by s.1 of the Civil Liability (Contribution) Act 1978. [89] Section 1(1) of this Act provides that:

> "… any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."

This provision, as is made clear by the words in brackets, applies even where the liability arises out of two separate contracts, for example, where an architect and a builder, each employed under a separate contract, are both guilty of breaches of contract causing damage to the owner of the building. [90] The section would also apply if one person were liable in contract and another in tort. [91] By ss.1(2) and (3) it is immaterial that the original liability of the claimant or the party from whom contribution is sought, has become statute-barred. But subject to s.1(3), "liability in respect of the same damage" refers to liability to the injured party at the time when contribution is being sought. [92]

"The same damage"

17-030

In *Royal Brompton Hospital NHS Trust v Hammond*, [93] architects could not recover contribution from builders because the damage in respect of which the claims were brought by the owners against the architects and builders was not the same so as to fall within s.1(1) of the Civil Liability (Contribution) Act 1978. The damage caused by the builders' breach of contract was the failure to provide the building on time; whereas the damage caused by the architects, through negligently certifying an extension of time, was the impairment of the owners' ability to obtain full compensation in a settlement from the builders. It was emphasised by their Lordships that the statutory words "the same damage" must be applied without any glosses, extensive or restrictive. The wider interpretations of "the same damage" in some earlier cases [94] were expressly disapproved. On the other hand, *Eastgate Group Ltd v Lindsey Morden Group Inc* [95] was referred to without disapproval and the decision appears to be consistent with the reasoning of the House of Lords. In that case, the question was whether, on the sale of a company (LMG) to E, a liability of LMG to E for breach of warranties as to the value of the company was a liability for "the same damage" as a liability of LMG's accountants to E for negligent accounting. It was held by the Court of Appeal that the liability was for the same damage, namely that E had bought a company worth less than E reasonably expected it to be worth. The fact that the measure of damages might differ (as between contract and tort) did not contradict the view that the damage was the same. The 1978 Act therefore applied.

Amount of contribution

17-031

Section 2(1) of the 1978 Act provides that the amount of the contribution shall be:

> "… such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

In this respect the Act makes a major change to the common law rules which still apply to cases of co-debtors; for under the rule stated in para.17-027, the debt can only be divided equally between the co-debtors. Under the Act, the liability can be apportioned unequally; in both cases, however, a complete indemnity can be awarded where appropriate.

Effect of judgment or compromise

17-032

Any judgment of a court is conclusive against the party from whom contribution is sought that the party claiming contribution was in fact liable for the damage in question. [96] A bona fide compromise is likewise conclusive, but in this case only assuming that the factual basis of the claim can be established. [97] The Act does not affect any contractual provision excluding or regulating a right to contribution, nor does it apply where a surety has a right to an indemnity as distinguished from a right to contribution.

Contribution from party against whom limitation has run

17-033

The Act, in replacing (as well as extending) the provisions of s.6 of the Law Reform (Married Women and Tortfeasors) Act 1935, has avoided some of the difficulties which arose under that Act where contribution was sought against a party who had been found (or was) not liable under a limitation statute. [98] Under the 1978 Act, it is expressly provided by s.1(3) that contribution can be sought from someone who has "ceased to be liable", and it seems clear that this remains the case even if he has actually been sued and successfully pleaded the Limitation Act. [99]

Assessment of contribution

17-034

The method of assessing the contribution under the 1978 Act follows the precedents previously set in s.6 of the 1935 Act and also the Law Reform (Contributory Negligence) Act 1945. In both these Acts the courts were given broad powers of apportioning liability (or responsibility) for damage in accordance with the "just and equitable" formula. In general it is well established that the courts must have regard to considerations of relative causative potency as well as to comparative blameworthiness under these provisions. [100] It is not wholly clear how easily these concepts are transferable from the tort context, where liability is usually based on negligence, to the contractual context where liability is usually strict, and does not involve "blameworthiness" except in the sense that any breach of contract may be said to be blameworthy. In a case of vicarious liability, comparative blameworthiness requires one to look at the blameworthiness of the person for whom the vicariously liable person was responsible: the vicariously liable person (e.g. the employer) stands in the shoes of the wrongdoer (e.g. the employee) and it is irrelevant that the vicariously liable person was non-blameworthy. [101]

Limits on right to contribution

17-035

It may also be worth noting that although the Act is designed to enable contribution to be obtained from any person liable in respect of the same damage, even though the liability of the parties arises from different legal sources (e.g. contract and tort), there will still be circumstances in which contribution will be unobtainable. For instance, a purchaser of defective goods who is held liable in negligence to a third party for damage caused by use of the goods, cannot claim contribution from the person who sold those goods to him if that person was not also liable to the third party; if the seller was guilty of a breach of the terms of the contract of sale, the purchaser may be able to recover a complete indemnity from the seller, depending on whether his own conduct has broken the causal link between the seller's breach and the third party's injury, but there can be no claim under the 1978 Act. [102]

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1. See, generally, Williams, *Joint Obligations* (1949); Mitchell, *The Law of Contribution and Reimbursement* (2003).

2. e.g. *Mikeover Ltd v Brady [1989] 3 All E.R. 618*.

3. An exception is an original lessee's and a subsequent assignee's covenants to the lessor to pay rent. These are regarded as creating several but non-cumulative liability. Payment by one does discharge the other; and the rules of release for joint and several liability apply so that contractual release of one promisor releases the other. See Williams, *Joint Obligations* (1949), para.5; *Deanplan Ltd v Mahmoud [1993] Ch. 151*. For leases granted after 1995 the original

tenant will generally be released from covenants in the lease once the lease has been assigned: see Landlord and Tenant (Covenants) Act 1995 ss.3 and 5. But under s.16 a tenant may enter into an "authorised guarantee agreement" to guarantee compliance with the covenants by the assignee.

4. *King v Hoare (1844) 13 M. & W. 494*; *Kendall v Hamilton (1879) 4 App. Cas. 504*; *Re Hodgson (1885) 31 Ch. D. 177, 188*.

5. For the tort definitions of several, joint, and joint and several liability, and the rules applying to them, see Clerk & Lindsell on Torts, 21st edn (2014), Ch.4. See also Williams, *Joint Torts and Contributory Negligence* (1951). The tort rules (e.g. on release) applicable to joint and several wrongdoers (e.g. release of one does not release the others; see Clerk & Lindsell on Torts, para.4–09) appear to differ from the contractual rules applicable to joint and several promisors (e.g. release of one releases the others: see below, para.17-017).

6. In the 1990s there was considerable debate over whether joint and several liability, in its tort sense, should be replaced by proportionate liability. The case for that reform was particularly urged by auditors in respect of contractual or tortious liability for negligence. For a rejection of that reform, see Feasibility Investigation of Joint and Several Liability, by the Common Law Team of the Law Commission (DTI Consultation Paper, 1996). See generally, R. Wright, "The Logic and Fairness of Joint and Several Liability" (1992) 23 Memphis State L.R. 45; M. Simpson, "Apportionment or Compensation? Joint and Several Liability Reconsidered" [1995] N.Z.L.J. 407; J. Payne, "Limiting the Liability of Professional Partnerships: In Search of this Holy Grail" (1997) 18 Company Lawyer 81; J. Freedman and V. Finch, "Limited Liability Partnerships: Have Accountants Sewn Up the 'Deep Pockets' Debate?" [1997] J.B.L. 387; K. Barker and J. Steele, "Drifting towards Proportionate Liability: Ethics and Pragmatics" [2015] C.L.J. 49.

7. This is so even though in relation to other promisors D1 might conceivably have been severally, jointly, or jointly and severally liable, in the standard contractual sense, to C.

8. *White v Tyndall (1888) 13 App. Cas. 263*; *The Argo Hellas [1984] 1 Lloyd's Rep. 296, 300*. An example of joint and several liability being created by express words is provided by *AIB Group (UK) Ltd v Martin [2001] UKHL 63, [2002] 1 W.L.R. 94*. M and G, who had borrowed money both individually and jointly from a bank, covenanted under a mortgage to pay their debts to the bank and that their liability should be "joint and several". The difficult question of construction was therefore not whether G had joint and several liability with M but whether that joint and several liability of G extended to loans made to M alone rather than to M and G jointly. The House of Lords held that G's joint and several liability did extend to repaying loans made to M alone.

9. Williams, *Joint Obligations* (1949) at para.12.

10. Partnership Act 1890 s.9. But by reason of s.12 of the 1890 Act, a partner is jointly and severally liable with his co-partners for wrongs committed in the ordinary course of business of the firm.

11. *Other v Iveson (1855) 3 Drew. 177*; *Re Barnard (1886) 32 Ch. D. 447*.

12. Bills of Exchange Act 1882 s.85(1).

13. s.85(2).

14. *Lep Air Services Ltd v Rolloswin Investments Ltd [1971] 1 W.L.R. 934*, affirmed on other grounds sub nom. *Moschi v Lep Air Services Ltd [1973] A.C. 331*. As to the liability of an agent in cases where he is liable together with his principal, see Vol.II, para.31-084.

15. *Re E.W.A. [1901] 2 K.B. 642*.

16. *Wilmer v Currey (1848) 2 De G. & Sm. 347*; *Levy v Sale (1877) 37 L.T. 709*; *White v Tyndall (1888) 13 App. Cas. 263*.

17. (1848) 2 De G. & Sm. 347. But cf. *Tippins v Coates (1853) 18 Beav. 401*.

18. *Mainwaring v Newman (1800) 2 Bos. & P. 120*; *Neale v Turton (1827) 4 Bing. 149*; *Faulkner v Lowe (1848) 2 Exch. 595*; *Boyce v Edbrooke [1903] 1 Ch. 836*; *Ellis v Kerr [1910] 1 Ch. 529*; *Napier v Williams [1911] 1 Ch. 361*.

19. *Gibbs v Merrill (1810) 3 Taunt. 307*; *Burgess v Merrill (1812) 4 Taunt. 468*; *Lovell and Christmas v Beauchamp [1894] A.C. 607*.

20. Minors Contracts Act 1987 s.2, which reverses *Coutts and Co v Browne-Lecky [1947] K.B. 104*. See also s.4, which amends Consumer Credit Act 1974 s.113(7).

21. Williams, *Joint Obligations*, para.15; *Cabell v Vaughan (1669) 1 Wms. Saund. 290a*; *Kendall v Hamilton (1879) 4 App. Cas. 504, 542–544*.

22. County Courts Act 1984 s.48(1).

23. See especially s.4 of the 1978 Act.

24. Insolvency Act 1986 s.345(4).

25. Civil Procedure Act 1833 s.8. This section was repealed by the Statute Law Revision and Civil Procedure Act 1883 s.4, but its principle is still applied by the courts although, under the Civil Procedure Rules 1998 r.6.36 and para.3.1 of Practice Direction 6B, permission to serve a claim form out of the jurisdiction may be granted where any person is a necessary or proper party to an action properly brought against some other person within the jurisdiction. See *Wilson Sons & Co v Balcarres Brook S.S. Co [1893] 1 Q.B. 422*.

26. *Gibbs v Merrill (1810) 3 Taunt. 307*; *Burgess v Merrill (1812) 4 Taunt. 468*.

27. Jacobs and Goldrein, *Pleadings: Principles and Practice* (1990), pp.200–201. One joint debtor may be protected by the Limitation Act and the other not where, e.g. the other has acknowledged the debt: Limitation Act 1980 s.31(6), below, para.17-026.

28. Carriers Act 1830 s.5.

29. *Ex p. Hodgkinson (1815) 19 Ves. 291, 294*; *Ex p. Norfolk (1815) 19 Ves. 455, 458*; *Mullett v Hook (1827) M. & M. 89*; *De Mautort v Saunders (1830) 1 B. & Ad. 399*; *Kendall v Hamilton (1879) 4 App. Cas. 504, 513–514, 541*.

30. *Baldney v Ritchie (1816) 1 Stark. 338*; *Stansfeld v Levy (1820) 3 Stark. 8*.

31. *Cabell v Vaughan (1669) 1 Wms. Saund. 291*, n.4; Williams, *Joint Obligations* (1949), para.20; Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.13-006.

32. CPR 1998 r.19.2(2).

33. *White v Tyndall (1888) 13 App. Cas. 263*. Quaere whether this rule has been abolished by s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934: see Williams, *Joint Obligations*, at para.25; Peel, *Treitel on The Law of Contract*, 13th edn (2011) at para.13-010.

34. *Calder v Rutherford (1882) 3 Brod. & Bing. 302*.

35. Partnership Act 1890 s.9; cf. *Kendall v Hamilton (1879) 4 App. Cas. 504, 538–539*; *Re Hodgson (1885) 31 Ch. D. 177*.

36. *Read v Price [1909] 1 K.B. 577*; Williams, *Joint Obligations*, at para.30.

37. Williams at para.42; *Banco Santander SA v Bayfern Ltd [2000] 1 All E.R. (Comm) 776, 780*.

38. *King v Hoare (1844) 13 M. & W. 494*; *Kendall v Hamilton (1879) 4 App. Cas. 504*. There were exceptions to the general rule. For example, if the judgment was a foreign one (*Bank of Australasia v Nias (1851) 16 Q.B. 717*); or if the defendant in the second action agreed that his own liability should survive the judgment in the first action (*Duffner v Bowyer (1924) 40 T.L.R. 700)*; or if the judgment was on an independent cause of action, such as a negotiable instrument given by one joint debtor (*Drake v Mitchell (1803) 3 East 251*; *Wegg Prosser v Evans [1895] 1 Q.B. 108*; *Badeley v Consolidated Bank (1886) 34 Ch. D. 536, 556*; affirmed *(1888) 36 Ch. D. 238*; *Goldrei, Foucard & Son v Sinclair [1918] 1 K.B. 180*); or, in relation to liquidated demands, where a judgment was signed against one or more joint debtors in default of a defence (see CPR 1998 r.12.8).

39. *McLeod v Power [1898] 2 Ch. 295*.

40. *Hammond v Schofield [1891] 1 Q.B. 453*. See Vol.II, para.31-070.

41. But in *Morris v Wentworth-Stanley [1999] 2 W.L.R. 470*, it was held by the Court of Appeal that s.3 of the Civil Liability (Contribution) Act 1978 did not apply to a judgment obtained by consent: that judgment embodied an accord and satisfaction and the applicable rule was that an accord and satisfaction with one joint debtor released other joint debtors.

42. It has been said that s.3 applies only to judicial determinations and not to arbitral awards: *The Argo Hellas [1984] 1 Lloyd's Rep. 296, 304*. Section 3 of the 1978 Act replaced s.6 of the Law Reform (Married Women and Tortfeasors) Act 1935, which abolished the "merger" doctrine in respect of joint tortfeasors only. By s.4 of the 1978 Act, if more than one action is brought in respect of the same damage, the claimant is to be deprived of his costs unless the court is of the opinion that there was reasonable ground for bringing the action.

43. *Lechmere v Fletcher (1833) 1 C. & M. 623*; *King v Hoare (1844) 13 M. & W. 494, 505*; *Blyth v Fladgate [1891] 1 Ch. 337, 353*.

44. *Re Davison Ex p. Chandler (1884) 13 Q.B.D. 50*.

45. *(1884) 13 Q.B.D. 50, 53*.

46. Williams, *Joint Obligations* (1949), para.50.

47. *Nicholson v Revill (1836) 4 A. & E. 675*; *Re E.W.A. [1901] 2 K.B. 642*; *Morris v Wentworth-Stanley [1999] 2 W.L.R. 470*; cf. *Cutler v McPhail [1962] 2 Q.B. 292* (joint tortfeasors); *Gladman Commercial Properties v Fisher Hargreaves Proctor [2013] EWCA Civ 1466, [2014] P.N.L.R. 11* (starting point—and, on the facts of the case, the end point—is that a settlement with one joint tortfeasor discharges all joint tortfeasors); contra, Williams at para.55, citing earlier authorities to the contrary, some of which, however, may be explained on the principle stated below at n.54.

48. In *North v Wakefield (1849) 13 Q.B. 536, 541*, the reason given was that otherwise the debtor released would be liable for contribution to the debtors not released and so the intention of the parties would be frustrated. But this reasoning seems dubious for it assumes what requires to be proved, viz. that the creditor intends to protect the debtor released against claims from his co-debtors. See *Ex p. Good, Re Armitage (1877) 5 Ch. D. 46, 57* where Jessel M.R. said: "It is very dangerous for modern judges to endeavour to find modern reasons for these old rules." See also Williams at pp.111–112. Similar difficulty attends the rules relating to the discharge of a surety as a result of an agreement to discharge a principal debtor, see Vol.II, paras 45-091—45-097.

49. *Nicholson v Revill (1836) 4 A. & E. 675*; *Re E.W.A. [1901] 2 K.B. 642*; *Deanplan Ltd v Mahmoud [1993] Ch. 151*; Williams at para.63. cf. *Jameson v Central Electricity Generating Board [1999] 2 W.L.R. 141*; a settlement, satisfying a claim against one joint and several tortfeasor, on its true interpretation extinguished the cause of action against the other joint and several tortfeasor. But *Jameson* did not lay down any rule of law that settlement with one joint and several tortfeasor inevitably precludes the claimant from bringing an action against another:

Heaton v Axa Equity and Law Life Assurance Society Plc [2002] UKHL 15, [2002] 2 W.L.R. 1081. This case concerned two successive breaches of contract by different parties. The claimants settled with one contract-breaker, and then claimed against the other in respect of damages which had formed part of the settled claim. It was held that the sum accepted was not, on construction of the settlement, to be taken as fixing the full measure of the claimants' loss; they could therefore recover substantial damages from the defendants, giving credit for sums paid by the first contract-breakers in respect of matters covered in the instant claims.

50. *Lucy Clayton v Kynaston (1699) 12 Mod. 221, 415, 548*; *Dean v Newhall (1799) 8 T.R. 168*; *Hutton v Eyre (1815) 6 Taunt. 289* (joint tortfeasors).

51. *Mallet v Thompson (1804) 5 Esp. 178*; *Hutton v Eyre (1815) 6 Taunt. 289*; Williams, *Joint Obligations*, at para.52.

52. As to the effect of a covenant, or agreement, not to sue a principal debtor on the liability of a surety, see Vol.II, paras 45-091—45-097.

53. *Solly v Forbes (1820) 2 Brod. & Bing. 38*; *North v Wakefield (1849) 13 Q.B. 536*; *Thompson v Lack (1846) 3 C.B. 540*; *Price v Barker (1855) 4 E. & B. 760*; *Willis v De Castro (1858) 4 C.B.(N.S.) 216*; *Bateson v Gosling (1871) L.R. 7 C.P. 9*; cf. *Duck v Mayeu [1892] 2 Q.B. 511* (joint tortfeasors); *Apley Estates Co v De Bernales [1947] Ch. 217* (joint tortfeasors); *Gardiner v Moore [1969] 1 Q.B. 55* (joint tortfeasors); *Bryanston Finance v de Vries [1975] 1 Q.B. 703* (joint tortfeasors); *Watts v Adlington, The Times, December 16, 1993* (joint tortfeasors).

54. *Watters v Smith (1831) 2 B. & Ad. 889*; *Ex p. Good, Re Armitage (1877) 5 Ch. D. 46*; *Re Wolmershausen (1890) 62 L.T. 541*; *Re E.W.A. [1901] 2 K.B. 642, 648–649*; *Johnson v Davies [1998] 3 W.L.R. 1299*; *Sun Life Assurance Society Plc v Tantofex (Engineers) Ltd [1999] 2 E.G.L.R. 135*; cf. *Watts v Adlington, The Times, December 16, 1993* (joint tortfeasors). See also *Heaton v Axa Equity and Law Life Assurance Society Plc [2002] UKHL 15, [2002] 2 W.L.R. 1081* (a separate contractbreaker, albeit liable for the same damage to the claimant, was held not to be discharged by the claimant's settlement with another contract-breaker). Contrast *Crooks v Newdigate Properties Ltd [2009] EWCA Civ 283* (joint tortfeasors) in which it was held that, on payment of the full judgment debt by the other joint tortfeasors (D2 etc.), the liability of D1 under that judgment was discharged/released because, despite a reservation of rights against D1, there was no outstanding loss that the victim of the tort (C1) could recover from D1. And the claimant (C2) who had been assigned the rights of C1 could be in no better position than C1.

55. *Re E.W.A. [1901] 2 K.B. 642, 649*.

56. *Deanplan Ltd v Mahmoud [1993] Ch. 151*; *Morris v Wentworth-Stanley [1999] 2 W.L.R. 470*.

57. *Watts v Adlington, The Times, December 16, 1993* (which concerned joint tortfeasors). This case was followed in *Finlay v Connell Associates, The Times, June 23, 1999* in deciding that a reservation of rights against a surety could be implied in an agreement not to sue a principal debtor. See also *Sun Life Assurance Society Plc v Tantofex (Engineers) Ltd [1999] 2 E.G.L.R. 135*, in which *Deanplan Ltd v Mahmoud [1993] Ch. 151* was distinguished. The High Court of Australia in *Thompson v Australian Capital Television Pty Ltd (1996) 186 C.L.R. 574* has removed the release rule altogether in respect of joint tortfeasors. See A.D.M. Hewitt, "Compromising With One Joint Tortfeasor" (1998) 72 A.L.J. 73.

58. See Vol.II, para.45-107.

59. *Swire v Redman (1876) 1 Q.B.D. 536*.

60. See Vol.II, paras 45-104—45-114.

61. Below, paras 25-020—25-025.

62. *Pigot's Case (1614) 11 Co. Rep. 26b*; *Master v Miller (1791) 4 T.R. 320, (1793) 5 T.R. 367*.

63. *Perring v Hone (1826) 4 Bing. 29*; *Gardner v Walsh (1855) 5 E. & B. 83*.

64. See s.21A of the Administration of Estates Act 1925 (inserted by s.10 of the Limitation Amendment Act 1980).

65. *Strong v Bird (1874) L.R. 18 Eq. 315*; *Re Applebee [1891] 3 Ch. 422*; *Re Bourne [1906] 1 Ch. 697*. The effect of these decisions is preserved by the wording of s.21A(1)(b) of the Administration of Estates Act 1925, but is now extended also to the case of the debtor who is appointed as administrator.

66. *Cheetham v Ward (1797) 1 Bos. & P. 630*; *Jenkins v Jenkins [1928] 2 K.B. 503*.

67. See *Jenkins v Jenkins [1928] 2 K.B. 503, 506*.

68. *Lowe v Peskett (1856) 16 C.B. 500*; *Re Rhoades [1899] 2 Q.B. 347*.

69. Insolvency Act 1986 s.281(7).

70. *Johnson v Davies [1998] 3 W.L.R. 1299* (on the construction of its terms, the voluntary arrangement was held not to discharge co-debtors).

71. Limitation Act 1980 s.31(6). See below, para.28-104.

72. s.30(2).

73. s.31(7).

74. But the Law Commission recommended that acknowledgments and part payments by one co-debtor should only affect the limitation period running against that debtor and not other co-debtors: see Limitation of Actions (Law Com No.270, 2001), paras 3.151, 3.155.

75. *Deering v Earl of Winchelsea (1787) 1 Cox 318; 2 Bos. & P. 270*; *Hutton v Eyre (1815) 6 Taunt. 289*; *Coope v Twynam (1823) Turn. & R. 426*; *Pendelbury v Walker (1841) 4 Y. & C. Ex. 424*; *Boulter v Peplow (1850) 9 C.B. 493*; *Batard v Hawes (1853) 2 E. & B. 287*; see Williams, *Joint Obligations* (1949), Ch.9; Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2012), Ch.20; Burrows, *The Law of Restitution*, 3rd edn (2011), pp.458–460.

76. For an example of proportionate, rather than equal, contribution, see *Commercial Union Assurance Co Ltd v Hayden [1977] Q.B. 804*. A surety has a right of indemnity, not merely contribution: see Vol.II, paras 45-125 et seq.

77. County Courts Act 1984 s.48(2); see above, para.17-009 n.22.

78. *Wolmershausen v Gullick [1893] 2 Ch. 514*; *Gardner v Brooke [1897] 2 Ir.R. 6*. Time begins to run, in respect of the right to contribution, only when that right crystallises by actual payment. See also Vol.II, paras 45-129 et seq.

79. *Ashby v Ashby (1827) 7 B. & C. 444, 449, 451–452*; *Prior v Hembrow (1841) 8 M. & W. 873*; *Batard v Hawes (1853) 2 E. & B. 287, 298*.

80. Above, para.17-012.

81. *Cunningham-Reid v Public Trustee [1944] K.B. 602*.

82. *Peter v Rich (1630) 1 Ch. Rep. 34*; *Hitchman v Stewart (1855) 3 Drew. 271*; *Lowe v Dixon (1885) 16 Q.B.D. 455*. Before the Judicature Act 1873, the rule at law was otherwise. Since that Act, the rule in equity prevails.

83. A debtor who was liable only for 50 per cent of the debt but who has paid in full cannot recover contribution: *Legal & General Assurance Society Ltd v Drake Insurance Co Ltd [1992] 1 Q.B.*

887.

84. *Davies v Humphreys (1840) 6 M. & W. 153, 168–169*; *Re Snowdon (1881) 17 Ch. D. 44*; *Stirling v Burdett [1911] 2 Ch. 418*.

85. *Davies v Humphreys (1840) 6 M. & W. 153, 169*.

86. *Wolmershausen v Gullick [1893] 2 Ch. 514*.

87. *Hay v Carter [1935] Ch. 397*.

88. As the Civil Liability (Contribution) Act 1978 does not apply to a claim for contribution from a co-debtor, the limitation period applicable to the 1978 Act, as laid down in s.10 of the Limitation Act 1980, does not apply to such a claim for contribution: *Hampton v Minns [2002] 1 W.L.R. 1*.

89. The Act was based on the Report on Contribution of the Law Commission (Law Com. No.79, 1977); see generally Dugdale (1979) 42 M.L.R. 182; Clerk & Lindsell on Torts, 21st edn (2014), paras 4-12—4-27.

90. Here the defendants would, in the contractual sense of the term, be severally liable but in the tort sense they would be jointly and severally liable; see above, para.17-004.

91. *Royal Brompton Hospital NHS Trust v Hammond [2002] UKHL 14, [2002] 1 W.L.R. 1397*; *Eastgate Group Ltd v Lindsey Morden Group Inc [2001] EWCA Civ 1446, [2001] 2 All E.R. (Comm) 1050*.

92. In *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd [2002] UKHL 17, [2002] 1 W.L.R. 1419* the House of Lords decided that those from whom contribution was sought were not "liable in respect of the … damage". Building works had been damaged by a fire, which on the assumed facts was due to the negligence (in breach of contract) of the main contractors, the electrical subcontractors, the engineer and the architect. By reason of a contractual arrangement, the main contractors and subcontractors were not liable to the building owners in respect of the fire damage (i.e. they had excluded their liability to pay compensation). No contribution could therefore be claimed from them by the engineer and architect.

93. *[2002] UKHL 14, [2002] 1 W.L.R. 1397*.

94. *Friends Provident Life Office v Hillier Parker May & Rowden [1997] Q.B. 85* (restitution of money and compensation); *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services [2001] EWCA Civ 1785, [2002] Lloyd's Rep. I.R. 185* (builder's defective work and insurance broker's failure to insure); *Bovis Lend Lease Ltd v Saillard Fuller & Partners (2001) 77 Con. L.R. 134, 181–182* (builder's defective work and insurer's liability under policy of insurance). In *Charter Plc v City Index Ltd [2007] EWCA Civ 1382* equitable liability for "knowing receipt" was treated as a wrong-based liability for compensation (rather than as being a liability to make restitution of an unjust enrichment). It therefore fell within the scope of the 1978 Act and the "knowing recipient" was held entitled to claim contribution from tortfeasors liable in respect of the same loss. The criticism of *Friends Provident* by the House of Lords in the *Royal Brompton* case was thought to be irrelevant to "knowing receipt".

95. *[2001] EWCA Civ 1446, [2001] 2 All E.R. (Comm) 1050*.

96. Civil Liability Act 1978 s.1(5). But in *BRB (Residuary) Ltd v Connex South Eastern Ltd [2008] EWHC 172, [2008] 1 W.L.R. 2867*, it was held that where by mistake D1 has been held liable to pay compensation under a court judgment, when the liability should have rested on D2, D1 can claim contribution from D2 under the Civil Liability (Contribution) Act 1978. D1 is liable under the judgment and that is a sufficient liability given that s.6(1) of the 1978 Act specifies that the basis of the liability for compensation can be "tort, breach of contract, breach of trust *or otherwise*" (emphasis added).

97. Civil Liability Act 1978 s.1(4). Where the facts are undisputed, and the compromise has been arrived at because of doubts about the law, the position seems to be that s.1(4) is irrelevant,

and that contribution can only be claimed if both parties were "liable", which is explained by s.1(6) to mean: "… any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person suffering the damage". See, generally, *J. Sainsbury Plc v Broadway Malyan [1999] P.N.L.R. 286*. An assignor of a cause of action is not someone "by or on behalf of" whom an action could have been brought (by the assignee): *Bovis Lend Lease Ltd v Saillard Fuller & Partners [2001] 77 Con. L.R. 134*. But it was also held in that case that an insurer, assigned a cause of action to reinforce its existing right of subrogation, was to be treated as standing in the shoes of the assignor (the insured) at all times and therefore was to be taken to be "a person who suffered the damage". In *Baker & Davies Plc v Leslie Wilks Associates [2005] EWHC 1179 (TCC), [2005] 3 All E.R. 603*, it was held that the 1978 Act does apply—so that contribution can be claimed—even where a settlement requires a party to carry out work for, rather than to make a payment to, the person who has suffered the damage: that is, the word "payment" in s.1(4) includes a payment in kind.

98. *Wimpey & Co Ltd v B.O.A.C. [1955] A.C. 169*; *Hart v Hall and Pickles Ltd [1969] 1 Q.B. 405*.

99. Or if he has settled: *Logan v Uttlesford DC (1984) (C.A.T. No.263)*. Compare, as to the position before the coming into force of the 1978 Act, *Harper v Gray & Walker [1985] 2 All E.R. 507*.

100. See, e.g. *Davies v Swan Motor Co [1949] 2 K.B. 291* (contributory negligence); *Downs v Chappell [1997] 1 W.L.R. 426* (contribution); *Euro-Asian Oil SA v Abilo (UK) Ltd [2016] EWHC 3340 (Comm), [2017] 1 Lloyd's Rep 287* at [365]-[368]. In *Abbey National Plc v Matthews & Son [2003] EWHC 925, [2003] 1 W.L.R. 2042*, a claim for contribution was struck out where the terms of a compromise between C and D1 made it impossible to decide what amount of contribution was "just and equitable": the compromise precluded execution of C's judgment against D1 for any sum beyond the contribution that C (as assignee of D1's contribution claim) might be held entitled to from D2.

101. *Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48, [2002] 3 W.L.R. 1913*.

102. See Hervey (1981) 44 M.L.R. 575, 576. In *Birse Construction Ltd v Haiste Ltd [1996] 1 W.L.R. 675* a reservoir was defectively constructed: although D1 was liable to P (who was itself liable to X) and D2 was liable to X, D1 and D2 were not liable for the same damage to the same person and hence contribution could not be recovered by D1 and D2.

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Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

Section 10. - Liquidated Damages, Deposits and Forfeiture of Sums Paid

(a) - Liquidated Damages or Penalty

Introduction

26-178

Where the parties to a contract agree that, in the event of a breach, the contract-breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the courts either as a penalty (which is irrecoverable) or as liquidated damages (which are recoverable). [969] The law on this topic has been fundamentally re-written by the decision of the Supreme Court in the cases (heard together) of *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*. [970] A clause is enforceable if it meets the traditional test that it does not extravagantly exceed a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the obligation in question, [971] but the true test is whether the party to whom the sum is payable had a legitimate interest in ensuring performance by the other party and the sum payable in the event of breach is not extravagant or unconscionable in comparison to that interest. This supersedes a number of decisions suggesting that a clause which provides for an additional payment to be made by a party who is in breach of the contract may also be enforceable, even if it was not strictly speaking a pre-estimate of the likely loss, if it was "commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach". [972]

Effect of distinction

26-178A

If the clause is not void as a penalty, it is enforceable irrespective of the loss actually suffered, whether the actual loss is less or greater. [973] Courts of equity held that if the sum fixed was unenforceable as a penalty to ensure that the promise was not broken, the promisee should nevertheless receive by way of damages the sum which would compensate him for his actual loss. [974]

The Court of Appeal has held that the strict legal position is that the innocent party can sue on the penal clause, but "it will not be enforced … beyond the sum which represents [his] actual loss". [975] Where there is provision for liquidated damages, the claimant may nevertheless, in appropriate cases, elect to ask for an injunction instead of enforcing the liquidated damages. [976]

Purpose of liquidated damage clauses

26-179

The purpose [977] of the parties in fixing a sum is to facilitate recovery of damages without the difficulty and expense of proving actual damage [978]; or to avoid the risk of under-compensation, where the rules on remoteness of damage might not cover consequential, indirect or idiosyncratic loss [979]; or to give the promisee an assurance that he may safely rely on the fulfilment of the promise [980]; or to deter a party from breaching the contract. [981] Often the parties to a contract fix a sum as liquidated damages in the event of one specific breach, and leave the claimant to sue for unliquidated damages in the ordinary way if other types of breach occur. [982]

"Underliquidated damages"

26-180

In practice, liquidated damages clauses frequently serve to limit one party's liability. In other words, the parties may agree that in the event of breach, the party in breach will pay a sum which is demonstrably less than a pre-estimate of the likely loss. A clause of this type is sometimes called an "underliquidated damages clause". This will not prevent it being a valid liquidated damages clause. [983]

These clauses are often the basis of the insurance arrangements to be made by the parties. A clause of this type may operate as a limitation of the party's liability. For that reason it is likely to be construed in the same way as other clauses limiting liability. [984] It is possible that an underliquidated damages clause is not caught by the Unfair Contract Terms Act 1977 [985] because it does not merely exclude or restrict one party's liability: the same amount is payable whether the actual loss is greater or less. [986] However, were such a clause to occur in a consumer contract, it would seem to fall within the Unfair Terms in Consumer Contract Regulations 1999 (if the contract was made before September 30, 2015 and if the term had not been individually negotiated [987]) or (if the contract was made after October 1, 2015) Pt 2 of the Consumer Rights Act 2015. [988]

Similar types of clause

26-181

In *Cavendish Square Holding BV v Makdessi* [989] a majority of the Supreme Court held that the penalty clause rules apply to provisions that would prevent a party who breaks the contract from receiving a sum to which it would otherwise be entitled, [990] and also to provisions that require a party in breach to transfer property to the other party at less than its full value. [991] The Supreme Court indicated that the penalty rules also apply to deposits [992] and forfeiture clauses [993] but not to sums that are payable on events other than a breach of contract, for example a sum that must be paid if a party exercises a right under the contract. [994]

Reluctance to find clause penal

26-181A

The rule against penalties has often been seen as anomalous because it applies even to clauses that were negotiated between experienced parties of equal bargaining power. [995] In *Cavendish*

Lords Neuberger and Sumption described it as “an edifice which has not weathered well”. [997]

The Privy Council [998] has cited with approval [999] the view of Dickson J. in the Supreme Court of Canada that:

> “… the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.” [1000]

Therefore, where there is no suggestion of oppression, “the court should not be astute to decry a ‘penalty clause’”. [1001] The:

> “… courts are predisposed … to uphold [liquidated damages clauses]. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.” [1002]

However, as it was put before the doctrine was modified by the *Cavendish Square* case, the correct question is not whether one party secured the clause by the use of unequal bargaining power or oppression, but whether or not the clause is a genuine pre-estimate of the likely loss:

> “… whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach …. The question that has always had to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss.” [1003]

Similarly, in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* the Supreme Court emphasised that where a party has a legitimate interest in securing performance rather than damages, the test of validity is whether the amount payable if the contract is broken is extravagant and unconscionable in comparison to that interest. [1004] A clause may be a penalty even though it was freely negotiated between parties of equal bargaining power. [1005]

A question of law

26-181B

The question whether a sum stipulated for in a contract is a penalty or liquidated damages is a question of law. [1006]

A question of construction

26-181C

In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [1007] a majority stated

that whether a clause is a penalty is a question of construction. From this it follows, Lords Neuberger and Sumption said, that the test must be applied as of the date of the agreement, not when it falls to be enforced; a penalty clause is a species of agreement that is by its nature contrary to public policy. It also follows that the application of the test does not involve a discretion, and if the clause is penal it is wholly unenforceable. These points suggest that the question is one that other courts have preferred to call one of characterisation rather than of interpretation or construction. [1008] However, construction in the normal sense may also be relevant. Though it is usually accepted that the words used by the parties are not determinative, [1009] if the parties' intention was to compensate rather than to deter, it seems that the validity of the clause should be judged by whether it is extravagant by comparison to a "genuine pre-estimate" test, disregarding any interest that might have justified a deterrent.

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969. A valid agreed damages clause is probably not subject to the Unfair Contract Terms Act 1977 (see Vol.I, paras 15-062 et seq.), even if it is set at a figure below the likely loss, see below, para.26-180. cf. however, the Unfair Terms in Consumer Contracts Regulations 1999 and Consumer Rights Act 2015 (below, para.26-180).

970. *[2015] UKSC 67, [2016] A.C. 1172*, noted by Conte (2016) 132 L.Q.R. 382 and Morgan [2016] C.L.J. 11. In what follows the decisions will frequently be referred to as "*Cavendish Square*" and "*ParkingEye*".

971. See the test laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79*, below, para.26-182. It is presumed that a party has a legitimate interest in recovering its likely loss: *Cavendish Square [2015] UKSC 67* at [32]. cf. a performance bond, which is *not* an estimate of the damage which might be caused by a breach of contract: *Cargill International SA v Bangladesh Sugar & Food Industries Corp [1996] 4 All E.R. 563*; *Comdel Commodities Ltd v Siporex Trade SA [1997] 1 Lloyd's Rep. 424 CA*.

972. *Lordsvale Finance Plc v Bank of Zambia [1996] Q.B. 752, 762–764*; *United International Pictures v Cine Bes Filmcilik ve Yapimcilik AS [2003] EWCA Civ 1669* at [15]; *Euro London Appointments Ltd v Claessens International Ltd [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep. 436* at [30]; *General Trading Co (Holdings) Ltd v Richmond Corp Ltd [2008] EWHC 1479 (Comm), [2008] 2 Lloyd's Rep. 475*; *Makdessi v Cavendish Square Holdings BV [2013] EWCA Civ 1539*. See further below, paras 26-193—26-194.

973. *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6*. This rule does not apply to deposits, though at least a deposit that it is larger than the customary amount may be a penalty: see below, paras 26-216Q and 26-216R.

974. Story, *Equitable Jurisprudence*, para.1316. The assessment of damages is according to common law; there is no equitable rule on damages where a clause has been held to be penal: *AMEV-UDC Finance Ltd v Austin (1986) 60 A.L.J.R. 741*.

975. *Jobson v Johnson [1989] 1 W.L.R. 1026, 1040* (see also at 1038, 1039–1042, 1049). (cf. however, the dictum in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) [1983] 2 A.C. 694, 702*). ("The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of the primary obligation instead.") In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172 Jobson v Johnson* was disapproved on other grounds, see below, para.26-216K. On whether the claimant may recover more than was provided for by the invalid penalty clause, see below, para.26-216L.

976. See the cases cited in Vol.I, para.26-007 n.48. Agreed damages clauses do not bar the

remedy of rejection of the goods: Benjamin's Sale of Goods, 9th edn (2014), para.13–037.

977. For an economic analysis of agreed damages clauses, see Goetz and Scott (1977) 77 Col. L.R. 554; Rea (1984) 13 J.Leg.Stud. 147. See also Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002) at Ch.9.

978. *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6, 11*. Even where the consequences of a breach are precisely ascertainable after the event, a sum reserved by the contract may be intended by the parties as an agreed estimate of damage in order to avoid the expense and difficulty of assessment: *Diestal v Stevenson [1906] 2 K.B. 345*.

979. *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428, 1447–1448*. See further below, para.26-186.

980. The clause may also operate as a limitation on liability: below, para.26-180. The traditional legal test, which was restricted to expected *loss*, did not permit the promisee to justify the sum fixed as a reasonable incentive to the promisor to perform his promise, nor as a disincentive to the promisor not to commit a *deliberate* breach (see Harris, Campbell and Halson at pp.136–139); but giving an incentive to perform or deterring breach is now accepted as legitimate if the party to whom the sum must be paid has a legitimate interest is securing performance rather than relying on damages. See below, para.26-197.

981. *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172*.

982. e.g. *Aktieselskabet Reidar v Arcos Ltd [1927] 1 K.B. 352*.

983. *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd [1933] A.C. 20*; *Tullett Prebon Group Ltd v El-Hajjali [2008] EWHC 1924 (QB), [2008] I.R.L.R. 760* at [83] ("a significantly smaller stipulated sum than the probable damages would be most unlikely to render a clause a penalty clause, though each case has to be decided on its own individual facts").

984. cf. the rule that the effect of an exemption clause depends on the construction of the contract: *Suisse Atlantique Société d'Armement Maritime v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361*; *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827* (see Vol.I, paras 15-025 et seq.).

985. See Vol.I, paras 15-066 et seq., and in particular para.15-069.

986. See Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 7–055 and 20–140.

987. See Vol.II, paras 38-201 et seq.

988. See Vol.II, paras 38-334 et seq.

989. *[2015] UKSC 67, [2016] A.C. 1172*.

990. See below, para.26-216.

991. See below, para.26-216.

992. See below, para.26-216Q.

993. See below, paras 26-216S et seq.

994. See below, paras 26-216C et seq.

995. For an early example see *Betts v Burch (1859) 4 H & N 506, 509*, cited by Lords Neuberger and Sumption in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172* at [8]. See also their judgment at [33].

996. *[2015] UKSC 67, [2016] A.C. 1172*.

997. The history of the rule in English law is summarised in the judgments of Lords Neuberger and Sumption in the *Cavendish Square case [2015] UKSC 67* at [4]–[8] and of Mason and Wilson JJ. in the Australian case of *AMEV-UDC Finance Ltd v Austin (1986) 162 C.L.R. 170* at [27]–[34]. See also A. Simpson, "The Penal Bond with Conditional Defeasance" (1996) 82 L.Q.R. 392; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), especially at pp.213 et seq. and 255 et seq. Lord Hodge gives an account of the history in Scots law at *[2015] UKSC 67* at [251]–[253].

998. *Philips Hong Kong Ltd v Att-Gen of Hong Kong (1993) 61 Build. L.R. 49, 58*.

999. The view was also cited with approval in the High Court of Australia: *Esanda Finance Corp Ltd v Plessing (1989) 166 C.L.R. 131, 140*. See also Lord Neuberger and Lord Sumption's descriptions of the doubts as to the basis of the doctrine, *Cavendish Square Holding BV v Makdessi [2015] UKSC 67* at [3].

1000. *Elsey v J.G. Collins Insurance Agencies Ltd (1978) 83 D.L.R. (3d.) 1, 15*.

1001. *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428, 1447*.

1002. *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] Build. L.R. 271 (TCC)* at [48]. See also the *Cavendish Square case [2015] UKSC 67* at [33].

1003. *Lordsvale Finance Plc v Bank of Zambia [1996] Q.B. 752, 762–764*, cited with approval in *Euro London Appointments Ltd v Claessens International Ltd [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep. 436* at [30].

1004. *[2015] UKSC 67* at [32]. On the role of unconscionability in this context, see below, para.26-214.

1005. *Makdessi v Cavendish Square Holdings BV [2013] EWCA Civ 1539; [2015] UKHL 67*, esp. at [257] (Lord Hodge).

1006. *Sainter v Ferguson (1849) 7 C.B. 716, 727*.

1007. *[2015] UKSC 67, [2016] A.C. 1172* at [9] (Lords Neuberger and Sumption) and [243] (Lord Hodge). See particularly on the construction point Dawson [2016] L.M.C.L.Q. 207.

1008. See the two-stage process (interpretation of the agreement to ascertain the parties' rights and obligations, followed by correct characterisation of the agreement) set out by Lord Millett in

Agnew v Inland Revenue Commissioners [2001] UKPC 28, [2008] 2 A.C. 710 at [32].

1009.

See Lord Dunedin's first proposition in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79, 86*, quoted below, para.26-182 and n.934.