Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Generally

13-001

Assuming that a contract has been validly created, it is necessary to consider the extent of the obligations imposed on the parties by the contract. In order to do this, the exact terms of the contract must be determined [1] and their comparative importance evaluated. [2] There may be some doubt about the interpretation of the contract, and resort will then have to be made to the principles of construction which have been laid down by the courts, [3] and also to those which govern the admissibility of evidence extrinsic to a written agreement. [4]

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1. See below, paras 13-002 et seq.

2. See below, paras 13-019 et seq.

3. See below, paras 13-041 et seq.

4. See below, paras 13-098 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 1. - Proof of Terms

Proof of terms

13-002

Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect. [5] But it by no means follows that the document will contain all the terms of the contract: it may be partly oral, and partly in writing. [6] Further, many contracts are made solely by word of mouth [7] or are contained in or evidenced by documents which have not been signed by the party affected. In such cases, it will be necessary to prove which statements, or stipulations, were intended to be incorporated as terms of the contract or to have contractual effect.

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5. *Parker v South Eastern Ry (1877) 2 C.P.D. 416, 421*; *Howatson v Webb [1908] 1 Ch. 1*; *The Luna [1920] P. 22*; *L'Estrange v Graucob Ltd [1934] 2 K.B. 394*; *McCutcheon v David MacBrayne Ltd [1964] 1 W.L.R. 125, 132–134*; *Bahamas Oil Refining Co v Kristiansands Tank-rederie A/S [1978] 1 Lloyd's Rep. 211*; *Charlotte Thirty Ltd v Croker Ltd (1990) 24 Const. L.R. 46*; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 211 A.L.R. 342*; *Peekay Intermark Ltd v Australia and NZ Banking Group Ltd [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511* at [43]; *One World (GB) Ltd v Elite Mobile Ltd [2012] EWHC 3706 (QB)* (although note the qualification expressed at [58] in relation to a possible exception to the rule where the term sought to be incorporated is onerous or unusual), on which see further *Dawson v Bell [2016] EWCA Civ 96, [2016] 2 B.C.L.C. 59* at [102]–[103]. But see *Jaques v Lloyd D. George & Partners Ltd [1968] 1 W.L.R. 625, 630*; *Tilden Rent-a-Car Co v Clendenning (1978) 83 D.L.R. (3d) 400*; *Crocker v Sundance Northwest Resorts Ltd (1988) 51 D.L.R. (4th) 321*; *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 Lloyd's Rep. 446, 454*. See further Spencer [1978] C.L.J. 104; Macdonald [1999] C.L.J. 413, 420; Peden and Carter (2005) 21 J.C.L. 96 and below, para.13-015 n.70.

6. See below, paras 13-099—13-102.

7. See above, para.5-001.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 1. - Proof of Terms

(a) - Contractual Undertakings and Representations

Terms and representations

13-003

During the course of negotiations leading to the conclusion of a valid and binding contract, a number of statements may be made, some of which may, and others may not, be intended to have contractual force. Some statements may be considered to be mere representations, intended to induce the other party to enter into the contract, but not imposing liability for breach of contract. [8] Others may be considered to be contractual terms, for the breach of which an action for damages will lie. [9] The question whether any particular statement is a mere representation or a contractual term is frequently a difficult one for the court. In reaching a conclusion it will take into account the following considerations: the importance of the truth of the statement [10]; the time which elapsed between the making of the statement and the final manifestation of consensus [11]; whether the party making the statement was, vis-à-vis the other party, in a better position to ascertain the truth of the statement [12]; and whether the statement was subsequently omitted when the agreement was embodied in a more formal contract in writing. [13] But none of these criteria is conclusive [14] and the true test would seem to be whether there is:

> "… evidence of an intention by one or both parties that there should be contractual liability in respect of the accuracy of the statement." [15]

Such intention is to be ascertained objectively. [16] In *Oscar Chess Ltd v Williams* [17] a statement made to a motor dealer by a private vendor of a motor-car, based on a previous alteration of the car log-book by an unknown person, that the car was "a 1948 model", whereas in fact it had been first registered in 1939, was held by the Court of Appeal to be a mere representation. But in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [18] a statement made by a motor dealer to a private purchaser, based on a reading of the mileometer, that it had done only 20,000 miles, whereas in fact it had done approximately 100,000, was held to be a warranty. The *Oscar Chess* case was distinguished on the ground that the vendor "honestly believed and on reasonable grounds that [the statement] was true", whereas the motor dealer in the latter case "stated a fact that should be within his own knowledge. He had jumped to a conclusion and stated it as a fact". [19] Such cases show that, in this area of contract law, the circumstances of each case must be individually considered to ascertain the intention of the parties and that the criteria stated above furnish no decisive tests in law:

> "The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true." [20]

Collateral contracts [21]

13-004

It may be difficult to treat a statement made in the course of negotiations for a contract as a term of the contract itself, either because the statement was clearly prior to or outside the contract or because the existence of the parol evidence rule [22] prevents its inclusion. Nevertheless, the courts are prepared in some circumstances to treat a statement intended to have contractual effect as a separate contract or warranty, collateral to the main transaction. [23] In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point [24] or unless the other promises not to enforce a term of the written agreement. [25] Thus in *De Lassalle v Guildford* [26] the claimant and the defendant negotiated for the lease of a house. The terms of the lease were arranged, but the claimant (the prospective tenant) refused to hand over the counterpart of the lease which he had signed unless the defendant assured him that the drains were in good order. The defendant gave this assurance, and the counterpart lease was thereupon handed to him. The drains were not in fact, in good order, and the claimant sued the defendant on his assurance, no reference to drains having been made in the lease itself. The Court of Appeal held that the assurance constituted a contract collateral to the lease on which the defendant was liable. However, in *Heilbut Symons & Co v Buckleton*, [27] Lord Moulton said:

> "Such collateral contracts, the sole effect of which is to vary or add to the terms of the written contract, are therefore viewed with suspicion by the law … 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 strictly shown."

But more recently Lord Denning M.R. stated [28] that "much of what was said in that case is entirely out of date".

13-005

It is undoubtedly true that the courts are nowadays much more willing to accept that a pre-contractual assurance gives rise to a collateral contract, [29] so that such collateral contracts are no longer rare. Where the assurance consists of a statement of present or past fact, there may be less need to infer a collateral contract, since a remedy in damages may be available under the Misrepresentation Act 1967 [30] for a representation of fact. But where the assurance is as to the future, the Act does not apply [31] and in such a case the claimant must prove a collateral contract or fail completely. Lord Denning M.R. has said [32]:

> "When a person gives a promise or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding."

13-006

Consideration for the collateral contract is normally provided by entering into the main contract, [33] but a collateral contract may also be actionable even if the main contract is unenforceable, e.g. for illegality. [34] Breach of the collateral contract will give rise to an action for damages for its breach, but not as a general rule to a right to treat the main contract as repudiated. However, the effect of a collateral contract may be to vary the terms of the main contract [35] or to estop a party from acting inconsistently with it if it would be inequitable for him to do so. [36]

Third parties

13-007

A collateral contract may also be found to exist where the main contract is not between the claimant and the defendant, but between the claimant and a third party. In *Shanklin Pier Ltd v Detel Products Ltd*, [37] the claimants, owners of Shanklin Pier, wished to have their pier painted with suitable paint. They asked the defendants, a firm of paint manufacturers, whether their paint was suitable for this purpose, and were assured that it was. The claimants therefore caused to be inserted in a contract made between them and the contractors who were to paint the pier a stipulation that the defendants' paint should be used. The paint was entirely unsuitable, and the claimants sued the defendants on their assurance. It was held that the assurance constituted a contract, collateral to the contract for painting the pier, the consideration for which was the claimants' entry into the contract containing the stipulation that the defendants' paint should be used. Similarly a collateral contract may exist where the main contract is between the defendant and a third party, as in *Charnock v Liverpool Corp*, [38] where the main contract to repair a car was between the repairer and an insurance company, but there was also a collateral contract between the repairer and the owner of the car that the repairer should do the repairs within a reasonable time.

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8. *Hopkins v Tanqueray (1854) 15 C.B. 130*; *Heilbut, Symons & Co v Buckleton [1913] A.C. 30*; *Routledge v McKay [1954] 1 W.L.R. 615*; *Oscar Chess Ltd v Williams [1957] 1 W.L.R. 370*. See also above, para.7-004.

9. *Bannerman v White (1861) 10 C.B.(N.S.) 844*; *De Lassalle v Guildford [1901] 2 K.B. 215*; *Schawel v Reade [1913] 2 I.R. 64*; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623*; and see the cases cited in nn.23–25, below.

10. *Bannerman v White*, above. cf. *Oscar Chess Ltd v Williams*, above.

11. *Routledge v McKay [1954] 1 W.L.R. 615*. See also *Pasley v Freeman (1789) 3 Term Rep. 51, 57*; *Schawel v Read [1913] 2 I.R. 64*; *Mahon v Ainscough [1952] 1 All E.R. 337*; *Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd's Rep. 611* at [10].

12. *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623*; *Esso Petroleum Co Ltd v Mardon [1976] Q.B. 801*. Contrast *Heilbut, Symons & Co v Buckleton [1913] A.C. 30*; *Gilchester Properties Ltd v Gomm [1948] 1 All E.R. 493*.

13. *Heilbut, Symons & Co v Buckleton [1913] A.C. 30, 50*; *Gilchester Properties Ltd v Gomm [1948] 1 All E.R. 493*. cf. *Miller v Cannon Hill Estates Ltd [1931] 2 K.B. 113*; *Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd's Rep. 611* at [10].

14. *Heilbut, Symons & Co v Buckleton [1913] A.C. 30, 50*.

15. *[1913] A.C. 30, 51* (and see 38, 42); *Pasley v Freeman (1789) 3 T.R. 51, 57*; *Oscar Chess Ltd v Williams [1957] 1 W.L.R. 370, 374*; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623, 629*; *Esso Petroleum Co Ltd v Mardon [1976] Q.B. 801*. See also *J.J. Savage & Sons Pty Ltd v Blackney (1970) 119 C.L.R. 435*.

16. *Inntrepreneur Pub Co v East Crown Ltd [2002] 2 Lloyd's Rep. 611* at [10].

17. *[1957] 1 W.L.R. 370*. See also *Routledge v McKay [1954] 1 W.L.R. 615*; *Dawson v Yeoward [1961] 1 Lloyd's Rep. 431*. cf. *Turner v Anquetil [1953] N.Z.L.R. 952*; *Beale v Taylor [1967] 1 W.L.R. 1193*.

18. *[1965] 1 W.L.R. 623*.

19. *[1965] 1 W.L.R. 623, 628, 629*.

20. *Heilbut, Symons & Co v Buckleton [1913] 1 A.C. 30, 51*.

21. See Paterson, *Collateral Warranties Explained* (1991) and para.18-005, below.

22. See below, paras 13-099—13-108.

23. *Lindley v Lacey (1864) 17 C.B.(N.S.) 578*; *Mann v Nunn (1874) 30 L.T. 526*; *Spicer v Martin (1888) 14 App. Cas. 12*; *Jacobs v Batavia & General Plantations Trust Ltd [1924] 1 Ch. 287*; *Jameson v Kinmell Bay Land Co Ltd (1931) 47 T.L.R. 593*; *Miller v Cannon Hill Estates Ltd [1931] 2 K.B. 113*; *Birch v Paramount Estates (1956) 167 E.G. 396*; *Frisby v BBC [1967] Ch. 932*; *Quickmaid Rental Services v Reece (1970) 114 S.J. 372, CA*; *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078*; *Esso Petroleum Co Ltd v Mardon [1976] Q.B. 801*; *Record v Bell [1991] 1 W.L.R. 853*; *Wake v Renault (UK) Ltd (1996) 15 Tr. L.R. 514*; *Procter & Gamble (Health and Beauty Care) Ltd v Carrier Holdings Ltd [2003] EWHC 83 (TCC), [2003] B.L.R. 255*; *Thinc Group v Armstrong [2012] EWCA Civ 1227* at [40]–[41]; Wedderburn [1959] C.L.J. 58; Greig (1971) 87 L.Q.R. 179.

24. *Morgan v Griffith (1871) L.R. 6 Ex. 70*; *Erskine v Adeane (1873) L.R. 8 Ch. App. 756*; *Newman v Gatti (1907) 24 T.L.R. 18, 20*; *Heilbut, Symons & Co v Buckleton [1913] 1 A.C. 30, 47*.

25. *Couchman v Hill [1947] K.B. 554*; *Webster v Higgin [1948] 2 All E.R. 127*; *Harling v Eddy [1951] 2 K.B. 739*; *City of Westminster Properties (1934) Ltd v Mudd [1959] Ch. 129*; *Brikom Investments Ltd v Carr [1979] Q.B. 467*; cf. *Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2007] EWCA Civ 622, (2007) 32 E.G. 90*.

26. *[1901] 2 K.B. 215*.

27. *[1913] A.C. 30, 47*. See also *Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2007] EWCA Civ 622, (2007) 32 E.G. 90*.

28. *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078, 1081*; *Howard Marine & Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd [1978] Q.B. 574, 590*. See also *Esso Petroleum Co Ltd v Mardon [1978] Q.B. 801, 817*.

29. *Esso Petroleum Co Ltd v Mardon [1976] Q.B. 801*; *Times Travel (UK) Ltd v Pakistan International Airlines Corp [2017] EWHC 1367 (Ch)* at [234]. But compare *Howard Marine & Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd [1978] Q.B. 574*.

30. s.2(1); see above, para.7-075.

31. See above, para.7-006.

32. *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078, 1081*. But see *Heilbut Symons & Co v Buckleton [1913] A.C. 30, 38, 42, 47, 49–50*; *Jonathan Wren & Co Ltd v Microdec Plc (1999) 65 Const. L.R. 157*; *Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd's Rep. 611* at [11]; *Brewer v Mann [2010] EWHC 2444 (QB)* at [142].

33. cf. *De Lassalle v Guildford [1901] 2 K.B. 215*; *Hill v Harris [1965] Q.B. 601*.

34. See below, para.16-193.

35. *Wake v Renault (UK) Ltd (1996) 15 Tr. L.R. 514*.

36. *Brikom Investments Ltd v Carr [1979] Q.B. 467*; but see above, para.4-135.

37. *[1951] 2 K.B. 854*. See *Brown v Sheen & Richmond Car Sales Ltd [1950] 1 All E.R. 1102*; *Andrews v Hopkinson [1957] 1 Q.B. 229*; *Smith v Spurling Motor Bodies Ltd (1961) 105 S.J. 967*; *Yeoman Credit Ltd v Odgers [1962] 1 W.L.R. 215*; *Wells (Merstham) Ltd v Buckland Sand & Silica Ltd [1965] 2 Q.B. 170*. cf. *Drury v Victor Buckland Ltd [1941] 1 All E.R. 269*; *Independent Broadcasting Authority v EMI Electronics (1980) 14 Build. L.R. 1*; *Lambert v Lewis [1982] A.C. 225*; *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd [1993] 1 W.L.R. 138* (reversed on other grounds, *[1995] Ch. 132*); *Fuji Seal Europe Ltd v Catalytic Combustion*

Corporation [2005] EWHC 1659 (TCC), 102 Con L.R. 47.

38. *[1968] 1 W.L.R. 1498*. cf. *Brown and Davis Ltd v Galbraith [1972] 1 W.L.R. 997*. See below, para.18-010.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 1. - Proof of Terms

(b) - Standard Form Contracts

Contracts in standard form

13-008

A different problem may arise in proving the terms of the agreement where it is sought to show that they are contained or referred to in a contract in standard form, i.e. in some ticket, receipt, or standard form document. If a party signs a contractual document, [39] he will normally be bound by its terms. [40] Frequently, however, the document is simply made available to him before or at the time of making the contract, and the question will then arise whether the printed conditions which it contains or to which it refers have become terms of the contract. [41] The party to whom the document is supplied will probably not trouble to read it, and may even be ignorant that it contains any conditions at all. Yet standard form contracts very frequently embody clauses which purport to impose obligations on him or to exclude or restrict the liability of the person supplying the document. [42] Thus it becomes important to determine whether these clauses should be given contractual effect.

Contractual document

13-009

Where the conditions are contained in a document, the document must be of a class which either the party receiving it knows, or which a reasonable man would expect, to contain contractual conditions. Thus a cheque book, [43] a time sheet, [44] a ticket for a deck chair, [45] a ticket handed to a person at a public bath house [46] and a parking ticket issued by an automatic machine [47] have been held to be cases:

> "… where it would be quite reasonable that the party receiving it should assume that the writing contained no condition and should put it in his pocket unread." [48]

On the other hand, a railway [49] or ship [50] ticket or a receipt for goods deposited [51] has been held to be a contractual document.

Time of notice

13-010

The conditions must be brought to the notice [52] of the party to be bound before or at the time when the contract is made. If they are not communicated to him until after the contract is concluded, they will be of no effect. In *Olley v Marlborough Court Ltd* [53] certain property of the claimant was stolen from his hotel bedroom owing to the negligence of the hotel management. On arrival at the hotel he

had signed the hotel register which contained no mention of any exemption clauses, but in the bedroom there was a notice disclaiming liability for articles lost or stolen. It was held that the notice was ineffective as he had not been made aware of it until after the contract was made.

Course of dealing

13-011

Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions. [54] But they may be incorporated by a "course of dealing" between the parties where each party has led the other reasonably to believe that he intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions. [55] It should, however, be noted that a more relaxed approach is adopted in art.25 of the Regulation (EU) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [56] to the degree of consensus required for the incorporation of an exclusive jurisdiction clause. [57]

Incorporation without express reference

13-012

Conditions usual in a particular trade may be incorporated where both parties are in the trade and are aware that conditions are habitually imposed and of the substance of those conditions, even if they are not referred to at the time of contracting. [58] Contracts may also be found to have been made subject to the terms of a "master agreement" even though that agreement is not referred to in the individual contracts. [59] A sequence of emails may be read together even if a later email does not expressly refer to the earlier emails. [60]

Meaning of notice

13-013

It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts [61] regarding notice in such circumstances are three in number:

(1) if the person receiving the document did not know that there was writing or printing on it, he is not bound;

(2) if he knew that the writing or printing contained or referred to conditions, he is bound;

(3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.

Reasonable sufficiency of notice

13-014

It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. [62] But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient. [63] Cases in which the notice has been held to be insufficient have been those where the conditions were printed on the back of the document, without any reference, or any adequate reference, on its face, such as, "[f]or conditions, see back", [64] where, on documents sent by fax, reference was made to conditions stated on the back, but those conditions were not in fact stated on the back or otherwise communicated, [65] or where the conditions were obliterated by a printed stamp. [66] In many situations, however, the tender of printed conditions will in itself be sufficient. [67] It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given. [68] Reference to standard terms to be found on a website may be sufficient to incorporate the terms on the website into the contract. [69]

Onerous or unusual terms

13-015

Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention. [70] "Some clauses which I have seen," said Denning L.J. [71]:

> "… would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

Personal disability

13-016

It is immaterial that the party receiving the document is under some personal, but non-legal, disability, such as blindness, illiteracy, or an inability to read our language. [72] Provided the notice is reasonably sufficient for the class of persons to which the party belongs (e.g. passengers on a ship or railway) he will be bound by the conditions.

Printed notices

13-017

Where printed notices are exhibited, it may be sufficient if the party to be bound has, before or at the time of making the contract, had his attention drawn to the notices, [73] or received a printed document which refers him to the notices, [74] in circumstances which make it clear to him that the contract is subject to the conditions contained in the notices. [75] The reference may be circuitous provided it is clear. [76] It has, however, been stated by Denning L.J. that:

> "The party who is liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected." [77]

In many situations it will nevertheless be sufficient to display a prominent public notice which can be plainly seen at the time of making the contract. [78] But the issue of a catalogue or brochure which states that the contract to be concluded will be subject to exempting conditions may not be sufficient to make the conditions terms of the contract if further steps to incorporate the conditions are not taken at the time the contract is concluded. [79]

Statute

13-018

Certain additional requirements of form have been imposed by statute on some classes of contract; for example, by the Carriers Act 1830 s.4, common carriers cannot limit their liability by publication of notices alone, but only by special contract. [80]

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39. cf. *Grogan v Robin Meredith Plant Hire (1996) 15 Tr. L.R. 371* (non-contractual document).

40. See the cases cited in para.13-002 n.5, above.

41. See Sales (1953) 16 M.L.R. 318; Clarke [1976] C.L.J. 51.

42. See below, Ch.15.

43. *Burnett v Westminster Bank [1966] 1 Q.B. 742*.

44. *Grogan v Robin Meredith Plant Hire (1996) 15 Tr. L.R. 371*.

45. *Chapelton v Barry U.D.C. [1940] 1 K.B. 532*.

46. *Taylor v Glasgow Corp 1952 S.C. 440*.

47. *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163*.

48. *Parker v South Eastern Ry (1877) 2 C.P.D. 416, 422*.

49. *Thompson v L.M. & S. Ry [1930] 1 K.B. 41*.

50. *Hood v Anchor Line (Henderson Bros) Ltd [1918] A.C. 837*; *Cockerton v Naviera Aznar SA [1960] 2 Lloyd's Rep. 451*.

51. *Parker v South Eastern Ry (1877) 2 C.P.D. 416*; *Alexander v Ry Executive [1951] 2 K.B. 882*.

52. For the meaning of notice, see below, para.13-013.

53. *[1949] 1 K.B. 532*. See also *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163* (ticket proffered by automatic machine); *Hollingworth v Southern Ferries Ltd [1977] 2 Lloyd's Rep. 70*; *Daly v General Steam Navigation Co Ltd [1979] 1 Lloyd's Rep. 257*; *Dillon v Baltic Shipping Co [1991] 2 Lloyd's Rep. 155* (ship tickets); *Metaalhandel JA Magnus BV v Ardfields Transport Ltd [1988] 1 Lloyd's Rep. 197, 204* (conditions in invoice). cf. *Cockerton v Naviera Aznar SA [1960]*

2 Lloyd's Rep. 451.

54. *McCutcheon v David Macbrayne Ltd [1964] 1 W.L.R. 125 HL* (no consistent course of dealing); *Hollier v Rambler Motors (A.M.C.) Ltd [1972] 2 Q.B. 71* (only three or four times in five years); *Capes (Hatherden) Ltd v Western Arable Services Ltd [2009] EWHC 3065 (QB), [2010] 1 Lloyd's Rep. 477* (four contracts in same year with interval of five months between the last of them and the two contracts in question); *Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC), [2015] B.L.R. 336* (claimant failed to follow a consistent practice of enclosing its terms and conditions with every purchase order).

55. *J. Spurling Ltd v Bradshaw [1956] 1 W.L.R. 461, 467*; *Cockerton v Naviera Aznar SA [1960] 2 Lloyd's Rep. 451*; *Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 A.C. 31, 90, 91, 104, 105, 130*; *Transmotors Ltd v Robertson Buckley & Co Ltd [1970] 1 Lloyd's Rep. 224*; *Eastman Chemical International A.G. v N.M.T. Trading Ltd [1972] 2 Lloyd's Rep. 25*; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd [1973] Q.B. 400*; *S.I.A.T. di del Ferro v Tradax Overseas SA [1978] 2 Lloyd's Rep. 470 (affirmed [1980] 1 Lloyd's Rep. 53)*; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd [1981] 2 Lloyd's Rep. 659 (affirmed [1982] 2 Lloyd's Rep. 42)*; *McCrone v Boots Farm Sales Ltd 1981 S.L.T. 103*; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] Q.B. 284, 295 (affirmed [1983] 2 A.C. 803)*; *Johnson Matthey Bankers Ltd v State Trading Corp of India Ltd [1984] 1 Lloyd's Rep. 427*; *Circle Freight International Ltd v Medeast Gulf Exports Ltd [1988] 2 Lloyd's Rep. 427*; *Balmoral Group Ltd v Borealis UK Ltd [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629* at [362]–[366]; *Capes (Hatherden) Ltd v Western Arable Services Ltd [2009] EWHC 3065 (QB), [2010] 1 Lloyd's Rep. 477* at [32]–[42]; cf. *Banque Paribas v Cargill International SA [1992] 1 Lloyd's Rep. 96, 98*; see Hoggett (1970) 33 M.L.R. 518. See also *Photolibrary Group Ltd v Burda Senator Verlag GmbH [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 881*; *SKNL (UK) Ltd v Toll Global Forwarding [2012] EWHC 4252 (Comm), [2013] 2 Lloyd's Rep. 115*.

56. Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L351/1. The Regulation came into force on January 10, 2015 and recasts and replaces Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L.12/1.

57. See *The Tilly Russ (M.S.) [1985] 1 Q.B. 931*; *Mainschiffahrts-Genossenschaft eG v Les Gravières Rhénanes SARL [1997] Q.B. 1*; *SSQ Europe SA v Johann & Backes OHG [2002] 1 Lloyd's Rep. 465*; *Africa Express Line Ltd v Socofi SA [2009] EWHC 3223 (Comm), [2010] 2 Lloyd's Rep. 181*.

58. *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd [1975] Q.B. 303*; *Chevron International Oil Co Ltd v A/S Sea Team [1983] 2 Lloyd's Rep. 256*; *Laceys Footwear (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd's Rep. 369, 378*; *Balmoral Group Ltd v Borealis UK Ltd [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629* at [357]; *Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC), [2015] B.L.R. 336* at [42]. cf. *Salsi v Jetspread Air Services Ltd [1977] 2 Lloyd's Rep. 57*; *Pancommerce SA v Veecheema BV [1983] 2 Lloyd's Rep. 304, 305*; *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd [1983] 2 Lloyd's Rep. 438*; *Shipbuilders Ltd v Benson [1992] 3 N.Z.L.R. 349*; *Grogan v Robin Meredith Plant Hire (1996) 15 Tr. L.R. 371*. See also *Matrix Europe Ltd v Uniserve Holdings Ltd [2008] EWHC 11 (QB), [2008] 1 C.L.C. 205* (BIFA terms applied even to unintentional delivery of goods).

59. *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 2 Q.B. 711*. But cf. *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH [2013] EWHC 338 (Comm), [2013] 2 Lloyd's Rep. 213*.

60. *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT [2011] EWHC 56 (Comm), [2011] 2 All E.R. (Comm) 95; [2012] EWCA Civ 265, [2012] 1 W.L.R. 3674*.

61. *Parker v South Eastern Ry (1877) 2 C.P.D. 416, 421, 423*; *Richardson, Spence & Co v Rowntree [1894] A.C. 217*; *Hood v Anchor Line (Henderson Bros) Ltd [1918] A.C. 837*; *McCutcheon v David Macbrayne Ltd [1964] 1 W.L.R. 125*; *Burnett v Westminster Bank [1966] 1 Q.B. 742*; *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163*; *Shepherd Homes Ltd v Encia*

Remediation Ltd [2007] EWHC 70 (TCC), [2007] B.L.R. 135; *Allen Fabrications Ltd v ASD Ltd [2012] EWHC 2213 (TCC)* at [56]. See Clarke [1976] C.L.J. 51. However, the court may be slower to incorporate a term into a contract where that term is to be found in a contract between two other parties or between one of the contracting parties and a third party: *Barrier Ltd v Redhall Marine Ltd [2016] EWHC 381 (QB)*; *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661*; *TTMI SARL v Statoil ASA [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep 220*.

62. *Parker v South Eastern Ry (1877) 2 C.P.D. 416*; *Richardson, Spence & Co v Rowntree [1894] A.C. 217*; *Hood v Anchor Line (Henderson Bros) Ltd [1918] A.C. 837, 844, 847*.

63. *Thompson v L.M. & S. Ry [1930] 1 K.B. 41*.

64. *Henderson v Stevenson (1875) L.R. 2 H.L.(Sc.) 470*; *Sugar v L.M. & S. Ry [1941] 1 All E.R. 172* ; *White v Blackmore [1972] 2 Q.B. 651, 664*. cf. *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd [2003] EWHC 2871 (TCC), [2004] 2 All E.R. (Comm) 129*; *Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC), [2015] B.L.R. 336*.

65. *Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd [1996] 2 Lloyd's Rep. 388*; *Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC), [2015] B.L.R. 336*.

66. *Richardson, Spence & Co v Rowntree [1894] A.C. 217*. On small and illegible print, see *Paterson Zochonis & Co Ltd v Elder, Dempster & Co Ltd [1923] 1 K.B. 420, 441*. cf. *P.S. Chellaram & Co Ltd v China Ocean Shipping Co [1991] 1 Lloyd's Rep. 493, 519*.

67. *Parker v South Eastern Ry (1877) 2 C.P.D. 416*; *Hood v Anchor Line (Henderson Bros) Ltd [1918] A.C. 837*; *Cockerton v Naviera Aznar SA [1960] 2 Lloyd's Rep. 451*; *Budd v P. & O. Steam Navigation Co [1969] 2 Lloyd's Rep. 262*; cf. *Union Steamships v Barnes (1956) 5 D.L.R. (2d) 535*.

68. *Circle Freight International Ltd v Medeast Gulf Exports Ltd [1988] 2 Lloyd's Rep. 427*; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570, 613*; *Crédit Suisse Financial Products v Société Generale d'Enterprises (1996) 5 Bank. L.R. 220*, *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 Lloyd's Rep. 446*; *O'Brien v MGN Ltd [2001] EWCA Civ 1279, [2002] C.L.C. 33*; *Sumukan Ltd v Commonwealth Secretariat [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep. 87*.

69. *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd [2015] EWHC 25 (Comm)* at [16].

70. *Parker v South Eastern Ry (1877) 2 C.P.D. 416, 428*; *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163*; *Hollingworth v Southern Ferries Ltd [1977] 2 Lloyd's Rep. 70*; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] Q.B. 433*; *Dillon v Baltic Shipping Co [1991] 2 Lloyd's Rep. 155*; *A.E.G. (UK) Ltd v Logic Resource Ltd [1996] C.L.C. 265*; *Laceys Footwear v Bowler International Freight (Wholesale) Ltd [1997] 2 Lloyd's Rep. 369, 384–385*; *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 Lloyd's Rep. 446, 451*, *Amiri Flight Authority v BAE Systems Plc [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767*; *Kaye v NuSkin UK Ltd [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40*. For the suggested extension of this principle to signed documents, see *Jaques v Lloyd D George & Partners Ltd [1968] 1 W.L.R. 625, 630*; *Tilden Rent-a-Car Co v Clendenning (1978) 83 D.L.R. (3d) 400*; *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 Lloyd's Rep. 446, 454*; *Montgomery Litho Ltd v Maxwell, 2000 S.C. 56*; *Amiri Flight Authority v BAE Systems Plc [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767* at [14]–[16]; *One World (GB) Ltd v Elite Mobile Ltd [2012] EWHC 3706 (QB)* at [52]–[58]; Macdonald [1999] C.L.J. 413, 422; above, para.13-002 n.5. Contrast *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570, 612*; *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161* at [209]; *Do-Buy 95 Ltd v National Westminster Bank Plc [2010] EWHC 2862 (QB)* at [91]; cf. also *Sumukan Ltd v Commonwealth Secretariat [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep. 40*; *Shepherd Homes Ltd v Encia Remediation Ltd [2007] EWHC 70 (TCC) [2007] Build. L.R. 135*; *Stretford v Football Association Ltd [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31*; *Photolibrary Group Ltd v Burda Senator Verlag GmbH [2008] EWHC*

1343 (QB), [2008] 2 All E.R. (Comm) 881; *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661*; *Allen Fabrications Ltd v ASD Ltd [2012] EWHC 2213 (TCC)* at [57]–[64] (terms not onerous or unusual).

71. *J. Spurling Ltd v Bradshaw [1956] 1 W.L.R. 461, 466*.

72. *Thompson v L.M. & S. Ry [1930] 1 K.B. 41*; cf. *Firchuk and Firchuk v Waterfront Cartage Division, etc., Ltd [1969] 2 Lloyd's Rep. 533, 534*. Quaere if the disability is known to the other contracting party: see *Geier v Kujawa Weston and Warne Bros (Transport) Ltd [1970] 1 Lloyd's Rep. 364*.

73. *Birch v Thomas [1972] 1 W.L.R. 294*.

74. *Watkins v Rymill (1883) 10 Q.B.D. 178*.

75. cf. *Hollingworth v Southern Ferries Ltd [1977] 2 Lloyd's Rep. 70*.

76. *Wyndham Rather Ltd v Eagle Star and British Dominions Insurance Co Ltd (1925) 21 Ll.L. Rep. 214*; *Thompson v L.M. & S. Ry [1930] 1 K.B. 41*; *Goodyear Tyre & Rubber Co v Lancashire Batteries [1958] 1 W.L.R. 857*.

77. *Harling v Eddy [1951] 2 K.B. 739, 748*. See also *Olley v Marlborough Court Ltd [1949] 1 K.B. 532, 549*; *Adams (Durham) Ltd v Trust Houses Ltd [1960] 1 Lloyd's Rep. 380*; *Mendelssohn v Normand Ltd [1970] 1 Q.B. 177, 182*.

78. *Olley v Marlborough Court Ltd [1949] 1 K.B. 532, 549*; *Ashdown v Samuel Williams & Sons Ltd [1957] 1 Q.B. 409*; *Thornton v Shoe Lane Parking Ltd [1970] 1 Q.B. 177*; *White v Blackmore [1972] 2 Q.B. 651*. Contrast *McCutcheon v David Macbrayne Ltd [1964] 1 W.L.R. 125*; *Smith v Taylor [1966] 2 Lloyd's Rep. 231*; *Burnett v British Waterways Board [1973] 1 W.L.R. 700*.

79. *Hollingworth v Southern Ferries Ltd [1977] 2 Lloyd's Rep. 70*.

80. See Vol.II, para.36-025. But the common carrier is now virtually extinct.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 2. - Classification of Terms

Conditions and warranties

13-019

Once it has been established that a certain stipulation is indeed a term of the contract, the question arises as to its comparative importance and effect. Traditionally, in English law, the terms of a contract have been classified as being either *conditions* or *warranties*, the difference between them being that any breach of a condition entitles the innocent party, if he so chooses, to treat himself as discharged from further performance under the contract, [81] and in any event to claim damages for loss sustained by the breach. A breach of warranty, on the other hand, does not entitle him to treat himself as discharged, but to claim damages only.

Intermediate terms

13-020

The dichotomy between conditions and warranties is not, however, exhaustive. The "more modern doctrine" [82] is that there exists a third category of "intermediate" (or "innominate") terms, the failure to perform which may or may not entitle the innocent party to treat himself as discharged, depending on the nature and consequences of the breach. [83]

Fundamental terms

13-021

There was at one time some support for the view that, in addition to conditions, warranties and intermediate terms, the law recognises yet a fourth category of term, the "fundamental term". [84] The fundamental term has been described as part of the "core" of the contract, [85] the non-performance of which destroys the very substance of the agreement. It has been distinguished by Devlin J. [86] as being "something narrower than a condition of the contract" and as:

> "… something which underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates."

Examples usually cited are those where a seller delivers goods wholly different from the agreed contract goods or delivers goods which are so seriously defective as to render them in substance not the goods contracted for: e.g. the delivery of beans instead of peas, [87] of pinewood logs instead of mahogany logs, [88] or of a vehicle which is incapable or barely capable of self-propulsion instead of a motor car. [89] In each case, so it is said, there is a breach of the fundamental term, that is to say, of the "core" obligation to deliver the essential goods which are the subject matter of the contract of sale.

13-022

The concept of the fundamental term has most often been employed in relation to exemption clauses. At one time it was asserted that, even though liability for a breach of condition might be excluded by an appropriately drafted exemption clause, no such clause could exonerate a party from failure to perform the fundamental term of an agreement. The House of Lords, however, has since held that there is no rule of law that an exemption clause is inapplicable in the case of a "fundamental" or "total" breach. [90] The question is now whether the clause, on its true construction, applies to the breach which has occurred. No doubt, as a matter of construction, a court will be reluctant to ascribe to an exemption clause so wide an ambit as in effect to deprive one party's stipulations of all contractual force. [91] But, for the purpose of ascertaining the intention of the parties in this respect, it seems unnecessary to predicate the existence of a fundamental term, i.e. in considering whether an exemption clause covers the delivery of beans instead of peas, to say that the contract contains a "fundamental term" to deliver peas. There may also be difficulties in identifying the "core" of the particular contract: Is it to supply "peas" or "leguminous vegetables" or "agricultural produce"? [92] The quest for the fundamental term may well deflect the court from its proper task of ascertaining the true construction of the exemption clause into a barren enquiry as to whether the essential object of the contract has not been fulfilled at all or whether it has been fulfilled, but not in a way that the contract requires.

13-023

Whether any further consequences follow from the categorisation of a particular contractual obligation as a fundamental term is even more doubtful. It is possible to contend that s.11(4) of the Sale of Goods Act 1979, [93] which in certain circumstances precludes a buyer who has accepted the goods from subsequently rejecting them and treating the contract as repudiated, does not apply to the breach of a fundamental term. [94] This seems to be only an ex-post facto rationalisation of an independent principle (if such exists) that, for the purposes of s.35 of the 1979 Act, a buyer will not be deemed to have accepted goods that are wholly different from those agreed to be sold. It is also possible to assert that the breach of a fundamental term gives rise, not merely to a claim for damages, but to recover all money paid as upon a consideration which has totally failed. [95] But it seems better to regard the question whether or not there has been a total failure of consideration as dependent upon the facts of the case, rather than upon the breach of a "fundamental term".

13-024

In conclusion it is submitted that it is neither necessary nor desirable to create yet a fourth category of contractual term—the "fundamental term"—in addition to conditions, warranties and intermediate terms. In *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*, [96] Lord Upjohn defined the expression "fundamental term" in language which clearly indicated that he regarded it as an alternative way of referring to a condition, i.e. a term which went to the root of the contract so that any breach of it entitled the innocent party to be discharged. There is therefore strong ground for the view that English law does not recognise any category of "fundamental terms" distinct from conditions.

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81. See below, para.24-040.

82. *Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, 998*.

83. See below, para.13-034.

84. See below, paras 15-023, 15-027. See also Guest (1961) 77 L.Q.R. 98, 327; Montrose [1964] C.L.J. 60, 254; Reynolds (1963) 79 L.Q.R. 534; Lord Devlin [1966] C.L.J. 192; Jenkins [1969] C.L.J. 251.

85. *Alderslade v Hendon Laundry Ltd [1945] K.B. 189, 192*.

86. *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty Son & Co [1953] 1 W.L.R. 1468, 1470*.

87. *Chanter v Hopkins (1838) 4 M. & W. 399, 404*.

88. *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty Son & Co [1953] 1 W.L.R. 1468, 1470*.

89. *Karsales (Harrow) Ltd v Wallis [1956] 1 W.L.R. 17*; *Yeoman Credit Ltd v Apps [1962] 2 Q.B. 508*; *Farnworth Finance Facilities Ltd v Attryde [1970] 1 W.L.R. 1053*.

90. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361*; *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827*; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 W.L.R. 964, 971*; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 A.C. 803*; see below, para.15-023.

91. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, 432*. See also *Tor Line AB v Alltrans Group of Canada Ltd [1984] 1 W.L.R. 48, 58–59*. See below, para.15-010.

92. See, e.g. *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 1 W.L.R. 964*; Lord Devlin [1966] C.L.J. 192, 212.

93. Formerly s.11(1)(c) of the Sale of Goods Act 1893.

94. See Vol.II, para.44-068.

95. *Rowland v Divall [1923] 2 K.B. 500*; *Karflex Ltd v Poole [1933] 2 K.B. 251*; *Warman v Southern Counties Car Finance Corp Ltd [1949] 2 K.B. 576*; *Butterworth v Kingsway Motors Ltd [1954] 1 W.L.R. 1286*; *Karsales (Harrow) Ltd v Wallis [1956] 1 W.L.R. 936*. See *also Hain S.S. Co v Tate & Lyle Ltd (1936) 41 Com. Cas. 350, 368, 369*, and Vol.II, paras 39-388, 44-081, 44-127.

96. *[1967] 1 A.C. 361, 422*; see below, para.15-024.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 2. - Classification of Terms

(a) - Conditions

Differing terminology

13-025

The word "condition" is sometimes used, even in legal documents, to mean simply "a stipulation, a provision" and not to connote a condition in the technical sense of that word. [97] Even within the sphere of the technical meaning attached to the word "condition", the terminology employed is, unfortunately, not uniform. [98] There may, for example, be conditions, the failure of which gives no right of action, but which merely suspends the rights and obligations of the parties. [99] The most commonly used sense of the word "condition" is that of an essential stipulation of the contract which one party guarantees is true or promises will be fulfilled. Any breach of such a stipulation entitles the innocent party, if he so chooses, to treat himself as discharged from further performance of the contract, and notwithstanding that he has suffered no prejudice by the breach. He can also claim damages for any loss suffered.

Conditions and other contract terms

13-026

The use of the word "condition" in this sense appears to have originated in the seventeenth century [100]: a stipulation might be regarded as so vital to the contract that its complete and exact performance by one party was a condition precedent to the obligation of the other party to perform his part. [101] In the modern law, the reason why a breach of a condition entitles the innocent party to treat himself as discharged has been said to be that conditions:

> "… go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all." [102]

And the reason why *any* breach of condition has this effect has been put on the ground that the parties are to be regarded as having agreed that any failure of performance, irrespective of the gravity of the event that has in fact resulted from the breach, should entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed. [103] The parties may, by express words [104] or by implication of law, [105] agree that a particular stipulation is to be a condition of their contract. They may agree to classify as a condition a term which would not otherwise amount to a condition under the general law [106] but, in order to do so, they should use "clear words". [107] The parties may also be held to have created a condition by necessary implication arising from the nature, purpose and circumstances of the contract, [108] and in this respect:

> "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability." [109]

Promissory and contingent conditions

13-027

A condition in the sense mentioned above may conveniently be termed a "promissory" condition, being a promise or assurance for the non-performance of which a right of action accrues to the innocent party. [110] This sense must be carefully distinguished from that of a "contingent" condition, i.e. a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. [111] In this latter case, the non-fulfilment of the condition gives no right of action for breach [112]; it simply suspends the obligations of one or both parties. [113] In *Trans Trust S.P.R.L. v Danubian Trading Co Ltd*, [114] Denning L.J. considered a condition in a contract for the sale of goods whereby the buyer was to open a confirmed credit in favour of the seller, and said:

> "What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract.' If no credit is provided, there is no contract between the parties. [115] In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of the contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit."

The first of these instances provided by Denning L.J. is that of a contingent, and the second of a promissory, condition.

Conditions precedent

13-028

The liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the occurrence or non-occurrence of some further event. In such a case the contract is said to be subject to a condition precedent. [116] The failure of a condition precedent may have one of a number of effects. [117] It may, in the first place, suspend the rights and obligations of both parties, as, for instance, where the parties enter into an agreement on the express understanding that it is not to become binding on either of them unless the condition is fulfilled. [118] Secondly, one party may assume an immediate unilateral binding obligation, subject to a condition. From this he cannot withdraw [119]; but no bilateral contract, binding on both parties, comes into existence until the condition is fulfilled. [120] Thirdly, the parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fulfilment of the condition. [121] These conditions precedent are, however, normally contingent and not promissory, and in such a case neither party will be liable to the other if the condition is not fulfilled.

Concurrent conditions

13-029

The word “condition” has also been employed in the case of “concurrent conditions”. Where the promises made by each party are to be fulfilled at the same time, or, at any rate, where each party’s obligation is to depend on the readiness and willingness of the other to perform at that time, the promises are termed concurrent conditions. For example, in a contract of sale of goods, delivery of the goods and payment of the price are in the absence of a contrary intention concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods. [122] Similarly, when freight is payable on delivery of cargo, payment of the freight and delivery of the cargo are normally concurrent conditions. [123]

Conditions subsequent

13-030

The obligation of one or both parties may be made subject to a condition that it is to be immediately binding, but if certain facts are ascertained to exist or upon the occurrence or non-occurrence of some further event, then either the contract is to cease to bind or one or both parties are to have the right to avoid the contract or bring it to an end. [124] In such a case the contract is said to be subject to a condition subsequent. An example is provided by the case of *Head v Tattersall* [125] where A bought a horse from B which B warranted to have been hunted with the Bicester hounds. If it did not answer its description, A was to have the right to return it by a certain day. The horse did not answer its description and A accordingly returned it before the day. In the meantime, however, the horse had been injured without A’s fault. It was held that the injury did not cause A to lose his right to return the horse and he could recover the purchase price paid. [126]

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97. *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235*; cf. *Skips A/S Nordheim v Syrian Petroleum Ltd [1984] Q.B. 599*.

98. See Stoljar (1953) 69 L.Q.R. 485.

99. See below, para.13-027.

100. See *Pordage v Cole (1669) 1 Wms. Saund. 319*; *Kingston v Preston (1773) 2 Doug. 689, 691*; *Boone v Eyre (1777) 1 H.Bl. 273n*; *Cutter v Powell (1795) 6 Term.R. 320*; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha [1962] 2 Q.B. 26, 65*; *Cehave NV v Bremer Handelsgesellschaft mbH [1976] Q.B. 44, 57, 72*. See also Chalmers, *Sale of Goods*, 2nd edn, p.164; Dawson [1981] C.L.J. 83, 87; and below, para.24-039.

101. See also Marine Insurance Act 1906 ss.33–41; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd [1992] 1 A.C. 233*.

102. *Wallis, Son & Wells v Pratt & Haynes [1910] 2 K.B. 1003, 1012*, per Fletcher Moulton J. (dissenting): approved *[1911] A.C. 394*; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 264, 272*; *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd’s Rep. 277, 282*.

103. *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 849*. See also *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711*; *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd’s Rep. 277*.

104. *Dawsons Ltd v Bonnin [1922] 2 A.C. 413*; *Lombard North Central Plc v Butterworth [1987] Q.B. 527*. But the terminology used may not be decisive: Sale of Goods Act 1979 s.11(3).

105. e.g. Sale of Goods Act 1979 ss.11(3), 12(5A), 13(1A), 14(6), 15(3). These provisions do not

apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015.

106. *Lombard North Central Plc v Butterworth [1987] Q.B. 527, 535*.

107. *Heritage Oil and Gas Ltd v Tullow Uganda Ltd [2014] EWCA Civ 1048, [2014] 2 C.L.C. 61* at [33] where it was noted that the decision of the House of Lords in *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235* represented the "high-water mark" of the reluctance of the courts to classify a term as a condition. Where the contract uses the term "condition" once and provides that "It is a condition of the agreement … " that should generally suffice to constitute the term as a condition: *Personal Touch Financial Services Ltd v Simplysure Ltd [2016] EWCA Civ 461* at [28].

108. *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711*. See also the cases cited in para.13-037 below (mercantile contracts).

109. *Bentsen v Taylor, Sons & Co [1893] 2 Q.B. 274, 281*. See also *Glaholm v Hays (1841) 2 M. & G. 257, 266*; *Re Comptoir Commercial Anversois and Power, Son & Co [1920] 1 K.B. 868, 899*; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha [1962] 2 Q.B. 26, 60*; *Astley Industrial Trust Ltd v Grimley [1963] 1 W.L.R. 584, 590*; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 719, 725*; *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd's Rep. 277, 282*; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd [1990] 1 W.L.R. 1337, 1347*; *Torvald Klaveness A/S v Arni Maritime Corp [1994] 1 W.L.R. 1465, 1475–1476*; Sale of Goods Act 1979 ss.11(3), 61(1).

110. Stoljar (1953) 69 L.Q.R. 485.

111. *London Passenger Transport Board v Moscrop [1942] A.C. 332, 341*; *Panoutsos v Raymond Hadley Corp of New York [1917] 2 K.B. 473*; *Aberfoyle Plantations Ltd v Cheng [1960] A.C. 115* ; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665 (affirmed on other grounds [1991] 2 A.C. 249)*; *Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd's Rep. 209*. In *Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 W.L.R. 435*, it was held that a provision for payment of a deposit on signing a memorandum of agreement was not a condition precedent (i.e. contingent condition) to the formation of the contract, but was a fundamental term (i.e. promissory condition) of a concluded contract. cf. *Haugland Tankers AS v RMK Marine Gemi Yapin Sanayii ve Dentz Tasimaciligi Isletmesi AS [2005] EWHC 321 (Comm), [2005] 1 Lloyd's Rep. 573* (payment of commitment fee condition precedent to exercise of option).

112. Unless one party himself deliberately procures the non-fulfilment of the condition in certain circumstances: see below, paras 13-085, 14-015.

113. See below, para.13-028.

114. *[1952] 2 Q.B. 297, 304*.

115. The analogy is not, however, an exact one, for in the case of a stipulation "subject to contract" no contract will usually come into existence at all (see above, para.2-125) whereas in the case of a contingent condition relating to the opening of a credit a contract normally comes into existence, though certain rights and obligations of the parties are suspended until the condition is fulfilled (see below, para.13-028). cf. *UR Power GmbH v Kuok Oils and Grains Pte Ltd [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495* at [16].

116. For the other use of the term "condition precedent" to mean a promissory condition, see above, para.13-026, below, para.24-039.

117. See the analyses, e.g. in *Property and Bloodstock Ltd v Emerton [1967] 2 All E.R. 839, affirmed [1968] Ch. 94*; *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 W.L.R. 74, 82*; *Wood Preservation Ltd v Prior [1969] 1 W.L.R. 1077*; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1972] 1 W.L.R. 840, 850, 854, 859 CA; affirmed [1974] A.C.*

235, 250–251, 256 HL; *North Sea Energy Holdings NV v Petroleum Authority of Thailand [1997] 2 Lloyd's Rep. 418, 429*.

118. *Pym v Campbell (1856) 6 E. & B. 370*; *Aberfoyle Plantations Ltd v Cheng [1960] A.C. 115*; *William Cory & Son Ltd v IRC [1965] A.C. 1088*; *Haslemere Estates Ltd v Baker [1982] 1 W.L.R. 1109*.

119. *Smith v Butler [1900] 1 Q.B. 694*.

120. *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 W.L.R. 74*; *Wood Preservation Ltd v Prior [1969] 1 W.L.R. 1077*; cf. *Eastham v Leigh, London & Provincial Properties Ltd [1971] Ch. 871*.

121. *Worsley v Wood (1796) 6 Term Rep. 710*; *Clarke v Watson (1865) 18 C.B.(N.S.) 278*; *Re Sandwell Park Colliery Co [1929] 1 Ch. 277*; *Parway Estates Ltd v IRC (1958) 45 T.C. 135*; *Smallman v Smallman [1972] Fam. 25*; *North Sea Energy Holdings NV v Petroleum Authority of Thailand [1997] 2 Lloyd's Rep. 418*; *Collidge v Freeport Plc [2008] EWCA Civ 485, [2008] I.R.L.R. 697*; *WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC), 131 Con. L.R. 63*; cf. *Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd's Rep. 209* (contract ceases to bind). See also (insurance contracts), Vol.II, para.42-079.

122. Sale of Goods Act 1979 s.28. See Vol.II, para.44-235 and *P T Berlian Laju Tanker TBK V Nuse Shipping Ltd [2008] EWHC 1330 (Comm), [2008] 2 Lloyd's Rep. 246* (sale of a ship).

123. *Paynter v James (1867) L.R. 2 C.P. 348*; *Duthie v Hilton (1868) L.R. 4 C.P. 138*; *Vogeman v Bisley (1897) 13 T.L.R. 172*.

124. *Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd's Rep. 209*. Examples can also be found in the "excepted risks" clauses of charterparties (*Atlantic Maritime Co Inc v Gibbon [1954] 1 Q.B. 88*), and the power given to a landlord to re-enter in cases of breach of covenant (*Bashir v Commissioner of Lands [1960] A.C. 44*). The former are contingent conditions; the latter, promissory.

125. *(1871) L.R. 7 Ex. 7*.

126. But Cleasby J. held (*(1871) L.R. 7 Ex. 7, 13, 14*) that, since the property in the horse had reverted to B, B had to bear the risk of loss which had occurred without A's fault in the meantime.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 2. - Classification of Terms

(b) - Warranties

Warranties

13-031

The word “warranty” has been described as “one of the most illused expressions in the legal dictionary”. [127] In many older cases, it was used in the sense of “condition” [128] and today it is very frequently used simply in the sense of a contractual undertaking or promise. In its most technical sense, however, it is to be understood as meaning a term of the contract, the breach of which may give rise to a claim for damages but not to a right to treat the contract as repudiated. [129] The use of the word “warranty” in this sense is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract, [130] the breach of which by one party does not entitle the other to treat his obligations as discharged. But the emergence of the new category of “intermediate” terms seems likely to have reduced the number of occasions when a term will be classified as a warranty in this sense almost to vanishing point, [131] save in the very exceptional circumstances where a term has been specifically so classified by statute. [132]

“Warranty” upon election

13-032

Upon the occurrence of a breach of condition, the injured party may elect to treat the breach of condition as a breach of warranty only and not as a ground for treating the contract as repudiated [133]; or he may be compelled to do so where he goes on with the contract and takes some benefit under it. [134] In such a case he is sometimes said to sue on a “warranty ex post facto”, although this expression is somewhat misleading since the breach is still that of a condition of the contract. [135]

Collateral warranties

13-033

Undertakings may be given that are collateral to another contract. [136] They may be considered to be independent of that other contract either because they cannot fairly be regarded as having been incorporated therein, [137] or because rules of evidence hinder their incorporation, [138] or because the main contract is defective in some way [139] or is subject to certain requirements of form [140] or is made between parties other than those by or to whom the undertaking is given. [141] Such undertakings are often referred to as collateral contracts, or “collateral warranties”.

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127. *Finnegan v Allen [1943] 1 K.B. 425, 430*.

128. *Behn v Burness (1863) 3 B. & S. 751*. In marine insurance, a promissory "warranty" is used to signify a condition precedent, the breach of which discharges the insurer from liability as from the date of breach: Marine Insurance Act 1906 ss.33–41; *Thomson v Weems (1884) 9 App. Cas. 671, 684*; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd [1992] 1 A.C. 233*.

129. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26, 70*; Sale of Goods Act 1979 ss.11(3), 61(1).

130. Sale of Goods Act 1979 s.61(1).

131. *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273* at [33]. But see *Palmco Shipping Inc v Continental Ore Corp [1970] 2 Lloyd's Rep. 21*; *Anglia Commercial Properties v North East Essex Building Co (1983) 266 E.G. 1096*.

132. Sale of Goods Act 1979 ss.11(3), 12(5A). See also Supply of Goods (Implied Terms) Act 1973 s.8(3). These provisions do not apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 (applicable to contracts made on or after October 1, 2015: see below, Vol.II, para.38-431).

133. Sale of Goods Act 1979 s.11(2).

134. Sale of Goods Act 1979 s.11(4).

135. *Wallis, Son & Wells v Pratt & Haynes [1911] A.C. 394*.

136. See above, para.13-004; Wedderburn [1959] C.L.J. 58.

137. *Esso Petroleum Ltd v Mardon [1976] Q.B. 801*.

138. See below, para.13-098.

139. e.g. for illegality: see below, para.16-193.

140. *Record v Bell [1991] 1 W.L.R. 853*.

141. See above, para.13-007.

Chitty on Contracts 32nd Ed.

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(c) - Intermediate Terms

Intermediate terms

13-034

The advantage that arises from the classification of a particular term as a condition is that of certainty [142]: the party affected by the breach of such a term knows at once where he stands, i.e. that he is immediately and unequivocally entitled to treat the contract as repudiated and, for example in a contract of sale of goods, to reject the goods. [143] On the other hand, since *any* breach of condition gives rise to this right, it may be exercised irrespective of the gravity of the breach or of the consequences resulting from the breach. The innocent party may have suffered no, or only trifling, loss or damage by reason of the breach, but is nevertheless entitled to refuse further performance of the contract. [144] The courts have therefore curtailed the right of discharge which follows from the classification of a term as a condition by the creation of another category of terms, adopting a more flexible approach to the consequences of breach and tending to encourage, rather than discourage, performance of the contract. [145] In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, [146] the Court of Appeal refused to ascribe to the shipowner's obligation to deliver a seaworthy vessel the character of a condition, and Diplock L.J. said [147]:

> "There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties' … Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly [148] in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking, as a 'condition' or a 'warranty.'"

The description that has been applied to such terms is that of "intermediate" or "innominate" terms. [149] Breach of such a term entitles the party not in default to treat the contract as repudiated only if the other party has thereby renounced his obligations under the contract, [150] or rendered them impossible of performance, [151] in some essential respect or if the consequences of the breach are so serious as to deprive the innocent party of substantially the whole benefit which it was intended that he should obtain from the contract. [152] The bar which must be cleared before there is an entitlement in the innocent party to treat itself as discharged is a "high" one [153] which requires the court to engage in a factsensitive inquiry, [154] involves "a multi-factorial assessment" [155] and the use of various "open-textured expressions". [156]

Instances of classification

13-035

In the absence of either express classification as a condition by the parties or of statute or binding authority classifying the disputed term as a condition, modern courts seem more inclined to classify a term as intermediate rather than as a condition: "the modern approach is that a term is innominate unless a contrary intention is made clear". [157] A term is most likely to be classified as intermediate if it is capable of being broken either in a manner that is trivial and capable of remedy by an award of damages or in a way that is so fundamental as to undermine the whole contract. Thus, for example, a shipowner's obligation in a charterparty to provide a seaworthy vessel, [158] to load containers without any stability problem [159] or to commence and carry out the voyage agreed on with reasonable despatch, [160] or a clause by which the master of the ship was to act under the charterer's orders, [161] have been classified as intermediate terms, the breach of which does not entitle discharge unless the consequences are such as to deprive the charterer of substantially the whole benefit of the contract or to frustrate the object of the charterer in chartering the ship. [162]

Classification of terms in sale of goods contracts

13-036

The Sale of Goods Act 1979 and the Supply of Goods (Implied Terms) Act 1973 expressly define certain implied terms in contracts of sale of goods or hire-purchase as being "conditions" or "warranties". [163] There can be no doubt that such classification is binding. But in *Cehave NV v Bremer Handelsgesellschaft mbH* [164] it was argued that s.11(1) of the Sale of Goods Act 1893 created a statutory dichotomy which divided all terms in contracts for the sale of goods into conditions and warranties. The Court of Appeal rejected that argument and held that an express term "shipment to be made in good condition" was an intermediate term the breach of which had to be so serious as to go to the root of the contract in order to entitle the buyer to reject the goods. In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [165] two charterparties were entered into in similar terms for the charter of a ship "to be built by the Osaka Shipbuilding Co Ltd and known as Hull No. 354". Owing to her size, the ship was built at a new yard by Oshima Shipbuilding Co Ltd (a company in which Osaka had a 50 per cent interest) and bore the yard or hull number Oshima 004, although she was still referred to in external documents as "called Osaka 354". The charterers sought to reject the vessel on the ground that, by analogy with contracts of sale of goods, the description of the ship was a condition of the contract, any departure from which justified rejection. The House of Lords held that they were not entitled to do so. On the other hand, terms, for example, in contracts of sale of goods that the goods contracted to be sold are afloat or already shipped, [166] or on board a ship "now at Rangoon" [167] or on a ship that will sail direct to the port of destination, [168] or that they are "under deck", [169] or as to the date of shipment, [170] have been held to be part of the description of the goods, and hence conditions. Also, a stipulation as to the place of delivery in an FOB contract [171] and a stipulation "linerterms Rotterdam" in a CIF contract [172] have been held to be conditions.

Classification of time stipulations. [173]

13-037

A number of cases have arisen relating to the question whether contractual stipulations as to the time of performance should be construed as making time of the essence of the contract (i.e. as conditions) or as intermediate terms. At common law, stipulations as to the time of performance were normally regarded as being of the essence of a contract. [174] But in equity they were not generally so regarded, [175] in particular in relation to contracts for the sale of land, and today the equitable rule prevails. [176] The relationship between the common law and equitable rules was considered by the House of Lords in *United Scientific Holdings Ltd v Burnley BC*, [177] where it was held that the timetable specified in rent review clauses for the completion of the various steps for determining the rent payable in respect of the period following the review was not of the essence. It is, however, clear that, although stipulations as to time will not ordinarily be construed as being of the essence, they will be so construed if expressly stated to be such [178] or if the court infers from the nature of the subject matter of the contract or the surrounding circumstances that the parties intended them to have that effect. [179] In mercantile contracts, where it is of importance that the parties should know precisely what their obligations are and be able to act with confidence in the legal results of their actions, the

courts will readily construe a stipulation as to time as a condition of the contract. [180] Thus stipulations, for example, as to the time within which a ship must be nominated [181] or is expected ready to load under a charterparty, [182] goods must be delivered under a contract of sale, [183] the loading port must be nominated, [184] the vessel provided, [185] notice of readiness to load must be given [186] and the goods must be ready to be delivered [187] under an FOB contract, goods must be shipped, [188] documents tendered [189] and notice of appropriation given [190] under a CIF contract, a letter of credit must be opened, [191] have been held to be conditions, entitling the innocent party in the event of default in punctual performance to treat himself as discharged. But there is no presumption of fact or rule of law that time is of the essence in mercantile contracts [192] and a stipulation as to time in such a contract, may on its true construction, be found to be merely an intermediate term. [193]

Effect of failure to perform on time

13-038

Where one party to a contract fails to perform an obligation by the date fixed by the contract, the other party may be entitled, in certain circumstances, immediately to serve notice that he will treat the contract as discharged if the obligation is not performed within a reasonable time as stipulated in the notice. This matter is discussed in Ch.21 (Performance) later in this work [194]; but it is to be noted that, as a general rule, where the original stipulation as to the time of performance was merely an intermediate term, failure to perform the obligation within the time limited by the notice does not, in itself, constitute a repudiation irrespective of the consequences of the breach. [195]

Force majeure clauses

13-039

A clause in a contract of sale excusing delivery, or permitting the seller to postpone or suspend delivery upon the happening of events beyond his control (a force majeure clause) [196] may require that certain procedures are to be followed or notices given to the buyer before the seller is entitled to rely on the clause. Such measures may be a condition precedent on which the availability of the protection provided by the clause depends, or merely an intermediate term, the non-compliance with which does not necessarily deprive the seller of his right to rely on the clause. [197] The classification depends, as Lord Wilberforce said in *Bremer Handelsgesellschaft v Vanden Avenne-Izegem PVBA* [198] on "(i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law". In that case, the House of Lords had to consider two such provisions. The first was a prohibition of export clause which required the sellers to advise the buyers "without delay" of impossibility of shipment by reason of such prohibition. [199] This was held to be an intermediate term, since it did not establish any definite time limit within which the advice was to be given. [200] The second provision, which took effect upon a number of events of force majeure, established a timetable of fixed periods within which the occurrence was to be notified, an extension of the shipping period claimed, and the buyers were to have the option of cancelling the contract. The stipulation as to time for claiming an extension was held to be a condition, punctual compliance with which was required as part of a "complete regulatory code". It was further held that a requirement of this second provision that the sellers should notify the buyers of the port or ports of loading from which it was intended to ship in consequence of the event of force majeure had to be precisely complied with. [201]

Conclusion

13-040

The conclusion [202] to be drawn from these cases is that a term of a contract will be held to be a condition:

(i)

if it is expressly so provided by statute;

(ii)

if it has been so categorised as the result of previous judicial decision (although it has been said that some of the decisions on this matter are excessively technical and are "open to re-examination by the House of Lords") [203];

(iii)

if it is so designated in the contract [204] or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract [205]; or

(iv)

if the nature of the contract or the subject matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of his obligations in the event that the term was not fully and precisely complied with. [206]

Otherwise a term of a contract will be considered to be an intermediate term. [207] Failure to perform such a term will ordinarily entitle the party not in default to treat himself as discharged only if the effect of breach of the term deprives him of substantially the whole benefit which it was intended that he should obtain from the contract. [208]

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142. *A/S Awilco of Oslo v Fulvia Spa (The Chikuma) [1981] 1 W.L.R. 314, 322*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 715, 718, 720, 725*; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd [1990] 1 W.L.R. 1337, 1348*; *Richco International Ltd v Bunge & Co Ltd [1991] 2 Lloyd's Rep. 93, 99*.

143. Sale of Goods Act 1979 ss.11(3), 12(5A), 13(1A), 14(6), 15(3). But see the modification of remedies for breach of condition contained in s.15A of the 1979 Act; Vol.II, para.44-070. These provisions do not apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 (applicable to contracts made on or after October 1, 2015: see below, Vol.II, para.38-431). In the case of the latter contracts the right to reject the goods (whether of a short term or final nature) is set out in ss. 20, 22 and 24 of the Act: see further para.38-447 et seq.

144. *Heritage Oil and Gas Ltd v Tullow Uganda Ltd [2014] EWCA Civ 1048* at [33].

145. *Cehave NV v Bremer Handelsgesellschaft mbH [1976] Q.B. 44, 70*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 715, 179*.

146. *[1962] 2 Q.B. 26*.

147. *[1962] 2 Q.B. 26* at 70.

148. Or impliedly: see *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711* and below, para.13-040.

149. *Cehave NV v Bremer Handelsgesellschaft mbH [1976] Q.B. 44, 60*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109, 113*;

Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 714, 717, 719, 724; *Aktion Maritime Corp of Liberia v S. Kasmas & Brothers Ltd [1987] 1 Lloyd's Rep. 283*; *Phibro Energy A.G. v Nissho Iwai Corp [1990] 1 Lloyd's Rep. 38, 58–59*; *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273* at [32]–[39].

150. See below, para.24-018.

151. See below, para.24-039.

152. See below, para.24-041.

153. *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd [2013] EWCA Civ 577, [2013] 4 All E.R. 377* at [48].

154. *Valilas v Januzaj [2014] EWCA Civ 436, 154 Con. L.R. 38* at [60].

155. *[2014] EWCA Civ 436, 154 Con. L.R. 38* at [53].

156. *[2014] EWCA Civ 436, 154 Con. L.R. 38* at [59].

157. *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447* at [93].

158. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26*; *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA [1980] 1 Lloyd's Rep. 638*.

159. *Compagnie Generale Maritime v Diakan Spirit SA [1982] 2 Lloyd's Rep. 574*.

160. *Freeman v Taylor (1831) 8 Bing. 124*; *Clipsham v Vertue (1843) 5 Q.B. 565*; *MacAndrew v Chapple (1866) L.R. 1 C.P. 643*.

161. *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc [1979] A.C. 757*.

162. *MacAndrew v Chapple (1866) L.R. 1 C.P. 643, 648*.

163. See Vol.II, paras 39-382, 44-056, 44-074—44-115. The Consumer Rights Act 2015 (which applies to consumer contracts made on or after October 1, 2015: see below, Vol.II, para.38-431) does not refer to the terms to be treated as included in contracts that fall within the scope of Ch.2 of Pt 1 of the Act as conditions or warranties but rather sets out the remedies to which the consumer is entitled if his or her statutory rights under such contracts are not met in ss.19-24: see below, Vol.II, paras 38-477 et seq.

164. *[1976] Q.B. 44*. See also *Tradax International SA v Goldschmidt [1977] 2 Lloyd's Rep. 604* (provision as to impurities); *Aktion Maritime Corp of Liberia v S. Kasmas & Brothers Ltd [1987] 1 Lloyd's Rep. 283* (condition of vessel on delivery); *Total International Ltd v Addax BV [1996] 2 Lloyd's Rep. 333* (provision as to quality); *R G Grain Trade LLP v Feed Factors International Ltd [2011] EWHC 1889 (Comm), [2011] 2 Lloyd's Rep. 432* (provision as to impurities). Contrast *Tradax Export SA v European Grain & Shipping Co [1983] 2 Lloyd's Rep. 100* (fibre content included in description).

165. *[1976] 1 W.L.R. 989*. See also *Sanko Steamship Co Ltd v Kano Trading Ltd [1978] 1 Lloyd's Rep. 156*.

166. *Benabu & Co v Produce Brokers Co Ltd (1921) 37 T.L.R. 609, 851*; *Macpherson Train & Co Ltd v Howard Ross & Co Ltd [1955] 1 W.L.R. 640, 642*.

167. *Oppenheimer v Fraser (1876) 34 L.T. 524*.

168. *Bergerco USA v Vegoil Ltd [1984] 1 Lloyd's Rep. 440*.

169. *Montagu L. Meyer Ltd v Travaru A/B; H Cornelius of Gambleby (1930) 46 T.L.R. 553*; *Messers Ltd v Morrison's Export Co Ltd [1939] 1 All E.R. 92*.

170. *Bowes v Shand (1877) 2 App. Cas. 455*.

171. *Petrotrade Inc v Stinnes Handel GmbH [1995] 1 Lloyd's Rep. 142*.

172. *Soon Hua Seng Co Ltd v Glencore Grain Co Ltd [1996] 1 Lloyd's Rep. 398*.

173. This paragraph was approved by Langley J. in *Haugland Tankers AS v RMK Marine Gemi Yapin Sanayii ve Dentz Tasimaciligi Isletmesi AS [2005] EWHC 321 (Comm), [2005] 1 Lloyd's Rep. 573* at [31]. See also *Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599* at [130].

174. See below, para.21-011.

175. See below, para.21-011.

176. Law of Property Act 1925 s.41; below, para.21-012.

177. *[1978] A.C. 904* (especially at 928); below, para.21-012.

178. *Steadman v Drinkle [1916] 1 A.C. 275, 279*; *Financings Ltd v Baldock [1963] 2 Q.B. 104, 120*; *Bunge Corp v Tradax Export SA [1980] 1 Lloyd's Rep. 294, 305, 307, 309, 310 (affirmed [1981] 1 W.L.R. 711)*; *Lombard North Central Plc v Butterworth [1987] Q.B. 527*.

179. *[1978] A.C. 904, 937, 941, 944, 950, 958*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 728-729*; *Universal Bulk Carriers Ltd v André et Cie SA [2000] 1 Lloyd's Rep. 459, 464*; *B.S. & N. Ltd v Micado Shipping Ltd (The Seaflower) [2001] 1 Lloyd's Rep. 348, 350, 354*; *MSAS Global Logistics Ltd v Power Packaging Inc [2003] EWHC 1393 (Ch)*.

180. *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 716*.

181. *Greenwich Marine Inc v Federal Commerce and Navigation Co Inc [1985] 1 Lloyd's Rep. 580*.

182. *The Mihalis Angelos [1971] 1 Q.B. 164*. See also *Behn v Burness (1863) 3 B. & S. 751*; *Compania de Naviera Nedelka SA v Tradax Internacional SA [1974] Q.B. 264*.

183. *Hartley v Hymans [1920] 3 K.B. 475, 484*; *Scandinavian Trading Co A/B v Zodiac Petroleum SA [1981] 1 Lloyd's Rep. 81*.

184. *Gill & Duffus SA v Société pour l'Exportation des Sucres [1986] 1 Lloyd's Rep. 322*.

185. *Olearia Tirrena SpA v NV Algemeene Oliehandel [1973] 2 Lloyd's Rep. 86*.

186. *Bunge Corp v Tradax Export SA above*.

187. *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd [1990] 1 W.L.R. 1337*.

188. *Bowes v Shand (1877) 2 App. Cas. 455*.

189. *Toepfer v Lenersan-Poortman NV [1980] 1 Lloyd's Rep. 143*; *Cerealmangimi SpA v Toepfer [1981] 1 Lloyd's Rep. 337*.

190. *Reuter v Sala (1879) 4 C.P.D. 239*; *Bunge GmbH v Landbouwbelang G.A. [1980] 1 Lloyd's Rep. 458*. See also *Société Italo-Belge pour le Commerce et L'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn. Bhd. [1981] 2 Lloyd's Rep. 695* (notice of shipment).

191. *Pavia & Co SpA v Thurmann-Nielsen [1952] 1 Lloyd's Rep. 153*; *Ian Stach Ltd v Baker Bosley Ltd [1958] 2 Q.B. 130*; *Nichimen Corp v Gatoil Overseas Inc [1987] 2 Lloyd's Rep. 46*;

Transpetrol Ltd v Transol Olieprodukten BV [1989] 1 Lloyd's Rep. 309. See also *Warde v Feedex International Inc [1985] 2 Lloyd's Rep. 289* (nomination of bank). Contrast *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd's Rep. 277* (opening of counter-trade guarantee).

192. *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 719*; *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd's Rep. 277*; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd [1990] 1 W.L.R. 1337, 1347*; *Phibro Energy A.G. v Nissho Iwai Corp [1991] 1 Lloyd's Rep. 38, 45, 48*; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447* at [56].

193. See, for example, *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd's Rep. 277* (opening of counter trade guarantee); *Re Olympia & York Canary Wharf Ltd (No.2) [1993] B.C.C. 159* (indemnity clause); *Torvald Klaveness A/S v Arni Maritime Corp [1994] 1 W.L.R. 1465* (charterer's re-delivery of ship); *Universal Bulk Carriers Ltd v André et Cie SA [2000] 1 Lloyd's Rep. 459* (obligation to narrow laycan period prior to first lay day); *ERG Raffinerie Mediterranée SpA v Chevron USA Inc [2007] EWCA Civ 494, [2007] 1 C.L.C. 807* (loading time in FOB contract); *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447*.

194. Below, para.21-011.

195. See *Eshun v Moorgate Mercantile Co Ltd [1971] 1 W.L.R. 722, 726*; *Behzadi v Shaftesbury Hotels Ltd [1992] Chs 1, 12*; *Re Olympia & York Canary Wharf Ltd (No.2), [1993] B.C.C. 159*; *Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599* at [131]; *Shawten Engineering Ltd v DGP International Ltd [2005] EWCA Civ 1359, [2006] B.L.R. 1*. *BNP Paribas v Wockhardt EU Operations (Swiss) AG [2009] EWHC 3116 (Comm), 132 Con. L.R. 177*; *Samarenko v Dawn Hill House Ltd [2011] EWCA Civ 1445, [2013] Ch. 36* at [42], [65]. But see *Multi Veste 226 BV v NI Summer Row Unitholder BV [2011] EHWC 2026 (Ch), 139 Con. L.R. 23* at [2011] and Stannard (2004) 120 L.Q.R. 137, 155. See below, para.21-018.

196. See below, para.15-152.

197. However, the analogy with an intermediate term may not be exact, given that it has been held that there is no rule of law according to which the consequence of a breach of a procedural requirement specified in the contract is the loss of the right to claim relief on the ground of force majeure. The inability of a party to invoke the force majeure clause in the contract arises as a consequence of the construction of the contract and would appear not to follow from the application of a rule of law: *Scottish Power UK Plc v BP Exploration Operating Co Ltd [2015] EWHC 2658 (Comm), [2016] 1 All E.R. (Comm) 536* at [234].

198. *[1978] 2 Lloyd's Rep. 109, 113*.

199. The clause is not accurately set out in the headnote.

200. But see *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD [2002] EWHC 2210 (Comm), [2003] 1 Lloyd's Rep. 1 ("shall give prompt notice to the other party" held to be a condition) [2003] EWCA Civ 617, [2003] 2 Lloyd's Rep. 645* at [34].

201. See also *Tradax Export SA v André & Cie SA [1976] 1 Lloyd's Rep. 416*; *Berg (V.) & Son Ltd v Vanden Avenne-Izegem PVBA [1977] 1 Lloyd's Rep. 499*; *Toepfer v Schwarze [1980] 1 Lloyd's Rep. 385*.

202. The conclusion set out in this paragraph was approved by the Court of Appeal in *B.S. & N. Ltd v Micado Shipping Ltd (The Seaflower) [2001] 1 Lloyd's Rep. 341, 348, 350, 353*.

203. *Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, 998*. The reference to the House of Lords should now be read as a reference to the Supreme Court.

204. ❗*Bettini v Gye (1876) 1 Q.B.D. 183, 187*; *Financings Ltd v Baldock [1963] 2 Q.B. 104, 120*; *Bunge Corp v Tradax Export SA [1980] 1 Lloyd's Rep. 294, 305, 307, 309, 310* (affirmed *[1981] 1 W.L.R. 711*); *Lombard North Central Plc v Butterworth [1987] Q.B. 527*; cf; *Personal Touch Financial Services Ltd v Simplysure Ltd [2016] EWCA Civ 461* at [28]–[31] *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235*; *Antaios Compania Naviera SA v Salen Rederierna AB [1985] A.C. 191*.

205. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26, 70*; *United Scientific Holdings Ltd v Burnley BC [1978] A.C. 904, 937, 941, 944, 950, 958*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109, 113*; *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 849*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711*; *George Hunt Cranes Ltd v Scottish Boiler & General Insurance Ltd [2001] EWCA Civ 1964, [2002] 1 All E.R. (Comm) 366*. But see *Rice v Great Yarmouth BC [2001] 3 L.G.L.R. 4 (CA)* (right to terminate for "any" breach of contract limited to repudiatory breaches).

206. ❗*United Scientific Holdings Ltd v Burnley BC [1978] A.C. 904, 937, 941, 944, 950, 958*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109, 113, 116* ; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 716, 717, 720, 729*; *Greenwich Marine Inc v Federal Commerce and Navigation Co Inc [1985] 1 Lloyd's Rep. 580, 584*; *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd's Rep. 277, 283*; *Barber v NWS Bank Plc [1996] 1 W.L.R. 641*; *B.S. & N. Ltd v Micado Shipping Ltd [2001] 1 Lloyd's Rep. 341, 350, 353, 356*; *P T Berlian Laju Tanker TBE v Nuse Shipping Ltd [2008] EWHC 1130 (Comm), [2008] 2 Lloyd's Rep. 246* at [65]; *C21 London Estates Ltd v Maurice Macneill Iona Ltd [2017] EWHC 998 (Ch)* at [70]–[72].

207. ❗*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26*; *Cehave M.V. v Bremer Handelsgesellschaft mbH [1976] Q.B. 44*; *United Scientific Holdings Ltd v Burnley [1978] A.C. 904, 928*; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep. 109, 113, 121, 128, 130*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 715–716, 717, 719, 724*; *Phibro Energy A.G. v Nissho Iwai Corp [1990] 1 Lloyd's Rep. 38, 45, 58–59*; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447* at [97], [99].

208. See below, para.24-041.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(a) - General Principles of Construction

Construction

13-041

The word "construction" refers to the process by which a court determines the meaning and legal effect of a contract. As such, it will embrace oral contracts as well as those in writing and implied terms as well as those that are expressed. In this chapter, however, the principles of construction discussed in the following paragraphs have mainly been developed in relation to written documents, and in this context "construction" denotes the process (sometimes referred to as *interpretation*) by which a court arrives at the meaning to be given to the language used by the parties in the express terms of a written agreement.

Object of construction

13-042

The object of all construction of the terms of a written agreement is to discover therefrom and from the available factual background [210] the meaning of the agreement. [211] The principles which govern the construction of contracts are the same at law and in equity, [212] for simple contracts and for specialties. [213] Interpretation is a "unitary" exercise which "involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated". [214]

"Intention of the parties"

13-043

The task of construing a written agreement has been said to be that of ascertaining the "common intention of the parties" to the agreement. [215] But this may be misleading [216] since it is clear that the agreement must be interpreted objectively [217]: the question is not what one or other of the parties meant or understood by the words used but rather what a reasonable person in the position of the parties would have understood the words to mean. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [218] Lord Hoffmann said:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

The words of the agreement must be construed as they stand. [219] That is to say the meaning of the document or of a particular part of it is to be sought *in the document itself*: "[o]ne must consider the meaning of the words used, not what one may guess to be the intention of the parties". [220] However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. The courts will, in principle, look at all the circumstances surrounding the making of the contract and available to the parties (usually referred to as the "factual matrix" or "available background") which would assist in determining how the language of the document would have been understood by a reasonable person in their position. The range of materials on which the modern courts now draw is considerably wider as the ambit of the "factual matrix" has increased, permitting the court to draw upon a greater range of materials when seeking to put the words of the contract in their context and interpret them accordingly. [221]

13-044

Further it has long been accepted that the courts will not approach the task of construction with too much concentration upon individual words to the neglect of the contract as a whole.

> "The common and universal principle ought to be applied: namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent." [222]

This process is sometimes referred to as an "iterative process" which involves checking each of the rival meanings against other provisions of the document and investigating its commercial consequences. [223]

Principles of construction

13-045

Certain principles of construction have been formulated by the courts. Previously, these principles, referred to as "rules", were applied somewhat rigidly and adhered to tenaciously (even though the application of one rule in preference to another might lead to an opposite result). However, it has been pointed out [224] that the modern approach to construction is:

> "… to assimilate the way in which [contractual] documents are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life."

As a result, most principles of construction are nowadays better regarded merely as guidelines or assumptions as to what the court may regard as the normal use of language and which assist judges to arrive at a reasonable interpretation of the words used, though subject to examination of the relevant circumstances surrounding the transaction. Some principles, on the other hand, such as the contra proferentem principle, [225] are of a different nature in that they are less obviously designed to assist in interpretation and are more closely assimilated to "rules" in the traditional sense.

Striking a balance

13-046

Given that the courts are concerned with the application of "principles" rather than "rules", it is not

surprising to find that these principles can at times conflict and the result is a degree of uncertainty or tension in the case-law. [226] ! At times the courts seem to place greater emphasis on the need for certainty in commercial transactions and, in such cases, they tend to adopt an interpretation which gives effect to the natural and ordinary meaning of the words used by the parties. [227] At other times, less emphasis has been placed on the need for certainty and instead the courts have reminded themselves that the proper approach to interpretation is "contextual and purposive", not "mechanical" and that "the value of machinery depends upon its being correctly directed towards the right end". [228] ! The differences, however, appear to be differences of emphasis rather than principle and in all cases the overriding aim of the court is to give effect to the intention of the parties, objectively ascertained, as reflected in the terms of their contract.

Law and fact

13-047

The construction of written instruments is a question of mixed law and fact. [229] The expression "construction" as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. [230] Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts. [231] However, the meaning of an ordinary English word, [232] of technical or commercial terms [233] and of latent ambiguities, [234] and the discovery of the surrounding circumstances (when they are relevant) are questions of fact. [235]

Construction of contract not wholly in writing

13-048

Where the contract is oral or does not depend solely on written documents, the question as to the character of the contract is properly one of fact. [236] But if a document is lost, so that secondary evidence of its contents is admissible, the construction of its terms is still a question of law and not of fact. [237]

Electronic "documents"

13-049

It is submitted that an agreement which is concluded by electronic means, the terms of which are recorded electronically in a computer or on disc and which are capable of being retrieved and converted into readable form, should be regarded as a written agreement for the purposes of the application of principles of construction and the admissibility of extrinsic evidence. [238]

Human Rights Act 1998

13-050

The question whether courts, as public authorities, ought to construe contracts so as to be compatible with "Convention rights" under the European Convention on Human Rights, or whether they should do so if one of the parties is a public authority, has been discussed in an earlier chapter of this book. [239]

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn

(2011); Mitchell, *Interpretation of Contracts* (2007).

210. See below, para.13-121.

211. See below, para.13-121.

212. *Hotham v East India Co (1787) Doug. 272, 277*; *Eaton v Lyon (1798) 3 Ves. 690, 692*; *Re Terry and White's Contract (1886) 32 Ch. D. 14, 21*; *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [25]; *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [28]; *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG [2014] EWHC 3068 (Comm), [2014] 2 Lloyd's Rep. 579* at [50].

213. *Seddon v Senate (1810) 13 East 63, 74*; *Total Transport Corp v Arcadia Petroleum Ltd [1998] 1 Lloyd's Rep. 351, 362*.

214. ❗*Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* at [12]. The "iterative" approach has been held to indicate "that there is no hard and fast order for the application of the various tools of interpretation, and that the Court always has the prospect of revisiting or taking an overview of the effect of the application of those tools at every and any moment before the end of the interpretative process": *125 OBS (Nominees1) v Lend Lease Construction (Europe) Ltd [2017] EWHC 25 (TCC)* at [98].

215. e.g. *Marquis of Cholmondeley v Clinton (1820) 2 Jac. & W.I. 91*.

216. *Great Western Ry v Bristol Corp (1918) 87 L.J. Ch. 414 (Lord Shaw)*; *IRC v Raphael [1935] A.C. 96 (Lord Wright)*.

217. *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749, 767, 775, 782*; *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 912–913*. See also *Guardian Ocean Cargoes Ltd v Banco do Brasil SA [1994] 2 Lloyd's Rep. 152*; *Deutsche Genossenschaftsbank v Burnhope [1995] 1 W.L.R. 1580, 1587*; *Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd's Rep. 611* at [10].

218. *[1998] 1 W.L.R. 896, 912*.

219. *IRC v Raphael [1935] A.C. 96, 142*; *British Movietonews v London and District Cinemas [1952] A.C. 166*.

220. *Smith v Lucas (1881) 18 Ch. D. 531, 542*. See also *Prenn v Simmonds [1971] 1 W.L.R. 1381, 1385 HL*; *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd [1991] 1 Lloyd's Rep. 100, 103*.

221. See further below, paras 13-120—13-123.

222. *Ford v Beech (1848) 11 Q.B. 852, 866*. See also *Smith v Packhurst (1742) 3 Atk. 135, 136*; *Lloyd v Lloyd (1837) 2 My. & Cr. 192, 202*; *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd [1953] 1 W.L.R. 1379; affirmed [1954] 1 W.L.R. 496*; *Ravennavi SpA v New Century Shipbuilding Ltd [2007] EWCA Civ 58, [2007] 2 Lloyd's Rep. 24* at [12]; *Garratt v Mirror Group Newspapers Ltd [2011] EWCA Civ 425, [2011] I.C.R. 880*.

223. ❗*Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [28]; *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 B V [2014] EWCA 984* at [31]–[32]; *BG Global Energy Ltd v Talisman Sinopec Energy UK Ltd [2015] EWHC 110 (Comm)* at [24]; *Arnold v Britton [2015] UKSC 36, [2015] A.C. 1619* at [77]; *Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc [2016] EWHC 437 (Comm)* at [29]; *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* at [12]. See also Grabiner (2012) 128 L.Q.R. 41.

224. By Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*

[1998] 1 W.L.R. 896, 912. See also *Don King Productions Ltd v Warren [1998] 2 Lloyd's Rep. 176, 188; [1999] 1 Lloyd's Rep. 588*.

225. See below, para.13-086.

226. In a number of cases there is agreement on the principles to be applied to the facts of the case (see, for example, *BSI Enterprises Ltd v Blue Mountain Music Ltd [2015] EWCA Civ 1151* at [38]; *Canary Wharf Finance II Plc v Deutsche Trustee Co Ltd [2016] EWHC 100 (Comm)* at [16] and *Videocon Global Ltd v Goldman Sachs International [2016] EWCA Civ 130* at [50]), and the disagreement relates to the application of these principles to the facts of the case and the weight to be attached to the various principles.

227. See, for example, *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [23].

228. *Lloyds TSB Foundation for Scotland v Lloyd's Banking Group Plc [2013] UKSC 3, [2013] 1 W.L.R. 366* at [21] and *Arnold v Britton [2015] UKSC 36, [2015] 2 W.L.R. 1593* at [17]–[22]. The need to strike a balance between the indications given by the language and the implications of rival constructions was acknowledged by Lord Hodge in *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* at [11]–[13]. The current approach of the courts appears to give more weight to the natural and ordinary meaning of the words, at least in the case where the parties are commercially experienced and have access to skilled legal advice: *Canary Wharf Finance II Plc v Deutsche Trustee Co Ltd [2016] EWHC 100 (Comm)* at [17] and *Vitol E & P Ltd v Africa Oil and Gas Corp [2016] EWHC 1677 (Comm)*; *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* at [13].

229. *Sattva Capital v Creston Moly [2014] SCC 53, [2014] 2 S.C.R. 633*, where the Supreme Court of Canada held that the "historical approach" according to which the interpretation of the rights and duties of the parties to a written contract was a question of law should be abandoned given that contractual interpretation is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in the light of the "factual matrix" of the contract.

230. *Chatenay v Brazilian Submarine Telegraph Co Ltd [1891] 1 Q.B. 79, 85*.

231. *Bowes v Shand (1877) 2 App. Cas. 455, 462*. See also *Neilson v Harford (1841) 8 M. & W. 806, 823*; *R. v Stephens (1978) 139 C.L.R. 315*; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] A.C. 724, 736*; *R. v Spens [1991] 1 W.L.R. 624, 631*; *Carmichael v National Power Plc [1999] 1 W.L.R. 2042, 2048*; *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co [2004] EWCA Civ 1660, [2005] 1 Lloyd's Rep. 606* at [15]; *Cottonex Anstalt v Patriot Spinning Mills Ltd [2014] EWHC 236 (Comm), [2014] 1 Lloyd's Rep. 615* at [43]–[51].

232. *Cozens v Brutus [1973] A.C. 854, 861*; *Belgravia Navigation Co SA v Cannor Shipping Ltd [1988] 2 Lloyd's Rep. 423*.

233. *Hill v Evans (1862) 4 De G.F. & J. 288, 295*.

234. *Robinson v Great Western Ry (1865) 35 L.J.C.P. 123*.

235. *Simpson v Margitson (1847) 11 Q.B. 23*.

236. *Moore v Garwood (1849) 4 Exch. 681*; *Brook v Hook (1871) L.R. 6 Ex. 89*; *Maskelyne v Stollery (1899) 16 T.L.R. 97*; *Maggs v Marsh [2006] EWCA Civ 1058, [2006] B.L.R. 395*; *Carmichael v National Power Plc [1999] 1 W.L.R. 2042, 2049*; *Thorner v Major [2009] UKHL 18, [2009] 1 W.L.R. 776* at [82]; *BVM Management Ltd v Roger Yeomans [2011] EWCA Civ 1254* at [23].

237. *Berwick v Horsfall (1858) 4 C.B.(N.S.) 450*.

238. *Derby & Co Ltd v Weldon (No.9) [1991] 1 W.L.R. 652*. See also Electronic Communications Act

2000; EC Directive on Electronic Commerce 2000/31 [2000] O.J. L178/1.

239. See above, paras 1-057—1-094.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(b) - Ordinary Meaning to be Adopted

Meaning of words [240]

13-051

Judges differ widely in their belief in the reliability of language and in the inherent meaning of words. In 1997 in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [241] Lord Hoffmann said [242]:

> "It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the 'meaning of his words' conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also … to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."

Again in 1998, in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [243] he said:

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean." [244]

Some 80 years earlier Holmes J. had similarly commented:

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." [245]

It would be unduly pessimistic to accept that human language is such that no sensible meaning can ever be given to the words in a document without reference to the circumstances in which those words came to be used. But even the "plain" and "obvious" meaning may take on a different meaning

in the light of the circumstances prevailing when the document was made. [246] On the other hand the actual language used by the parties undoubtedly does impose constraints on the court's willingness to depart from the plain and obvious meaning. If the meaning of the words is clear and unambiguous, why should the court not assume that it was what the parties meant? [247] Moreover, an examination of all the factual circumstances that might point to an interpretation which differs from the one which the words themselves convey may lead to an unnecessary protraction of the judicial process. A balance has therefore to be struck. [248] As Corbin remarked [249]:

> "The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it. At what point the court should cease listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense."

The current approach of the courts to the construction of contracts is "neither uncompromisingly literal nor unswervingly purposive". [250] The instrument must speak for itself, but the words used must, as stated by Lord Hoffmann, [251] be understood to bear the meaning which they would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

Adoption of the ordinary meaning of words

13-052

The starting point in construing a contract is that words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the word, but that in which it is generally understood [252]. The courts assume that the parties have used language in the way that reasonable persons ordinarily do. So terms are:

> "… to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." [253]

Technical words

13-053

Prima facie the assumption is that technical words should have their technical meaning given to them unless something can be found in the context to exclude it, [254] for if a word is of a technical or scientific character, then its primary meaning is its technical and scientific meaning. [255] But:

> "… when it is clear from the context of an instrument in what sense words are used in that instrument, the sound rule of construction is to attribute to them that meaning, even though the words be technical and have technically a different meaning; for it is only so that you can effectuate the intention." [256]

Also:

> "… where it can be ascertained that a particular vernacular meaning is attributed to words under circumstances similar to those in which the [scientific] expression to be construed is found, the vernacular meaning must prevail over the scientific." [257]

Thus "petroleum" in a reservation in a conveyance was construed according to the vernacular, and not the scientific, meaning, and so was held to include gas in solution in the liquid as it existed in the earth. [258] Yet even this distinction is not a rigid one to be applied without regard to the circumstances of the case. [259]

Established judicial construction

13-054

Where the same words or contractual provisions have for many years received a judicial construction, the court will suppose that the parties have contracted upon the belief that their words will be understood in the accepted legal sense. [260]

European directives

13-055

A contract of a public and regulatory nature which has been drafted with a view to implementing a European Directive should be construed in a manner compatible with the Directive. [261]

Absurdity, inconsistency, etc

13-056

In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [262] Lord Hoffmann said [263]:

> "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

So, the principle that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity [264] or would create some inconsistency with the rest of the instrument. [265] It may also not be applied, as Lord Hoffmann indicates, where there has been an obvious linguistic mistake [266] or where, if the words were construed in their ordinary sense, they would lead to a very unreasonable result or impose upon the contractor a responsibility which it could not reasonably be supposed he meant to assume. [267] In *Wickman Machine Tools Sales Ltd v L.G. Schuler AG* [268] Lord Reid said:

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear." [269]

However, in *Chartbrook Ltd v Persimmon Homes Ltd*, [270] Lord Hoffmann cautioned that "it clearly requires a strong case to persuade the court that something must have gone wrong with the language" in order to justify a meaning which departs from the words actually used. Not only must it be clear that "something has gone wrong with the language", it must also be "clear what a reasonable person would have understood the parties to have meant": [271] in other words, both the "problem" and the "solution" must be clear if the court is to give to the words a meaning other than that which they ordinarily bear. It is no part of the court's function to rewrite the contract for the parties so that, where the draftsman has not thought through the consequences of his own drafting, he will not be permitted to say that "something has gone wrong with the language" in order to save himself from the consequences of his own poor or inadequate drafting. [272] Furthermore, considerations of commercial common sense, or whether "something has gone wrong with the language" are not to be invoked retrospectively, but must be considered at the date of every entry into the contract. [273]

Ambiguity

13-057

Where the parties have used unambiguous language, the court must apply it. [274] But a word or phrase in a contract may be open to more than one potential meaning or interpretation. In such a case the court will consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled (but is not obliged [275]) to prefer the construction which is consistent with business common sense and to reject the other. [276]

Badly drafted contracts

13-058

In *Mitsui Construction Co Ltd v Att-Gen of Hong Kong* [277] Lord Bridge said (of a building contract) that the fact that the contract was badly drafted:

> "… affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis."

However, the fact that the drafting of the contract is generally poor, may incline a court to conclude that the parties did not, objectively, intend that the literal meaning of the words they used should be used to "govern and override clear conflicting business common sense". [278] In other words, greater weight may be given in such cases to a "purposive" or "contextual" approach to the interpretation of the contract given that an interpretation which gives greater weight to the "ordinary" or "literal" meaning of the words used is less likely to give effect to the intention of the parties. Similarly, in an appropriate case a court may acknowledge that a contract was prepared by and concluded between lay persons where exactitude of language may not be expected and, in such a

case, a court may give greater weight to the commercial sense of the agreement as a whole than to the syntax of a particular term. [279]

Mercantile contracts

13-059

Although it has been stated that there is not in law any difference of construction between mercantile contracts and other instruments, [280] commercial documents "must be construed in a business fashion" [281] and "there must be ascribed to the words a meaning that would make good commercial sense". [282] Indeed, in *The Antaios* [283] Lord Diplock said that [284]:

> "… if detailed semantic and syntactical analysis of words in a commercil contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense."

Lord Diplock's dictum has been referred to many times. [285] It does not, however, mean that the court can rewrite the language used by the parties, where it is clear and unambiguous, in order to produce a more balanced, fair or "businesslike" result. [286] But if alternative interpretations are available, it will be necessary to consider the implications of each interpretation and which interpretation is most likely to give effect to the commercial purpose of the agreement. [287] In mercantile contracts, the words employed may also have acquired a special meaning, [288] and this may be a different meaning from their natural one. [289] Hence it is that mercantile contracts are to be construed according to the usage and custom of merchants, [290] provided that the custom is not inconsistent with the agreement. [291] When such contracts contain peculiar expressions which have in particular places or trades a known meaning attached to them, the meaning of these expressions is a question of fact, although the meaning of the contract still remains a question of law. [292] Further:

> "… the custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable." [293]

A mercantile contract in standard form should be construed in a uniform sense and not in a fundamentally different manner when applied to different classes of persons. [294]

Custom of particular place

13-060

There are also cases in which regard must be had to the usage or custom of the place where the contract was made or to which it had reference, in order to discover the meaning and intention of the parties. Where, therefore, it appeared that, in the place where a contract concerning a sale of cider was made, the word meant the juice of apples as soon as the juice was expressed, it was held that the contract must be construed to have been for the sale of cider in that sense of the word. [295] And so where a lease was granted of a warren in Suffolk, and the landlord covenanted to pay £60 per thousand rabbits which the tenant was bound to leave on the premises, and it appeared by custom in Suffolk in such cases that 1,000 rabbits meant 1,200, it was held that the landlord was only bound to pay for rabbits reckoned at that rate. [296]

13-061

On the other hand, there are occasions when the courts have refused to modify the natural meaning

of a word in the light of custom, e.g. to attribute to the word “alongside” in contracts of affreightment a peculiar meaning derived from the custom of a port so as to increase the shipowner’s obligation. [297] Moreover it is a question of fact in each case whether or not a contract containing terms which have a peculiar meaning owing to some usage or custom was in fact made with reference to that usage or custom, and the mere fact that such a custom exists in the district covered by the contract does not raise a conclusion in law that the meaning of the contract is to be governed by the custom. [298]

Special meaning

13-062

Although a contract must normally be construed in accord with the ordinary meaning of the expressions contained in it, by considering the circumstances and situation of the parties at the time, and the subject matter of the agreement, the court may be enabled to ascertain a special meaning placed upon the words [299] and such special meaning then takes the place of the ordinary meaning for the purpose of construing the contract. Also words in ancient documents are to be interpreted according to the meaning which they bore at the date of the document. [300]

Law of Property Act s.61

13-063

By s.61 of the Law of Property Act 1925, in all deeds, contracts, wills, orders, and other instruments executed, made, or coming into operation after December 31, 1925, unless the context otherwise requires:

(a)

"month" means calendar month [301];

(b)

"person" includes a corporation [302];

(c)

the singular includes the plural and vice versa [303];

(d)

the masculine includes the feminine and vice versa.

Construction of general words

13-064

The approach adopted to the construction of general words is that they are to be restricted according to the nature of the circumstances or of the person. [304] Thus where a railway company agreed *efficiently* to work and repair the railway and works demised, it was held that the word “efficiently” had to be construed according to the resources and powers of the particular company. [305] The same would no doubt apply (subject to the terms of the contract as a whole) to an obligation to take

"reasonable steps" or to use "reasonable endeavours". [306]

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn (2011); Mitchell, *Interpretation of Contracts* (2007).

240. See Farnsworth (1967) 76 Yale L.J. 939.

241. *[1997] A.C. 749*. *Rennie v Westbury Homes (Holdings) Ltd [2007] EWHC 164; [2007] N.P.C. 16* ; *Savings Bank of the Russian Federation v Refco Securities LLC [2006] EWHC 857 (Comm), [2006] 2 All E.R. (Comm) 722*.

242. *[1997] A.C. 749, 775*.

243. *[1998] 1 W.L.R. 896*. The principles set out by Lord Hoffmann in this case at 912–913 have subsequently been adopted in numerous cases: *Static Control Components (Europe) Ltd v Egan [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429* at [12]–[14]; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307* at [47]–[48]; *Sirius International Insurance (Publ) v FAI General Insurance Ltd [2004] UKHL 54; [2004] 1 W.L.R. 3251* at [19]; *Dairy Containers Ltd v Tasman Orient Line CV [2004] UKPC 22, [2005] 1 W.L.R. 215* at [12]; *NBTY Europe Ltd v Nutricia International BV [2005] EWHC 734 (Comm), [2005] 2 Lloyd's Rep. 350* at [31]; *Canmer International Inc v UK Mutual Steamship Assurance Assn (Bermuda) Ltd [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep. 479* at [22]; *Absalom v TCRU Ltd [2005] EWHC 1090 (Comm), [2005] 2 Lloyd's Rep. 735* at [25]; *Gastronome (UK) Ltd v Anglo-Dutch Meats (UK) Ltd [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587* at [14]; *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727 (Comm), [2006] 2 All E.R. (Comm) 722*; *Forrest v Glasser [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep. 392* at [20]; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [9]; *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [14]; *Proteus Property Partners Ltd v South Africa Property Opportunities Plc [2011] EWHC 768 (QB)*; *Deutsche Trustee Co Ltd v Fleet Street Finance Three Plc [2011] EWHC 2117 (Ch)*.

244. *[1998] 1 W.L.R. 896, 913*.

245. *Towne v Eisner (1918) 245 U.S. 416, 425*.

246. See below, para.13-121.

247. *Melanesian Mission Trust Board v Australian Mutual Provident Society [1997] 1 N.Z.L.R. 391, 394 (Lord Hope)*. See also *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp [2000] 1 Lloyd's Rep. 339, 346 (Kennedy L.J., dissenting)*; *HSBC Bank Plc v Liberty Mutual Insurance Co (UK) Ltd, The Times, June 11, 2001*; *Arnold v Britton [2015] UKSC 36, [2015] 2 W.L.R. 1593* at [17]–[22].

248. *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [2001] EWCA Civ 1047, [2001] 2 All E.R. (Comm) 299* at [16].

249. (1944) 53 Yale L.J. 603, 623.

250. *Arbuthnott v Fagan [1995] C.L.C. 1396, 1400 (Bingham M.R.)*. See also *Charter Reinsurance Ltd v Fagan [1997] A.C. 313, 326, 350*; *Persimmon Homes Ltd v Ove Arup & Partners Ltd [2015] EWHC 3573 (TCC), [2016] B.L.R. 112* at [21].

251. *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 912*; above, para.13-043. This approach has been followed in numerous cases, including *Zeus*

Tradition Marine Ltd v Bell [1999] 1 Lloyd's Rep. 703, 706; *Boats Park Ltd v Hutchinson [1999] 2 N.Z.L.R. 1129*; *First Realty Plc v Norton Rose [1999] 2 B.C.L.C. 428*; *Harbinger UK Ltd v GE Information Services Ltd [2000] 1 All E.R. (Comm) 166*; *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp [2000] 1 Lloyd's Rep. 339, 344*; *Eridania Spa v Rudolf A Oetker [2000] 2 Lloyd's Rep. 191, 196*; *Association of British Travel Agents Ltd v British Airways Plc [2000] 2 Lloyd's Rep. 209, 216*; *City of London v Reeve & Co Ltd [2000] B.L.R. 211, 216*; *Bank of Credit and Commerce International v Ali (No.5) [2001] UKHL 8, [2002] 1 A.C. 251* at [8], [39]; *Sirius International Insurance (Publ) v FAI General Insurance Ltd [2004] UKHL 54, [2004] 1 W.L.R. 3251* at [19]; *Westerngeco Ltd v ATP Oil & Gas (UK) Ltd [2006] EWHC 1164 (Comm), [2006] 2 Lloyd's Rep. 535* at [10]; *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd (No.2) [2007] EWHC 145 (TCC), (2007) 111 Const. L.R. 48* at [155]-[157]; *UBS AG v HSH Nordbank AG [2008] EWHC 1529 (Comm), [2008] 2 Lloyd's Rep. 500* at [92]; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [9]; *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [21]–[26]; *Secretary of State for Transport v Stagecoach South Western Trains Ltd [2009] EWHC 2431 (Comm), [2010] 1 Lloyd's Rep. 175* at [36]; *Global Coal Ltd v London Commodity Brokers [2010] EWHC 1347 (Ch)* at [15]; *Osteopathic Education and Research Ltd v Purfleet Office Systems Ltd [2010] EWHC 1801 (QB)* at [62]; *Fenice Investments Inc v Jerram Falkus Construction Ltd [2009] EWHC 3272 (TCC), 128 Con. L.R. 124*; *Emeraldian Ltd Partnership v Wellmix Shipping Ltd [2010] EWHC 1411 (Comm), [2011] 1 Lloyd's Rep. 301* at [53]; *Re Agrimarche Ltd [2010] EWHC 1655 (Ch), [2010] B.C.C. 775*; *Scottish Widows and Life Assurance Socy v BGC International Ltd [2011] EWHC 729 (Ch)* at [17]; *Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429, [2011] 1 W.L.R. 770* at [17]; *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [14]; *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA [2011] EWHC 1822 (Ch), [2011] 2 Lloyd's Rep. 538* at [96]; *Mirador International LLC v MF Global UK Ltd [2012] EWCA Civ 1662* at [19], [35]; *Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736, [2013] Ch. 305*; *National Merchant Buying Society Ltd v Bellamy [2013] EWCA Civ 452, [2013] 2 All E.R. (Comm) 674* at [39]; *TSG Building Services Plc v South Anglia Housing Ltd [2013] EWHC 1151 (TCC), [2013] B.L.R. 484*; *Amlin Corporate Member Ltd v Oriental Assurance Corp [2013] EWHC 2380 (Comm), [2014] 1 All E.R. (Comm) 415* at [28]; *British Malleable Iron Co Ltd v Relevan (IOM) Ltd [2013] EWHC 1954 (Ch), [2013] E.G.L.R. 23*.

252. ❗An emphasis on the natural and ordinary meaning of the words used by the parties is not to be equated with "an unduly literal or semantic interpretation" (*Fomento de Construcciones y Contratas SA v Black Diamond Offshore Ltd [2016] EWCA Civ 1141, [2017] 1 B.C.L.C. 196* at [12]) nor does it permit an over-literal interpretation of one provision without regard to the whole of the document, particularly in the case of complex documents which have been put into circulation in the market (*Metlife Seguros de Retiro SA v JP Morgan Chase Bank, National Association [2016] EWCA Civ 1248*). The normal or dictionary meaning of the words used may yield to their context (*Savills (UK) Ltd v Blacker [2017] EWCA Civ 68* at [33]), although the balance to be struck between the natural and ordinary meaning of the words and their context is not always an easy one to strike.

253. *Robertson v French (1803) 4 East 130, 135*. See also *Shore v Wilson (1842) 9 Cl. & Fin. 355, 527*; *Mallan v May (1844) 12 M. & W. 511, 517*; *Tielens v Hooper (1850) 5 Exch. 830*; *Grey v Pearson (1857) 6 H.L. Cas. 61, 78, 106*; *Beard v Moira Colliery Co [1915] 1 Ch. 257, 268*; *Royal Greek Government v Minister of Transport [1949] 1 K.B. 525, 528*; *Melanesian Mission Trust Board v Australian Mutual Provident Society [1997] 1 N.Z.L.R. 391, 394 PC*; *Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313, 384*; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307* at [93]; *Thames Valley Power Ltd v Total Gas & Power Ltd [2003] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep. 441* at [25]; *Forrest v Glasser [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep. 392* at [21]; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [12]. Contrast *Staffordshire A.H.A. v South Staffordshire Waterworks Co [1978] 1 W.L.R. 1387, 1394*; *Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313, 391*.

254. *Laird v Briggs (1881) 19 Ch. D. 22, 34*; *Monypenny v Monypenny (1858) 4 K. & J. 174, 182*; *Roddy v Fitzgerald (1858) 6 H.L.C. 823, 877*.

255. *Holt & Co v Collyer (1881) 16 Ch. D. 718, 720*.

256. *Graham v Ewart (1856) 1 H. & N. 550, 562*; *Musgrave v Forster (1871) L.R. 6 Q.B. 590, 596*; *Holt & Co v Collyer (1881) 16 Ch. D. 718*. See also (insurance contracts) below, para.42-077.

257. *Michael Borys v Canadian Pacific Ry [1953] A.C. 217, 223*; *Lord Provost and Magistrates of Glasgow v Farie (1888) 13 App. Cas. 657, 669*; *Luigi Monta of Genoa v Cechofracht Co Ltd [1956] 2 Q.B. 552*.

258. *Michael Borys v Canadian Pacific Ry [1953] A.C. 217*. See also *Lovell and Christmas Ltd v Wall (1911) 103 L.T. 588*; *Tester v Bisley (1948) 64 T.L.R. 184*; cf. *Earl of Lonsdale v Att-Gen [1982] 1 W.L.R. 887*.

259. *Michael Borys v Canadian Pacific Ry [1953] A.C. 217, 223*.

260. *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co (1887) 12 App. Cas. 484, 490*; *Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] A.C. 724, 735*; *Skips A/S Nordheim v Syrian Petroleum Co Ltd [1983] 2 Lloyd's Rep. 592, 597*; *Navrom v Callitsis Ship Management SA [1987] 2 Lloyd's Rep. 276, 278 (affirmed [1988] 2 Lloyd's Rep. 416)*; *Marc Rich & Co Ltd v Tourloti Compania Naviera SA [1988] 2 Lloyd's Rep. 101, 105*; *Chiswell Shipping Ltd v National Iranian Tanker Co [1991] 2 Lloyd's Rep. 251, 257*; *I.D.C. Group Ltd v Clark [1992] 2 E.G.L.R. 184, 186*; *British Sugar Plc v NEI Power Projects Ltd (1997) 87 Build. L.R. 42, 50*; *Rose v Stavrou, The Times, June 3, 1999*, *Cero Navigation Corp v Jean Lion & Cie [2000] 1 Lloyd's Rep. 292, 294*; *Sunport Shipping Ltd v Tryg-Baltica International (UK) Ltd [2003] EWCA Civ 12, [2003] 1 Lloyd's Rep. 138* at [25], [56]; *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ 814, [2005] 1 W.L.R. 3850* at [29]; *Atlas Navios-Navegacao Lda v Navigators Insurance Co Ltd [2012] EWHC 802 (Comm), [2012] 1 Lloyd's Rep. 629* at [25]. But contrast *Wickman Machine Tool Sales Ltd v L.G. Schuler A.G. [1974] A.C. 235*; *Macedonia Maritime Co v Austin & Pickersgill Ltd [1989] 1 Lloyd's Rep. 73*.

261. *White v White [2001] UKHL 9, [2001] 1 W.L.R. 481*.

262. *[1998] 1 W.L.R. 896*.

263. *[1998] 1 W.L.R. 896, 913* (applied in *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Group Corp [2000] 1 Lloyd's Rep. 339, 344, 345, 346*). cf. *Nippon Yusen Kubishiki Kaisha v Golden Strait Corp [2003] EWHC 16 (Comm); [2003] 2 Lloyd's Rep. 592* at [10], [14].

264. *Grey v Pearson (1857) 6 H.L.C. 61, 106*; *Abbott v Middleton (1858) 7 H.L.C. 68, 114*; *Thelluson v Rendlesham (1859) 7 H.L.C. 429, 519*; *Caledonian Ry v North British Ry (1881) 6 App. Cas. 114, 130*; *Ostfriesische Volksbank EG v Fortis Bank [2010] EWHC 361 (Comm), [2010] 2 All E.R. (Comm) 921*; cf. *Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313, 387*; *Zeus Tradition Marine Ltd v Bell [1999] 1 Lloyd's Rep. 703, 707*; *BP Exploration Operating Co Ltd v Dolphin Drilling Ltd [2009] EWHC 3119, [2010] 2 Lloyd's Rep. 192*.

265. Words prima facie synonymous should be construed in the same sense throughout the instrument; *Re Birks [1900] 1 Ch. 417, 418*; *Yafai v Muthana [2012] EWCA Civ 289*, but there is no principle of general application to compel this: *Watson v Haggitt [1928] A.C. 127*.

266. *Static Control Components (Europe) Ltd v Egan [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 428*; *BP Exploration Operation Co Ltd v Kvaerner Oilfield Products Ltd [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307* at [95]; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [9]; *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [14], [22]; *Westvilla Properties Ltd v Dow Properties Ltd [2010] EWHC 30 (Ch), [2010] 2 P. & C.R. 19* at [20]; *W W Gear Construction Ltd v McGee Group Ltd [2010] EWHC 140 (TCC), 131 Con. L.R. 63* at [12]; *ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, [2012] 1 W.L.R. 472* at [22]; *Caresse Navigation Ltd v Office Nationale de l'Electricité [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep. 337*, at [45]; cf. *Armitage v Staveley Industries Plc [2004] EWHC 2320 (Comm), [2004] Pens. L.R. 385*; *Canmer International Inc v UK Mutual Steamship Assurance Assn (Bermuda) Ltd [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep. 479* at [24]–[29]; *Forrest v Glasser [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep. 392* at [24]; *Royal Bank of Scotland Plc v Highland Financial Partners LP [2010] EWCA Civ 809* at [11]; *Gessner Investments Ltd v Bombardier Inc [2011] EWCA Civ 1118*; *West v Ian Finlay &*

Associates [2014] EWCA Civ 316, [2014] B.L.R. 324.

267. *Re Levy Ex p. Walton (1881) 17 Ch. D. 746, 751*; *Baumwoll Manufactur von Scheibler v Furness [1893] A.C. 8, 15*; *Dodd v Churton [1897] 1 Q.B. 562, 566*; *Miramar Maritime Corp v Holborn Oil Trading Ltd [1984] A.C. 676, 682*; *Antaios Compania Naviera SA v Salen Rederierna AB [1985] A.C. 191, 200-201*; *Harbinger UK Ltd v GE Information Services Ltd [2000] 1 All E.R. (Comm) 166*; *Kazakstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV [2000] 1 All E.R. (Comm) 708*; *AET Inc Ltd v Arcadia Petroleum Ltd [2009] EWHC 2337 (Comm), [2009] 2 Lloyd's Rep. 593* at [3]. Contrast *Jones v St John's College, Oxford (1870) L.R. 6 Q.B. 115*; *The Raven [1980] 2 Lloyd's Rep. 266, 269*; *Lakeport Navigation Co Panama SA v Anonima Petroli Italiana [1982] 2 Lloyd's Rep. 205*; *Pera Shipping Corp v Petroship SA [1985] 2 Lloyd's Rep. 103, 107*; *Eurico SpA v Phillipp Bros [1987] 2 Lloyd's Rep. 215*; *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd [1994] 3 N.Z.L.R. 189*; *City Alliance Ltd v Oxford Forecasting Services Ltd [2001] 1 All E.R. (Comm) 233*; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [23]; *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI [2009] EWHC 2656 (Comm), [2009] 2 Lloyd's Rep. 631* at [27]; *HHR Pascal BV v W 2005 Puppet 11 BV [2009] EWHC 2771 (Comm), [2010] 1 All E.R. (Comm) 399*; *Global Coal Ltd v London Commodity Brokers [2010] EWHC 1347 (Ch)* at [71].

268. *[1974] A.C. 235*.

269. *[1974] A.C. 235, 251*. This dictum was cited with approval in *Wace v Pan Atlantic Group Ltd [1981] 2 Lloyd's Rep. 339, 343*; *Forsikringsaktieselskapet Vesta v J.N.E. Butcher Bain Dawes Ltd [1989] 1 Lloyd's Rep. 330, 346*; *Macedonia Maritime Co v Austin & Pickersgill Ltd [1989] 2 Lloyd's Rep. 73, 81*; *Niobe Maritime Corp v Tradax Ocean Transportation SA [1995] 1 Lloyd's Rep. 579*; *International Fina Services AG v Katrina Shipping Ltd [1995] 2 Lloyd's Rep. 344, 350*; *Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313, 355*.

270. *[2009] UKHL 38, [2009] 1 A.C. 1101* at [15]. See also *Enviroco Ltd v Farstad Supply A/S [2009] EWCA Civ 1399, [2010] 2 Lloyd's Rep. 375* at [21].

271. ❗*Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [25]; *LSREF III Wight Ltd v Millvalley Ltd [2016] EWHC 466 (Comm)*; *Bouygues (UK) Ltd v Febrey Structures Ltd [2016] EWHC 1333 (TCC)*; *BP Gas Marketing Ltd v La Societe Sonatrach [2016] EWHC 2461 (Comm), 169 Con. L.R. 141* at [281]. It is "only in exceptional cases" that commercial common sense can "drive the court to depart from the natural meaning of contractual provisions" (*Carillion Construction Ltd v Emcor Engineering Services Ltd [2017] EWCA Civ 65, [2017] B.L.R. 203* at [46]; *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWCA Civ 990, [2017] 1 W.L.R. 1893* at [42]; *Arnold v Britton [2015] UKSC 36, [2015] A.C. 1619* at [19]–[20]). For an example of such an "exceptional" case see *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd [2017] EWCA Civ 359*.

272. ❗*Prophet Plc v Huggett [2014] EWCA Civ 1013, [2014] I.R.L.R. 797* (where a sentence in a restrictive covenant was held to be a "carefully drawn piece of legal prose" which reflected "exactly what the draftsman intended" but the draftsman had not thought through sufficiently the consequence of one of the restrictions which had been inserted into the clause: the Court of Appeal held that the employer had to live with the consequences of its own drafting). In *Credit Suisse Asset Management LLC v Titan Europe 2006-1 Plc [2016] EWCA Civ 1293* Arden L.J. at [28] referred to the fundamental principle of English law of party autonomy, from which it follows that the court will not rewrite the bargain that the parties have freely chosen to make (see also *BP Gas Marketing Ltd v La Societe Sonatrach [2016] EWHC 2461 (Comm), 169 Con. L.R. 141* at [274]).

273. ❗*Arnold v Briton [2015] UKSC 36, [2015] 2 W.L.R. 1593* at [19]. However, where an event subsequently occurs which was plainly not intended or contemplated by the parties, the court may depart from the ordinary meaning of the words used in order to give effect to the intention of the parties: *Arnold v Britton* at [22]. In *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* Lord Hodge acknowledged (at [11]) that the court "must be alive to

the possibility that one side may have agreed to something which with hindsight did not serve his interest".

274. *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [23]; *Arnold v Britton [2015] UKSC 36, [2015] 2 W.L.R. 1593* at [17]–[22]. But it may be going too far to state that, in a case where there is no ambiguity in the disputed contract term, considerations of commercial common sense do not need to be considered: *Liontrust Investment Partners LLP v Flanagan [2017] EWCA Civ 985* at [39]).

275. *Edgworth Capital (Luxembourg) Sarl v Ramblas Investments BV [2015] EWHC 150 (Comm)* at [34].

276. *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [21] (Lord Clarke); *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* at [11]. The fact that there are two possible meanings of the disputed term has been held to be the beginning of the inquiry, not its end (*Scottish Power UK Plc v BP Exploration Operating Co Ltd [2016] EWCA Civ 1043* at [29]). It is then necessary for the court to apply "all its tools of linguistic, contextual, purposive and common sense analysis to discern what the clause really means" (per Briggs L.J. in *Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128, [2016] 1 C.L.C. 573* at [19]). See also para.13-059 nn.280 and 281, below. cf. *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA [2012] EWCA Civ 1413* at [22] (two possible constructions not present).

277. *(1986) 33 Build. L.R. 1, 14, PC*. See also *Sinochem International Oil (London) Ltd v Mobile Sales and Supply Corp [2000] 1 Lloyd's Rep. 339, 344*; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [2001] EWCA Civ 1047, [2001] 2 All E.R. (Comm) 299* at [13]; *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [26]; *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd [2017] UKSC 59* at [48].

278. *Cohen v Teseo Properties Ltd [2014] EWHC 2442 (Ch)* at [30]. A point also acknowledged by the Supreme Court in *Arnold v Britton [2015] UKSC 36, [2015] 2 W.L.R. 1593* at [18]. But the mere fact that the contract does not achieve what one party subsequently states was its object does not necessarily result in the conclusion that the contract was badly drafted: *Fairway Lakes Ltd v Revenue & Customs Commissioners [2015] UKFTT 605 (TC)*. In *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* Lord Hodge acknowledged (at [13]) that in cases where the contract is one of some sophistication and complexity and has been negotiated and prepared with the assistance of skilled professionals, the agreement may be successfully interpreted principally by textual analysis. But in the case where the contract is one of some informality or has not been drafted with the benefit of skilled professional assistance it may be appropriate to place greater emphasis on the factual matrix when seeking to interpret the contract. However, Lord Hodge also acknowledged that negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. It is therefore important to recognise that there may be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions "may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type".

279. *Thorney Park Golf Ltd v Myers Catering Ltd [2015] EWCA Civ 19*.

280. *Southwell v Bowditch (1876) 1 C.P.D. 374, 376*.

281. *Southland Frozen Meat and Produce Export Co Ltd v Nelson Brothers Ltd [1898] A.C. 442, 444*. See also *Glynn v Margetson & Co [1893] A.C. 351, 359*; *Menth & Co v Ropner & Co [1913] 1 K.B. 27, 32*; *Lake v Simmons [1927] A.C. 487, 509*; *Digby v General Accident Fire and Life Assurance Corp Ltd [1949] 1 K.B. 226, 246*; *Panamanian Oriental Steamship Corp v Wright [1971] 1 Lloyd's Rep. 487, 492* ("a businesslike interpretation"); *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749, 771* ("a commercially sensible construction"); *Handelsbanken Norwegian Branch of Svenska Handelsbanken AB (Publ.) v*

Dandridge [2002] EWCA Civ 577, [2002] 2 Lloyd's Rep. 421 at [24] ("a businesslike interpretation in the context in which [the words] appear"); *Homburg Houtimport BV v Agrosin Private Ltd [2003] UKHL 12, [2004] 1 A.C. 715* at [10] ("a business sense"); *Sirius International Insurance (Publ) v FAI General Insurance Ltd [2004] UKHL 54, [2004] 1 W.L.R. 3251* at [19] ("a … commercial approach").

282. *Miramar Maritime Corp v Holborn Oil Trading Ltd [1984] A.C. 676, 682*; *International Fina Services AG v Katrina Shipping Ltd [1995] 2 Lloyd's Rep. 344, 350*; *Axa Reinsurance (UK) Plc v Field [1996] 3 All E.R. 517, 526*; *Society of Lloyd's v Robinson [1999] 1 All E.R. (Comm) 545, 551*.

283. *Antaios Compania Naviera SA v Salen Rederierna AB [1984] A.C. 191, 201*.

284. See also *Shipping Corp of India Ltd v NBB Niederelke Schiffartsgesellschaft mbH & Co [1991] 1 Lloyd's Rep. 77, 80*; *Bankers Trust Co v State Bank of India [1991] 2 Lloyd's Rep. 443, 456*; *International Fina Services AG v Katrina Shipping Ltd [1995] 2 Lloyd's Rep. 344, 350*; *Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313, 355*; but cf. 387; *Sinochem International Oil (London) Ltd v Mobil Sales and Supply Corp [2001] 1 Lloyd's Rep. 339, 344*; *Sirius International Insurance (Publ) v FAI General Insurance Ltd [2004] UKHL 54, [2004] 1 W.L.R. 3251* at [19]; *Mora Shipping Inc v Axa Corporate Solutions Assurance SA [2005] EWCA Civ 1069, [2005] 2 Lloyd's Rep. 769* at [32]; *Absalom v TCRU Ltd [2005] EWHC 1090 (Comm), [2005] 2 Lloyd's Rep. 735* at [25].

285. *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2008] EWHC 944 (Comm), [2008] 2 Lloyd's Rep. 202* at [26] (reversed on other grounds *[2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461*); *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [9]; *Internet Broadcasting Corp Ltd v MAR LLC [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep. 295* at [27]; *Ostfriesische Volksbank EG v Fortis Bank [2010] EWHC 361 (Comm), [2010] 2 All E.R. (Comm) 921*; *Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429, [2011] 1 W.L.R. 770*; *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900*; *E-Nik Ltd v Secretary of State for Communities and Local Government [2012] EWHC 3027 (Comm), [2013] 2 All E.R. (Comm) 868* at [261].

286. *Co-operative Wholesale Society Ltd v National Westminster Bank Plc [1995] 1 E.G.L.R. 97, 98*; *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732, [2007] C.I.L.L. 2449*; *Emeraldian Ltd Partnership v Wellmex Shipping Ltd [2010] EWHC 1411 (Comm), [2010] 1 C.L.C. 993*; *Gesner Investments Ltd v Bombardier Inc [2010] EWHC 2643 (Comm), [2010] All E.R. (D) 234 (Comm)* at [28]; *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [23]; *Kudos Catering (UK) Ltd v Manchester Central Convention [2012] EWHC 1192 (QB)* at [40], [54]; *Greatship (India) Ltd v Oceanografia SA de CV [2012] EWHC 3468 (Comm), [2013] 1 All E.R. (Comm) 1244* at [17]; *Ted Baker Plc v AXA Insurance UK Plc [2012] EWHC 1406 (Comm), [2013] 1 All E.R. (Comm) 129* at [71]; *BMA Special Opportunity Hub Finance Ltd [2013] EWCA Civ 416* at [24]; *Fons Ltd v Corporal Ltd [2014] EWCA Civ 304* at [16]; *MT Hojgaard a/s v E.ON Climate and Renewables UK Robin Rigg West Ltd [2014] EWHC 1088 (TCC)* at [76], *Cottonex Anstalt v Patriot Spinning Mills Ltd [2014] EWHC 236 (Comm), [2014] 1 Lloyd's Rep. 615* at [52]-[58]; *Soufflet Negoce SA v Fedcominvest Europe Sarl [2014] EWHC 2405 (Comm), [2014] 2 Lloyd's Rep 537* at [27]; *Tartsinis v Navona Management Co [2015] EWHC 57 (Comm)* at [54]; *Arnold v Britton [2015] UKSC 36, [2015] 2 W.L.R. 1593* at [17]-[22]; *Credit Suisse Asset Management LLC v Titan Europe 2006-1 Plc [2016] EWCA Civ 1293* at [28].

287. *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900* at [30]. See also *Barclays Bank Plc v HHY Luxembourg SARL [2010] EWCA Civ 1248, [2011] 1 B.C.L.C. 336* at [25], [26]; *Ener-G Holdings Plc v Hormell [2011] EWHC 3290 (Comm)* at [9]; *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal [2012] EWHC 690 (Comm)*; *Teal Assurance Co Ltd v WR Berkley Insurance (Europe) Ltd [2013] UKSC 57, [2013] 2 All E.R. (Comm) 1009* at [29]–[31]; *Fons Ltd v Corporal Ltd [2014] EWCA Civ 304* at [15].

288. See, e.g. *Care Shipping Corp v Itex Itagrani Export SA [1993] Q.B. 1* ("sub-freights").

289. See, e.g. *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd [1989] 1 Lloyd's Rep. 1, 6* ("whether in berth or not").

290. *Re Walkers, Winser & Hamm and Shaw, Son & Co [1904] 2 K.B. 152*; *Upjohn v Hitchens [1918] 2 K.B. 48*; see below, para.13-135.

291. *Gibbon v Young (1818) 8 Taunt. 254*; *Hayton v Irwin (1879) 5 C.P.D. 130*; *The Alhambra (1881) 6 P.D. 68*; *Re L. Sutro & Co and Heilbut, Symons & Co [1917] 2 K.B. 348*; *Westacott v Hahn [1918] 1 K.B. 495*; *Palgrave, Brown & Sons v S.S. Turid [1922] 1 A.C. 397*; *Ted Baker Plc v AXA Insurance UK Plc [2012] EWHC 1406 (Comm)*; see below, para.13-131.

292. *Hutchinson v Bowker (1839) 5 M. & W. 535*; *Hill v Evans (1862) 4 De G.F. & J. 288*; see above, para.13-047.

293. *Gibson v Small (1853) 4 H.L.C. 353, 397*.

294. *Global Coal Ltd v London Commodity Brokers Ltd [2010] EWHC 1347 (Ch)*. See also *Atlas Navios-Navegacao Lda v Navigators Insurance Co Ltd [2012] EWHC 802 (Comm), [2012] 1 Lloyd's Rep. 629* at [23] (worldwide use).

295. *Studdy v Sanders (1826) 5 B. & C. 628*.

296. *Smith v Wilson (1832) 3 B. & Ad. 728*. See below, para.13-133.

297. *Palgrave, Brown & Sons v S.S. Turid [1922] 1 A.C. 397*; *Aktieselskabet Dampsskibsselskabet Primula v Horsley (1923) 40 T.L.R. 11*; *Hillas & Co v Rederiaktiebolaget Aeolus (1926) 32 Com. Cas. 169*; cf. *Aktieselskab Helios v Ekman [1872] 2 Q.B.D. 83*; *Smith, Hogg & Co v Louis Bamberger & Sons [1929] 1 K.B. 150*.

298. *Clayton v Gregson (1836) 5 A. & E. 302*.

299. *Shore v Wilson (1842) 9 Cl. & F. 355, 555*; *Smith v Doe (1821) 2 B. & B. 473, 550, 602*; *Payne v Haine (1847) 16 M. & W. 541*; *Myers v Sarl (1860) 3 E. & E. 306*; *Perrin v Morgan [1943] A.C. 399, 421*; *Levermore v Jobey [1956] 1 W.L.R. 697*; *Sydall v Castings Ltd [1967] 1 Q.B. 302*; cf. *Hospital for Sick Children v Walt Disney Productions Inc [1968] Ch. 52*; *Zeus Tradition Marine Ltd v Bell [1999] 1 Lloyd's Rep. 703, 706*. See below, para.13-124.

300. *Shore v Wilson (1842) 9 Cl. & F. 355, 566*; *North British Ry Co v Budhill Coal and Sandstone Co [1910] A.C. 116, 128*; *Earl of Lonsdale v Att-Gen [1982] 1 W.L.R. 887, 924-928*. See below, para.13-124.

301. Prior to 1926, the general rule was that "month" meant lunar month, but the rule was fortunately almost destroyed by exceptions. The word always meant calendar month in ecclesiastical law, in mercantile transactions, mortgages and statutes (since 1850), or where the meaning required it from the context: see *Schiller v Petersen [1924] 1 Ch. 394, 417*; Sale of Goods Act 1979 s.10(3). A calendar month ends on the day of the next following month having the same number as that on which computation began, e.g. March 30 to April 30; but if the next month has no day of the same number, the calendar month ends on the last day of the next month, e.g. January 30 to February 28 or 29 (in leap year): *Dodds v Walker [1981] 1 W.L.R. 1027*, see also below, para.21-027. See also the Interpretation Act 1978 s.5 and Sch.1; *Wilkie v IRC [1952] 1 Ch. 153*.

302. cf. *Deutsche Genossenschaftsbank v Burnhope [1995] 1 W.L.R. 1580 HL*.

303. cf. *Re A Solicitor's Arbitration [1962] 1 W.L.R. 353*.

304. Verba generalia restringuntur ad habilitatem rei vel aptitudinem personae (Bac. Max. 10). See below, para.13-126.

305. *West London Ry v London and N.W. Ry (1853) 11 C.B. 327, 356*. See also *Burges v Wickham (1863) 3 B. & S. 669, 698*; *Booth v Alcock (1873) L.R. 8 Ch. App. 663, 667*; *Thames and*

Mersey Marine Insurance Co v Hamilton, Fraser & Co (1887) 12 App. Cas. 484, 490; *Shell Tankers (UK) Ltd v Astro Comino Armadora SA [1981] 2 Lloyd's Rep. 40*.

306. *Rhodia International Holdings Ltd v Huntsman International LLC [2007] EWHC 292 (Comm), [2007] 2 All E.R. (Comm) 577*; *EDI Central Ltd v National Car Parks Ltd [2010] CSOH 141, 2011 S.L.T. 75*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(c) - Whole Contract to be Considered [307]

The whole contract is to be considered

13-065

Every contract is to be construed with reference to its object and the whole of its terms, [308] and accordingly, the whole context must be considered in endeavouring to interpret it, even though the immediate object of inquiry is the meaning of an isolated word or clause [309]:

> "It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." [310]

And so Lord Davey said in *N.E. Ry v Hastings*, [311] quoting Lord Watson [312]:

> "The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible."

13-066

For example, in the case of a bond with a condition, the condition may be read in order to explain the obligatory part of the instrument, e.g. where no species of money was mentioned, but the debtor was bound for 7,700 [313]; and in determining the meaning of words which are used for the purpose of designating periods of time, such as the words "from" and "until", [314] the whole contract is to be taken into consideration. [315] Also, when the meaning of a contract for services is ambiguous, the court will take into consideration even the price agreed to be paid for those services for the purpose of enabling them to determine the extent of the service to be rendered under the contract. [316]

13-067

Nevertheless:

> "… it has long been recognised … that to seek perfect consistency and economy of

> draftsmanship in a complex form of contract which has evolved over many years is to pursue a chimera." [317]

Although the court is bound to have regard to the whole of the contract and the words used, it may be necessary to adapt the language in order to effect the intentions of the parties. [318]

Control by recitals

13-068

When the words in the operative part of an instrument are ambiguous, the recitals and other parts of the instrument may be used to fix the appropriate meaning of those words. [319] But clear words in the operative part of an instrument cannot be controlled by recitals. [320]

Several instruments

13-069

Several instruments made to effect one object may be construed as one instrument, and be read together, but so that each shall have its distinct effect in carrying out the main design. [321] Thus, a lease and counterpart are two documents relating to one transaction and a palpable mistake in the lease may be corrected by reference to the counterpart, just as it might be by reference to other parts of the lease itself [322]:

> "Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to the case as if they were one deed." [323]

Yet although the words "contemporaneously executed" have been used, there is no doubt that this is not essential, so long as the court, having regard to the circumstances, comes to the conclusion that the series of documents represents a single transaction between the same parties. [324] So the articles of association of a company may be read to explain the memorandum [325] and a prospectus which invited applications for deposit notes on certain terms could be read together with a deposit note from which one of those terms had been omitted. [326] In *Re Sigma Finance Corp* [327] the Supreme Court emphasised the need, when looking at a complex series of agreements, to construe an agreement which was part of a series of agreements by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme. Contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. [328]

Supplemental instruments

13-070

Under s.58 of the Law of Property Act 1925, any instrument expressed to be supplemental to a previous instrument shall, as far as may be, be read and have effect as if the supplemental instrument contained a full recital of the previous instrument.

Alterations and deletions

13-071

Evidence of prior negotiations is normally not admissible to construe a written contract [329] and drafts will not be admitted either to alter the language of the contract or to help in its interpretation. [330] So, where an instrument appears to have been altered while the parties were negotiating, the court cannot look at it as it originally stood compared with the alterations which were made in it, to see whether those alterations will throw any light upon the question of interpretation. [331] However, when the parties use a printed form, and delete parts of it, there is some authority for the view that regard may be paid to what has been deleted as part of the surrounding circumstances in the light of which the meaning of the words which they chose to leave in is to be ascertained. [332] But there is weighty authority to the contrary. [333] In any event, it is doubtful whether the court can look at the words deleted except to resolve an ambiguity in the words retained. [334] The position may nevertheless be different where alterations are made to an already concluded agreement. In *Punjab National Bank v De Boinville* [335] Staughton L.J. said:

> "… if the parties to a concluded agreement subsequently agree in express terms that some words in it are to be replaced by others, one can have regard to all aspects of the subsequent agreement in construing the contract, including the deletions, even in a case which is not, or not wholly, concerned with a printed form."

Also where a one-off contract has been drafted by reference to a standard form contract which formed the basis for its drafting, the court can take into account the omission from the one-off contract of words that appear in the standard form contract in order to resolve an ambiguity in the former document. [336]

Printed and written clauses

13-072

Where the contract is contained in a printed form with writing superadded, the written words, if there should be any reasonable doubt about the sense and meaning of the whole, are to have greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects. [337] Nevertheless, it is open to the parties to stipulate in their printed conditions of contract that written provisions appended to the printed form are not to override, modify or affect in any way the application or interpretation of that which is contained in the printed conditions, and effect must then be given to such a stipulation even though this is contrary to the ordinary rule. [338]

Discrepancy between words and figures

13-073

In the event of a difference between words and figures, the written words normally prevail. [339]

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn (2011); Mitchell, *Interpretation of Contracts* (2007).

307. Ex antecedentibus et consequentibus fit optima interpretatio (2 Co.Inst. 317).

308. *Throcmerton v Tracey (1585) 1 Plow. 145, 161*; *Hume v Rundell (1824) 2 S. & S. 174, 177*; *Richards v Bluck (1848) 6 C.B. 437, 441*; *Reid v Fairbanks (1853) 13 C.B. 692, 730*; *Re Strand Music Hall Co Ltd (1865) 35 Beav. 153, 159*; *Miller v Borner [1900] 1 Q.B. 691*; *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 W.L.R. 1095* at [10].

309. *Smith v Packhurst (1742) 3 Atk. 135, 136*; *Browning v Wright (1799) 2 B. & P. 13*; *Stavers v Curling (1836) 3 Scott 740*; *Turner v Evans (1853) 2 E. & B. 512*; *Glynn v Margetson [1893] A.C. 351*; *Midland Ry of Western Australia v State of Western Australia [1956] 1 W.L.R. 1037*; *Nereide SpA di Navigazione v Bulk Oil International Ltd [1982] 1 Lloyd's Rep. 1*; *Abu Dhabi National Tanker Co v Product Star Shipping Ltd [1991] 2 Lloyd's Rep. 468, 478, [1993] 1 Lloyd's Rep. 397*; *Cementation Piling and Foundations Ltd v Aegon Insurance Co Ltd [1995] 1 Lloyd's Rep. 97, 101*; *International Fina Services AG v Katrina Shipping Ltd [1995] 2 Lloyd's Rep. 344, 350*.

310. *Barton v Fitzgerald (1812) 15 East 529, 541*; *Coles v Hulme (1828) 8 B. & C. 568*. See also *Trenchard v Hoskins (1625) Winch. 93*.

311. *[1900] A.C. 260, 267*.

312. *Chamber Colliery Co v Twyerould (1893)* reported *[1915] 1 Ch. 268n, 272*. See also *Sir Lindsay Parkinson & Co v Commissioners of H.M. Works and Public Buildings [1949] 2 K.B. 632, 662*.

313. *Coles v Hulme (1828) 2 B. & C. 568*.

314. See below, para.21-025.

315. *R. v Stevens (1804) 5 East 244*; *Wilkinson v Gaston (1846) 9 Q.B. 137*.

316. *Allen v Cameron (1833) 1 C. & M. 832, 840*.

317. *Homburg Houtimport PV v Agrosin Private Ltd [2003] UKHL 12, [2004] 1 A.C. 715* at [12], per Lord Bingham, citing *Simond v Boydell (1779) 1 Dougl. 268*; *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd [1908] A.C. 16, 20-21*; *Hillas & Co Ltd v Arcos Ltd (1932) 43 Ll.L. Rep. 35*; *Chandris v Isbrandtsen-Moller Inc [1951] 1 K.B. 240, 245*.

318. See below, para.13-074.

319. *Hesse v Albert (1828) 3 M. & Ry 406*; *Walsh v Trevanion (1850) 15 Q.B. 733, 751*; *Re Mitchell's Trusts (1878) 9 Ch. D. 5, 9*; *Leggott v Barrett (1880) 15 Ch. D. 306, 311*; *Re Moon Ex p. Dawes (1886) 17 Q.B.D. 275, 286*; *Orr v Mitchell [1893] A.C. 238, 253, 254*; *Crouch v Crouch [1912] 1 K.B. 378*; *Rutter v Charles Sharpe & Co [1979] 1 W.L.R. 1429, 1433* (factual matrix).

320. *Leggott v Barrett (1880) 15 Ch. D. 306, 311*; *Re Moon Ex p. Dawes (1886) 17 Q.B.D. 275, 286*. See also *Young v Smith (1865) L.R. 1 Eq. 180, 183*; *Dawes v Tredwell (1881) 18 Ch. D. 354, 358*; *Foakes v Beer (1884) 9 App. Cas. 605*; *Australian Joint Stock Bank v Bailey [1899] A.C. 396*; *Royal Insurance Co Ltd v G. & S. Assured Investments Co Ltd [1972] 1 Lloyd's Rep. 267, 274*; *Rutter v Charles Sharpe & Co [1979] 1 W.L.R. 1428, 1433*; *Mr H TV Ltd v ITV2 Ltd [2015] EWHC 2840 (Comm)* at [38]. In *Russell v Stone (trading as PSP Consultants) [2017] EWHC 1555 (TCC)* Coulson J. noted that modern methods of interpretation, in which background plays a far larger part than used to be the case, may have "tempered" the traditional approach, such that recitals in a deed can be looked at as part of the surrounding circumstances of the contract "without a need to find ambiguity in the operative provisions of the contract".

321. *Duke of Bolton v Williams (1793) 2 Ves. 138*; *Harrison v Mexican Rail Co (1875) L.R. 19 Eq. 358*; *Stott v Shaw [1928] 2 K.B. 26*.

322. *Burchell v Clark (1876) 2 C.P.D. 88*; *Matthews v Smallwood [1910] 1 Ch. 777*.

323. *Manks v Whiteley [1912] 1 Chs 735, 754* (reversed on other grounds sub nom. *Whiteley v Delaney [1914] A.C. 132*); *Fowler v Hunter (1829) 3 Y. & J. 506*.

324. *Smith v Chadwick (1882) 20 Ch. D. 27, 63*; *Ford v Stuart (1852) 15 Beav. 493*; *Whitbread v Smith (1854) 3 De G.M. & G. 727*.

325. *Re Capital Fire Insurance Association (1882) 21 Ch. D. 209, 212*.

326. *Jacobs v Batavia and General Plantations Trusts Ltd [1924] 2 Ch. 329*; cf. *Smith v Chadwick (1882) 20 Ch. D. 27*.

327. *[2009] UKSC 2, [2010] 1 All E.R. 571*. See also *Deutsche Bank AG v Sebastian Holdings Inc [2010] EWCA Civ 998, [2011] 1 Lloyd's Rep. 106* at [40]; *Royal Bank of Scotland Plc v Highland Financial Partners LP [2010] EWCA Civ 809* at [11]; and *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No.1 Plc [2016] UKSC 29* at [30], although it was acknowledged that in the case of a contract or trust deed which governs the terms upon which a negotiable instrument is held "very considerable circumspection" is appropriate before the contents of such other documents are taken into account.

328. *RWE Npower Renewables Ltd v J N Bentley Ltd [2014] EWCA Civ 150*, at [15]. Thus it should only be in cases of a "clear and irreconcilable discrepancy" that it should be necessary for a court to have to resolve any discrepancy between the terms (see below, para.13-080).

329. See below, para.13-122.

330. See below, para.13-122.

331. *Inglis v Buttery (1878) 3 App. Cas. 552, 558, 569, 576*; *Channel Islands Ferries Ltd v Sealink UK Ltd [1987] 1 Lloyd's Rep. 559, 577 (affirmed [1988] 1 Lloyd's Rep. 323)*.

332. *Baumwoll Manufactur von Scheibler v Gilchrest & Co [1892] 1 Q.B. 253, 256; cf. [1893] A.C. 8, 15*; *Gray v Carr (1871) L.R. 6 Q.B. 522, 524, 529*; *Stanton v Richardson (1874) L.R. 9 C.P. 390*; *Glynn v Margetson [1893] A.C. 351, 357*; *Caffin v Aldridge [1895] 2 Q.B. 648, 650*; *Santay & Co v Cox, McEllen & Co (1921) 10 Ll.L. Rep. 459, 460*; *Bailey Sons & Co v Ross, Smythe & Co [1940] 3 All E.R. 60*; *Louis Dreyfus et Cie v Parnaso Compania Naviera SA [1959] 2 Q.B. 498*; *London & Overseas Freighters Ltd v Timber Shipping Co SA [1972] A.C. 1, 15*; *Mottram Consultants Ltd v Bernard Sunley Ltd [1975] 2 Lloyd's Rep. 197, 209*; *Punjab National Bank v De Boinville [1992] 1 W.L.R. 1138, 1148*.

333. *Ambatielos v Jurgens [1923] A.C. 175, 185*; *Sassoon v International Banking Corp [1927] A.C. 711, 721*; *City & Westminster Properties (1934) Ltd v Mudd [1959] Ch. 129*; *Finzel, Berry & Co v Eastcheap Dried Fruit Co [1962] 1 Lloyd's Rep. 370, affirmed [1962] 2 Lloyd's Rep. 11*; *Compania Naviera Termar SA v Tradax Export SA [1965] 1 Lloyd's Rep. 198, 204*; *Borthwick (Thomas) (Glasgow) Ltd v Bunge & Co Ltd [1969] 1 Lloyd's Rep. 17*; *Tradax Export v Volkswagenwerk [1969] 2 Q.B. 599, 607*; *Ben Shipping Co (Pte) Ltd v An-Board Bainne [1986] 2 Lloyd's Rep. 285, 291*; *Wates Construction (London) Ltd v Franthom Property Ltd (1991) 7 Const. L.J. 243*; *Rhodia Chirex Ltd v Laker Vent Engineering Ltd [2003] EWCA Civ 1859, [2004] B.L.R. 75*; *Mapani Copper Mines Plc v Millennium Underwriting Ltd [2008] EWHC 1331 (Comm), [2009] Lloyd's Rep. I.R. 158*.

334. *Louis Dreyfus et Cie v Parnaso Cia. Naviera SA [1959] 1 Q.B. 498*, reversed on other grounds *[1960] 2 Q.B. 49*.

335. *[1992] 1 W.L.R. 1138, 1149*. See also *Centrepoint Custodians Pty Ltd v Lidgerwood Investments Pty Ltd [1990] V.R. 411*; *Trasimex Holdings SA v Addax BV [1997] 1 Lloyd's Rep. 610, 614*; *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161* at [83], [84]; *KPMG v Network Rail Infrastructure Ltd [2007] EWCA Civ 363, [2007] Bus. L.R. 1336*.

336. *Team Services v Kier Management and Design (1994) 63 Build. L.R. 76*.

337. *Robertson v French (1803) 4 East 130, 136*; *Glynn v Margetson & Co [1893] A.C. 351, 358*; *Re L. Sutro & Co and Heilbut, Symons & Co [1917] 2 K.B. 348, 358, 361*; *Hadjipateras v Weigall & Co (1918) 34 T.L.R. 360*; *Société d'Avances Commerciales (London) Ltd v A. Besse & Co Ltd [1952] 1 T.L.R. 644*; *The Brabant [1967] 1 Q.B. 588*; *Kum v Wah Tat Bank Ltd [1971] 1 Lloyd's Rep. 439, 445*; *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru [1988] 1 Lloyd's Rep. 116, 121*; cf. *T. W. Thomas & Co v Portsea Steamship Co Ltd [1912] A.C. 1*; *Evergos Naftiki Eteria v Cargill Plc [1997] 1 Lloyd's Rep. 35, 38*; *Homburg Houtimport BV v Agrosin Ltd [2003] UKHL 12, [2004] 1 A.C. 715* at [11]; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54*.

338. *Gold v Patman & Fotheringham Ltd [1958] 1 W.L.R. 697, 701*; *North West Metropolitan Regional Hospital Board v T. A. Bickerton & Son Ltd [1970] 1 W.L.R. 607, 617*; *English Industrial Estates Corp v George Wimpey & Co Ltd [1973] 1 Lloyd's Rep. 118*. But the written provisions may be looked at "to follow exactly what was going on", *[1973] 1 Lloyd's Rep. 118*, at 126, 128.

339. *Saunderson v Piper (1839) 5 Bing.N.C. 425*; Bills of Exchange Act 1882 s.9(2).

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(d) - Making Sense of the Agreement

Meaning of agreement

13-074

It is not open to the court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think the parties ought to have agreed, or what the court may think would have been a reasonable contract for the parties to make. [340] Commercial common sense "should not be invoked to undervalue the importance of the language of the provision" which is to be construed. [341] But if, from the document itself and the admissible background, [342] the meaning of the agreement can reasonably be discerned, then the court will give effect to that meaning even though this involves departing from or qualifying particular words used. So the court will be prepared to restrict, transpose, modify, supply or reject words or terms in the document, provided the meaning of the document is plain in spite of the words. The duty of the court in this respect was summed up by Kelly C.B. in *Gwyn v Neath Canal Co* [343]:

> "The result of all the authorities is, that when a court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned."

Some examples of these expedients are discussed in the paragraphs which follow.

Restricting

13-075

Where some of the words in a printed form of charterparty were left in by oversight, instead of being struck out, the House of Lords restricted the printed words to those applicable to the particular agreement. [344] Also in *Glynn v Margetson* [345] there was a wide deviation clause in a bill of lading for the carriage of oranges from Malaga to Liverpool. The ship left Malaga for a port not on the way to Liverpool, and the oranges were damaged by the delay. The House of Lords held that the deviation clause must be restricted to conform with the intention of a voyage from Malaga to Liverpool with a perishable cargo; to hold otherwise would defeat the object of the contract.

Transposing

13-076

"Words shall be transposed to support the intent of the parties" [346]; "[t]he law is not nice in grants, and therefore it doth often transpose words contrary to their order to bring them to the intent of the parties". [347] In a marriage settlement the words "[s]uch younger child or children" were made to include both sons and daughters by transposing a clause creating a power to make provision "for such younger children" and that containing a limitation to daughters. [348]

Modifying

13-077

It has already been noted that the grammatical or ordinary sense of the words of a contract may be departed from if this would lead to some absurdity or inconsistency with the rest of the instrument or if there has been an obvious linguistic mistake. [349] It is also open to the court to correct a misnomer [350] or mistaken designation in a contract: Falsa demonstratio non nocet cum de corpore constat. [351] So where the parties to a charterparty attached thereto a typed paramount clause which stated that:

> "… this *bill of lading* shall have effect subject to the provisions of the Carriage by Sea Act of the United States … which shall be deemed to be incorporated herein,"

it was held that the erroneous description of the charterparty as a bill of lading did not defeat the intention of the parties that the document should be subject to the Act. [352] However, the court will not be inclined to engage in a "verbal manipulation" of a designation in a contract if the actual words used make perfectly good sense without any modification. [353] An obvious mistake in a written instrument can be corrected as a matter of construction without obtaining a decree in an action for rectification [354] (by a process which has been referred to, not without criticism, as "corrective interpretation" [355]) but there must have been a clear mistake and it must be clear what correction ought to be made in order to cure the mistake. [356] Such a mistake may well emerge only upon consideration of the content of the instrument against the admissible background (which must always be taken into account) [357] and correction of the mistake is then an aspect of the task of ascertaining what a reasonable person would have understood the parties to have meant. [358]

Supplying

13-078

In principle, the court will not interpolate words into a written instrument, of whatever nature, unless it is clear both that words have been omitted and what those words were. [359] But, in simple situations, the word "pounds", for example, when omitted, has been supplied after or before a figure in a bill of sale [360] or a bill of exchange, [361] and in deeds the name of the grantor, [362] the obligor [363] and the grantee [364] have been supplied. In more complex cases concerning commercial contracts the courts have gone further and supplied such words as were required to make commercial sense of the agreement. [365]

Rejecting

13-079

It might be thought to be a sensible principle of construction that an interpretation which leaves part of the language of a document useless or creates surplusage is to be avoided. But this presumption has often been said to be of little value in the construction of commercial documents. [366] If there is in a contract a word or phrase to which no sensible meaning can be given [367] or which is mere surplusage,

[368] it may be rejected. Inconsistent or repugnant words or expressions, if they cannot be harmonised, must similarly be rejected.

Inconsistent or repugnant clauses

13-080

Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected. [369] The old rule was, in such a case, that the earlier clause was to be received and the later rejected [370]; but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. When considering how to interpret a contract in the case of alleged inconsistency, the courts distinguish between a case where the contract makes provision for the possibility of inconsistency and the case where there is no such provision. In the latter case the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. [371] However, matters are otherwise in the case where there is a term in the contract dealing with the possibility of inconsistency. [372] In such a case court should approach the interpretation of the contract without any pre-conceived assumptions and should neither strive to avoid nor to find an inconsistency but rather should approach the documents in a "cool and objective spirit to see whether there is inconsistency or not". [373] To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. [374] A term may also be rejected if it is repugnant to the remainder of the contract. [375] However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement. [376] Thus, if there is a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the proviso is inconsistent and void. [377] But if a clause merely limits or qualifies without destroying altogether the obligation created by another clause, the two are to be read together and effect is to be given to the contract as disclosed by the instrument as a whole. [378]

Unforeseen events: change of circumstances

13-081

In a case from Scotland [379] the Supreme Court had to consider how a covenant should be construed in a novel legal and accounting context, which was not foreseen or foreseeable (or was "unthinkable") at the time the covenant was entered into. Lord Mance stated [380] that a court should first consider the "landscape, matrix and aim" of the agreement and then decide "how its language best operated in the fundamentally changed and unforeseen circumstances in the light of the parties' original intentions and purposes". The emphasis was placed upon the adoption of a "contextual and purposive" rather than a "mechanical" interpretation so that effect was given to the objectively ascertained intention of the parties in these changed circumstances and the court was not required to adopt a literal (or "mechanical") interpretation of the words when to do so would have failed to give effect to the intention of the parties as ascertained by the court. [381]

Clauses incorporated by reference

13-082

If clauses are incorporated by reference into a written agreement, and those clauses conflict with the clauses of the agreement, then, in the ordinary way, [382] the clauses of the written agreement will

prevail. [383] Moreover, the incorporating provision may be so general or wide as to have the effect of incorporating more than can make any sense in the context of the agreement, in which case the surplus may be rejected as insensible or inconsistent, or disregarded as "mere surplusage". [384] A term in a proposal for insurance which conflicts with a term of the policy will be overridden by the term of the policy. [385]

Grammatical errors

13-083

Errors of syntax are a particularly frequent source of disputes in relation to written contracts. However plain the syntax of a sentence may be, if it is clear from the content of the instrument and the admissible background [386] that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning prevails, in spite of the syntax of such particular sentence. So, in *Ewing v Ewing*, [387] a deed of partnership provided that the capital of a deceased partner should be paid out as at the last balance by certain regular instalments "with interest thereon from the date of the last balance". The word "thereon" was held to refer not to the last instalment but was intended to be payable on the balance of the capital remaining unpaid. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [388] a majority of the House of Lords held that an exception from an assignment of "[a]ny claim (whether sounding in rescission for undue influence or otherwise)" should be construed to read "[a]ny claim sounding in rescission (whether for undue influence or otherwise)", thus limiting the exception. The background circumstances and the terms of related non-contractual documents showed, it was said, that the apparent syntax did not convey the intended meaning. In *Chartbrook Ltd v Persimmon Homes Ltd* [389] the House of Lords held that to interpret the definition of "additional residential payment" in the contract in accordance with ordinary rules of syntax made no commercial sense and amended the definition accordingly. Lord Hoffmann stated that it must be shown that "something must have gone wrong with the language" [390] and then "what a reasonable person would have understood the parties to have meant by using the language that they did". [391]

Saving the document

13-084

If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, ineffective or meaningless, the former sense is to be adopted. This principle is often expressed in the phrase ut res magis valeat cum pereat. [392] Thus, if by a particular construction the agreement would be rendered ineffectual and the apparent object of the contract would be frustrated, but another construction, though in itself less appropriate looking to the words only, would produce a different effect, the latter interpretation is to be applied, if that is how the agreement would be understood by a reasonable person with a knowledge of the commercial purpose and background of the transaction. [393] So, where the words of a guarantee were capable of expressing either a past or a concurrent consideration, the court adopted the latter construction, because the former would render the instrument void. [394] If one construction makes the contract lawful and the other unlawful, the former is to be preferred. Thus a bond conditioned "to assign all offices" will be construed to apply to such offices as are by law assignable. [395]

Party cannot rely on his own breach

13-085

It has been said that, as a matter of construction, unless the contract clearly provides to the contrary [396] it will be presumed that it was not the intention of the parties that either should be entitled to rely on his own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under

it. [397] This presumption applies only to acts or omissions which constitute a breach by that party of an express or implied contractual obligation, [398] or (possibly) of a non-contractual duty, [399] owed by him to the other party. Breach of a duty, whether contractual or non-contractual, owed to a stranger to the contract will not suffice. [400] However, such a "principle of construction" appears to be somewhat different in nature from those discussed above. It may therefore be that it is better regarded as depending on an implied term of the contract in question [401] or as one illustration of a more general principle that "[a] man cannot be permitted to take advantage of his own wrong". [402]

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn (2011); Mitchell, *Interpretation of Contracts* (2007).

340. *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp [2000] 1 Lloyd's Rep. 339* at [29]. See also *Wickman Machine Tool Sales Ltd v Schuler AG [1974] A.C. 235, 251* ; *Equity & Law Life Assurance Plc v Bodfield Ltd [1987] 1 E.G.L.R. 124*; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [12]; *HHR Pascal BV v W2005 Puppet II BV [2009] EWHC 2771 (Comm), [2010] 1 All E.R. (Comm) 399; Lord Goff [1984] L.M.C.L.Q. 382, 391*.

341. *Arnold v Britton [2015] UKSC 36, [2015] 2 W.L.R. 1593* at [17]. The importance of giving appropriate weight to the language of the contract, especially where the parties have access to skilled legal advice, has been recognised in more recent case law: see, for example, *Canary Wharf Finance II Plc v Deutsche Trustee Co Ltd [2016] EWHC 100 (Comm)* at [17] and *Vitol E & P Ltd v Africa Oil and Gas Corp [2016] EWHC 1677 (Comm)*; *Carillion Construction Ltd v Emcor Engineering Services Ltd [2017] EWCA Civ 65, [2017] B.L.R. 203* at [46]; *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWCA Civ 990, [2017] 1 W.L.R. 1893* at [42].

342. See below, para.13-121.

343. *(1865) L.R. 3 Ex. 209, 215*, cited with approval by Lord Lowry in *Forsikringsaktieselskapet Vesta v J. N. E. Butcher, Bain Dawes Ltd [1989] 1 Lloyd's Rep. 331, 345*. See also *Indian Oil Corp v Vanol Inc [1991] 2 Lloyd's Rep. 634, 636*.

344. *Baumwoll Manufactur von Scheibler v Gilchrest & Co [1893] A.C. 8, 15*. See also *Dudgeon v Pembroke (1877) 2 App. Cas. 284*.

345. *[1893] A.C. 351, 357*. See also *Davy Offshore Ltd v Emerald Field Contracting Ltd [1992] 2 Lloyd's Rep. 142, 155*. cf. *G.H. Renton & Co Ltd v Palmyra Trading Corp of Panama [1957] A.C. 149*; *Sudatlantica Navegacion SA v Devamar Shipping Corp [1985] 2 Lloyd's Rep. 271, 274*. See below, para.15-010.

346. Comyns' Digest, art."Parols", A.21.

347. *Parkhurst v Smith (1742) Wiles 327, 332*; cf. *Magrath v McGeany [1938] Ir. R. 309*.

348. *Fenton v Fenton (1837) 1 Dr. & W. 66*.

349. See above, para.13-056.

350. The law relating to misnomer was explored by Rix L.J. in *Dumford Trading AG v DAO Atlantrybflot [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289*, where this paragraph was cited (at [27]); but see below, para.13-127. See also *The Tutova [2006] EWHC 2223 (Comm), [2007] 1 Lloyd's Rep. 104* at [10]; *Front Carriers Ltd v Atlantic and Orient Shipping Corp [2007] EWHC 421 (Comm), [2007] 2 Lloyd's Rep. 131* at [44]; *Gastronome (UK) Ltd v Anglo Dutch Meals (UK) Ltd [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587* at [14]; *Liberty Mercian Ltd v Cuddy Civil*

Engineering Ltd [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761 at [81].

351. *Llewellyn v Jersey (1843) 11 M. & W. 183, 189*; *Morrell v Fisher (1849) 4 Exch. 591, 604*; *Cowen v Truefitt Ltd [1899] 2 Ch. 309*; *Eastwood v Ashton [1915] A.C. 900, 914*; *Whittam v W.J. Daniel & Co Ltd [1962] 1 Q.B. 271, 277*; *F. Goldsmith (Sicklesmere) Ltd v Baxter [1970] Ch. 85*; *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd [1975] 1 W.L.R. 1281*; *Nittan v Solent Steel Fabrication Ltd [1981] 1 Lloyd's Rep. 633*; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M. & I.) Ltd [1981] 2 Lloyd's Rep. 659 (affirmed [1982] 2 Lloyd's Rep. 42)*; *Mohammed bin Abdul Rahman Orri v Seawind Navigation Co SA [1986] 1 Lloyd's Rep. 36*; *Coral (UK) Ltd v Rechtman [1996] 1 Lloyd's Rep. 235*; *Gastronome (UK) Ltd v Anglo-Dutch Meats (UK) Ltd [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587*. Contrast *Internaut Shipping GmbH v Fercometal SARL [2003] EWCA Civ 812, [2003] 2 Lloyd's Rep. 430* (mistake beyond misnomer).

352. *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1959] A.C. 133*. In the Court of Appeal, it had been held that the paramount clause was meaningless and to be rejected: *[1957] 2 Q.B. 233*.

353. *Miramar Maritime Corp v Holborn Oil Trading Ltd [1984] A.C. 676*. But see *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd [1997] A.C. 749*.

354. *East v Pantiles Plant Hire Ltd [1982] 2 E.G.L.R. 111* at 112; *Holding & Barnes Plc v Hill House Hammond Ltd [2001] EWCA Civ 1334* at [14]; *Lafarge (Aggregates) Ltd v London Borough of Newham [2005] EWHC 1337 (Comm), [2005] 2 Lloyd's Rep. 577* at [25]; *Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63, (Comm); [2006] 1 Lloyd's Rep. 599* at [109]; *Littman v Aspen Oil Broking Ltd [2005] EWCA Civ 1579, [2006] 2 P. & C.R. 2*. The relationship between interpretation and rectification has been variously described in the case law. In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44, [2011] 1 A.C. 662* , Lord Clarke (at [45]) stated that the relationship between the two was "close", whereas Leggatt J. in *Tartsinis v Navona Management Co [2015] EWHC 57 (Comm)* at [13] described them as "very different exercises".

355. *Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736, [2013] Ch. 305* at [62]. For criticism see Buxton [2010] C.L.J. 253.

356. *East v Pantiles Plant Hire Ltd [1982] 2 E.G.L.R. 11* at 112; *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [22]; *Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429, [2011] 1 W.L.R. 770* at [21]; *ING Bank NV v Ros Roca [2011] EWCA Civ 353, [2012] 1 W.L.R. 472* at [22]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761* at [81]; *Bouygues (UK) Ltd v Febrey Structures Ltd [2016] EWHC 1333 (TCC)*; *LSREF III Wight Ltd v Millvalley Ltd [2016] EWHC 466 (Comm)*; *Hayfin Opal Luxco 3 SARL v Windermere VII CMBS Plc [2016] EWHC 782 (Ch)*.

357. See below, paras 13-083, 13-121.

358. *KPMG v Network Rail Infrastructure Ltd [2007] EWCA Civ 363, [2007] Bus. L.R. 1336* at [44]-[50]; *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [22]-[23]; *ING Bank NV v Ros Roca [2011] EWCA Civ 353, [2012] 1 W.L.R. 472* at [22]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761* at [81].

359. *Homburg Houtimport BV v Agrosin Private Ltd [2003] UKHL 12, [2004] 1 A.C. 715* at [23]; *Cambridge Display Technology Ltd v EI Dupont de Nernouts [2004] EWHC 1415 (Ch) [2005] F.S.R. 14*.

360. *Mourmand v Le Clair [1903] 2 K.B. 216*; *Coles v Hulme (1828) 8 B. & C. 568*.

361. *Elliott's Case (1777) 2 East P.C. 951; 1 Leach 175*.

362. *Lord Say and Seal's Case (1711) 10 Mod. 41, 45*.

363. *Dobson v Keys (1610) Cro.Jac. 261*.

364. Co.Litt. 7a.

365. *Tropwood A.G. of Zug v Jade Enterprises Ltd [1982] 1 Lloyd's Rep. 232*; *Homburg Houtimport BV v Agrosin Private Ltd [2003] UKHL 12, [2004] 1 A.C. 715*; cf. *Petroleo Brasileiro SA v Elounda Shipping Co [1985] 2 Lloyd's Rep. 154*; *City Alliance Ltd v Oxford Forecasting Services Ltd [2001] 1 All E.R. (Comm) 233, 237*; *X v Y [2011] EWHC 152 (Comm), [2011] 1 Lloyd's Rep. 694*.

366. *Royal Greek Government v Minister of Transport (1949) 83 Ll.L. Rep. 228, 235*; *Chandris v Isbrandtsen-Moller Inc [1951] 1 K.B. 385, 392*; *Total Transport Corp v Arcadia Petroleum Ltd [1998] 1 Lloyd's Rep. 351, 357*.

367. *Smith v Packhurst (1742) 3 Atk. 135, 136*; *Stone v Yeovil Corp (1876) 1 C.P.D. 691, 701*; *Nicolene v Simmonds [1953] 1 Q.B. 543*. Contrast *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd [1953] 1 W.L.R. 280*; *Tropwood A.G. of Zug v Jade Enterprises Ltd [1982] 1 Lloyd's Rep. 232*; *Commercial Union Assurance Co v Sun Alliance Insurance Group Plc [1992] 1 Lloyd's Rep. 475, 480*.

368. *Waugh v Bussell (1814) 5 Taunt. 707, 711*; *Gray v Carr (1871) L.R. 6 Q.B. 522, 536, 550, 557*; *Burrell & Sons v F. Green & Co [1914] 1 K.B. 293, 303*; *Chandris v Isbrandtsen-Moller Co Inc [1951] 1 K.B. 240, 245*; *Carga del Sur Compania Naviera SA v Ross T. Smyth & Co Ltd [1962] 2 Lloyd's Rep. 147, 154*; *The Merak [1965] P. 223*; *Pera Shipping Corp v Petroship SA [1985] 2 Lloyd's Rep. 103, 106-107*; *Mangistaumunaigaz Oil Production Association v United World Trade Inc [1995] 1 Lloyd's Rep. 617*; *Total Transport Corp v Arcadia Petroleum Ltd [1998] 1 Lloyd's Rep. 351, 357-358*.

369. *Walker v Giles (1848) 6 C.B. 662, 702*; *Love v Rowtor Steamship Co Ltd [1916] 2 A.C. 527, 535* ; *Sabah Flour and Feedmills Sdn. Bhd. v Comfez Ltd [1988] 2 Lloyd's Rep. 18*; cf. *Taylor v Rive Droite Music Ltd [2005] EWCA Civ 1300, [2006] E.M.L.R. 4*.

370. Shep.Touch. 88; *Doe d. Leicester v Biggs (1809) 2 Taunt. 109, 113*; *Forbes v Git [1922] 1 A.C. 256, 259*.

371. ! *RWE Npower Renewables Ltd v JN Bentley Ltd [2014] EWCA Civ 150*.

372. ! *Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep. 342*; *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd [2016] EWCA Civ 496*.

373. ! *Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep. 342, 350*; *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd [2016] EWCA Civ 496*.

374. ! *Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep. 342, 350*; *Cobelfret Bulk Carriers NV v Swissmarine Services SA [2009] EWHC 2883 (Comm), [2010] 1 Lloyd's Rep. 317* at [20]; *Public Company Rise v Nibulon SA [2015] EWHC 684 (Comm)*; *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd [2016] EWCA Civ 496*.

375. ! *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1959] A.C. 133*. ; *Mercuria Energy Trading Pte Ltd v Citibank NA [2015] EWHC 1481 (Comm), [2015] 1 C.L.C. 999* at [76].

376. *Barton v Fitzgerald (1812) 15 East 529, 541*; *Bush v Watkins (1851) 14 Beav. 425, 432*; *Société Co-operative Suisse des Céréales et Matiéres Fourrageres v La Plata Cereal Co SA (1947) 80 Ll.L. Rep. 530, 537*; *Bremer Handelsgesellschaft mbH v J.H. Rayner & Co Ltd [1979] 2 Lloyd's Rep. 216*; *Sudatlantica Navegacion SA v Devamar Shipping Corp [1985] 2 Lloyd's Rep. 271*;

Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep. 342, 349; *STX Pan Ocean Co Ltd v Ugland Bulk Transport AS [2007] EWHC 1317 (Comm), [2008] 1 Lloyd's Rep. 86* at [18]; *RWE Npower Renewables Ltd v J N Bentley Ltd [2014] EWCA Civ 150*.

377. *Furnivall v Coombes (1843) 5 M. & G. 736*. See also *Watling v Lewis [1911] 1 Ch. 414*; *Re Tewkesbury Gas Co [1911] 2 Ch. 279 (affirmed [1912] 1 Ch. 1)*.

378. ! *Williams v Hathaway (1877) 6 Ch. D. 544*; *Forbes v Git [1922] 1 A.C. 256, 259*; *Walton (Grain & Shipping) Ltd v British Italian Trading Co Ltd [1959] 1 Lloyd's Rep. 223, 227*; *Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep. 342, 351*; *Alexander (as representative of the "Property 118 Action Group") v West Bromwich Mortgage Co Ltd [2016] EWCA Civ 496*; *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd [2017] UKSC 59*. It is a question of construction for the court whether the multiple provisions cover the same or similar territory are all effective to impose the several obligations that their terms suggest, or that the effect of one or more provisions is to modify or exclude the apparent meaning of another provision of the contract: *125 OBS (Nominees1) v Lend Lease Construction (Europe) Ltd [2017] EWHC 25 (TCC)* at [99].

379. *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc [2013] UKSC 3, [2013] 1 W.L.R. 366*.

380. *[2013] UKSC 3* at [22]-[23].

381. ! *[2013] UKSC 3* at [21]. Contrast the more conservative approach taken by the Supreme Court in *Arnold v Britton [2015] UKSC 36, [2015] 2 W.L.R. 1593*. There are, however, no special rules of interpretation applicable to long term or relational contracts other than the need to recognise that terms in such contracts must often be phrased in broad, flexible terms to enable parties to adjust their bargain to meet changing circumstances and the courts should therefore not be too astute to declare such terms to be unenforceable on the ground of uncertainty or vagueness: *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396* at [64]–[68].

382. cf. *Sabah Flour and Feedmills Sdn. Bhd. v Comfez Ltd [1988] 2 Lloyd's Rep. 18*; *The Northgate [2007] EWHC 2796 (Comm), [2008] 1 Lloyd's Rep. 511* at [39], [53].

383. *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1959] A.C. 133, 155, 178-179*; *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd [1975] 1 W.L.R. 1281, 1289*; *Sabah Flour and Feedmills Sdn. Bhd. v Comfez Ltd [1988] 2 Lloyd's Rep. 18, 20*; *Metalfer Corp v Pan Ocean Shipping Co Ltd [1998] 2 Lloyd's Rep. 632, 637*; *Finagra (UK) Ltd v O.T. Africa Line Ltd [1998] 2 Lloyd's Rep. 622, 627*; *BCT Software Solutions Ltd v Arnold Laver & Co Ltd [2002] EWHC 1298 (Ch), [2002] 2 All E.R. (Comm) 85* at [42]; *Petroleum Oil and Gas Corp of South Africa (Pty) Ltd v F38 Singapore Pte Ltd [2008] EWHC 2480 (Comm), [2009] 1 Lloyd's Rep. 107* at [20]; *Cobelfret Bulk Carriers NV v Swissmarine Services SA [2009] EWHC 2883 (Comm), [2010] 1 Lloyd's Rep. 317* at [20]; cf. *Bayoil SA v Seaworld Tankers Corp (The Leonidas) [2001] 1 Lloyd's Rep. 533* (no conflict between clauses).

384. ! *Skips A/S Nordheim v Syrian Petroleum Co Ltd [1983] 2 Lloyd's Rep. 592, 594*; cf. *Miramar Maritime Corp v Holborn Oil Trading Ltd [1984] A.C. 676, 683*; *Balli Trading Ltd v Afalona Shipping Co Ltd [1993] 1 Lloyd's Rep. 1, 6*; *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd [2015] EWCA 844*. When considering whether to incorporate the terms of one contract document into another contract, the first rule of interpretation is to construe the incorporating clause in order to decide on the width of the incorporation, and the second is that the court must read the incorporated wording into the host document to see if, in that setting, some parts of the incorporated wording nevertheless have to be rejected as inconsistent or insensible when read in their new context: *TJH and Sons Consultancy Ltd v CPP Group Plc [2017] EWCA Civ 46* at [13].

385. *Thor Navigation Inc v Ingosstrakh Insurance [2005] EWHC 19 (Comm), [2005] 1 Lloyd's Rep. 547* (applying *Izzard v Universal Insurance [1937] A.C. 773, 780*).

386. See below, para.13-121.

387. *(1882) 8 App. Cas. 822*. See also *Wills v Wright (1677) 2 Mod. 285*; *Waugh v Middleton (1853) 8 Exch. 352, 356*.

388. *[1998] 1 W.L.R. 896*. See also *Static Control Components (Europe) Ltd v Egan [2004] EWCA Civ 392; [2004] 2 Lloyd's Rep. 429*; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd [2004] EWHC 999 (Comm), [2005] 1 Lloyd's Rep. 307* at [95]; *Cereal Investments Co (CIC) SA v ED&F Man Sugar Ltd [2007] EWHC 2843 (Comm), [2008] 1 Lloyd's Rep. 355* at [19]; cf. *Armitage Staveley Industries Plc [2004] EWHC 2320 (Comm), [2004] Pens. L.R. 385*; *Osmium Shipping Corp v Cargill International SA [2012] EWHC 571 (Comm), [2012] 2 All E.R. (Comm) 197*.

389. *[2009] UKHL 38, [2009] 1 A.C. 1101*.

390. At [15].

391. At [21]. See *ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, [2012] 1 W.L.R. 472* at [22].

392. ! Verba ita sunt intelligenda ut res magis valeat cum pereat: Bac. Max. 3; Noy. Max. 50. The maxim can only be invoked in a case where there is a genuine ambiguity: *Egon Zehnder Ltd v Tillman [2017] EWCA Civ 1054* at [12].

393. *Solly v Forbes (1820) 2 B. & B. 38, 48*. See also Co.Litt. 42a; *Mills v Dunham [1891] 1 Ch. 576, 590*; *Lancashire CC v Municipal Mutual Insurance Ltd [1996] 3 All E.R. 545, 553, 557*; *Bank of Credit and Commerce International SA v Ali [2002] 1 A.C. 251, 269*; *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 447 (TCC), [2007] B.L.R. 195* at [57]-[58]; *Beckett Investment Management Group Ltd v Hall [2007] EWCA Civ 613, [2007] I.C.R. 1539*; *Pioneer Freight Futures Co Ltd v TMT Asia Ltd (No.2) [2011] EWHC 1888 (Comm), [2011] 2 Lloyd's Rep. 565* at [574].

394. *Haigh v Brooks (1839) 10 A. & E. 309*; *Goldshede v Swan (1847) 1 Exch. 154*; *Steele v Hoe (1849) 14 Q.B. 431*; *Broom v Batchelor (1856) 1 H. & N. 255*. See also *Rowell Leakey & Co v Scottish Provident Institution [1927] 1 Ch. 55, 65* (insurance policy).

395. *Harrington v Kloprogge (1785) 2 B. & B. 678*, note (a). See also *Fausset v Carpenter (1831) 2 Dow. & Cl. 232*; *Lewis v Davison (1839) 4 M. & W. 654*. The same principle applies to the performance of a contract: if a payment is made in performance of a contract partly legal and partly illegal it is presumed that it is made in performance of the legal part of the contract: *A. Smith & Son (Bognor Regis) Ltd v Walker [1952] 2 Q.B. 319*; *Cantor Art Services Ltd v Kenneth Bieber Photography Ltd [1969] 1 W.L.R. 1226*.

396. *Micklefield v S.A.C. Technology Ltd [1990] 1 W.L.R. 1002*. See also *Richco International Ltd v Alfred C. Toepfer International GmbH [1991] 1 Lloyd's Rep. 136*.

397. *Alghussein Establishment v Eton College [1988] 1 W.L.R. 587, HL*. See also *Doe d. Bryan v Bancks (1821) 4 B. & Ald. 401, 406*; *Malins v Freeman (1838) 4 Bing. N.C. 395, 399*; *New Zealand Shipping Co v Société des Ateliers et Chantiers de France [1919] A.C. 1, 6, 8, 9, 15*; *Quesnel Forks Gold Mining Co Ltd v Ward [1920] A.C. 222, 227*; *Amalgamated Building Contractors Ltd v Waltham Holy Cross U.D.C. [1952] 2 All E.R. 452, 455*; *Cheall v Association of Professional Executive and Computer Staff [1983] 2 A.C. 180, 189*; *Ackerman v Protim Services [1988] 2 E.G.L.R. 259*; *Gyllenhammar & Partners International Ltd v Saur Brodogradevna Industrija [1989] 2 Lloyd's Rep. 403, 412*; *Micklefield v S.A.C. Technology Ltd [1990] 1 W.L.R. 1002, 1007*; *Richco International Ltd v Alfred C. Toepfer International GmbH [1991] 1 Lloyd's Rep. 136, 144*; *Cerium Investments v Evans [1991] C.L.Y 1870 CA*; *WX Investments Ltd v Begg [2002] EWHC 925 (Ch), [2002] 1 W.L.R. 2849* at [12]. The breach may be deliberate or inadvertent: *Cheall v Association of Professional Executive and Computer Staff [1983] 2 A.C. 180*.

398. *Cheall v Association of Professional Executive and Computer Staff [1983] 2 A.C. 180*;

Alghussein Establishment v Eton College [1988] 1 W.L.R. 587; *Gyllenhammar & Partners International Ltd v Saur Brodogradevna Industrija [1989] 2 Lloyd's Rep. 403*; *J. Lauritzen A.S. v Wijsmuller BV [1990] 1 Lloyd's Rep. 1, 13*; *Antclizo Shipping Corp v Food Corp of India (The Antclizo) (No.2) [1992] 1 Lloyd's Rep. 558, 567-568*.

399. *Cheall v Association of Professional Executive and Computer Staff [1983] 2 A.C. 180*; *Ackerman v Protim Services [1998] 2 E.G.L.R. 259*; *J. Lauritzen A.S. v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep. 1, 13*; *Antclizo Shipping Corp v Food Corp of India (The Antclizo) (No.2) [1992] 1 Lloyd's Rep. 558, 568*; *Eurobank Ergasias SA v Kalliroi Navigation Co Ltd [2015] EWHC 2377 (Comm)*.

400. *Cheall v Association of Professional Executive and Computer Staff [1983] 2 A.C. 180*.

401. *Richco International Ltd v Alfred C. Toepfer International GmbH [1991] 1 Lloyd's Rep. 136*. See also *Bulk Shipping A.G. v Ipco Trading SA [1992] 1 Lloyd's Rep. 39, 43*; *BDW Trading Ltd v J M Rowe (Investments) Ltd [2011] EWCA Civ 548, [2011] 20 E.G. 113 (C.S.)* at [34]; and below, para.14-015.

402. See, e.g. *Rede v Farr (1817) 6 M. & S. 121, 124*; *Doe d. Bryan v Bancks (1821) 4 B. & Ald. 401, 409*; *Roberts v Bury Commissioners (1870) L.R. 4 C.P. 755*; *Alfred C. Toepfer v Peter Cremer [1975] 2 Lloyd's Rep. 118, 124*; *Total Transport Corp v Amoco Trading Co [1985] 1 Lloyd's Rep. 423, 426*. But that principle is not absolute: *Cheall v Association of Professional Executive and Computer Staff [1983] 2 A.C. 180, 189*; *Alghussein Establishment v Eton College [1988] 1 W.L.R. 587, 595*; *Micklefield v S.A.C. Technology Ltd [1990] 1 W.L.R. 1002*; *Richco International Ltd v Alfred C. Toepfer International GmbH [1991] 1 Lloyd's Rep. 136*; *Decoma UK Ltd v Haden Drysys International Ltd [2005] EWHC 2948 (TCC), (2005) 103 Const. L.R. 1*. See also below, para.14-015.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(e) - Construction against Grantor

Construction against grantor

13-086

Another principle of construction is that a deed or other instrument shall be construed more strongly against the grantor or maker thereof. [403] This rule is often misinterpreted. It is only to be applied to remove (and not to create) a doubt or ambiguity [404] and as a last resort where the issue cannot otherwise be resolved by the application of ordinary principles of construction. [405] Its application to negotiated contracts has also been doubted. [406] Nevertheless, despite certain doubts which have been cast upon it from time to time, [407] the principle has been constantly cited as a rule of construction from Coke's time to the present day. [408] For instance, Coke says [409], "[i]t is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself"; and in 1949, Evershed M.R. said:

> "We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended … that it has a remarkably, if not an extravagantly, wide scope, and I think that the rule contra proferentem should be applied." [410]

13-087

The justification for the rule has been said to be that:

> "… a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not." [411]

13-088

So, in the case of a guarantee, if the party who drafts it uses ambiguous language, such ambiguity may be taken more strongly against himself. [412] If a carrier gives two notices, limiting his responsibility

in cases of loss of goods, he is bound by that which is least beneficial to himself. [413] A notice under which a party claims a general lien is to be construed against him. [414] And if an instrument is made in terms so ambiguous as to make it doubtful whether it is a bill or note, the holder may, as against the maker of the instrument, treat it as either at his election. [415] Important applications of this principle arise in the case of conditions, warranties and exceptions in insurance policies [416] and in the case of time-bar [417] and exemption clauses, [418] for it is usually the party who has drafted the document who is seeking to rely on the protection of its provisions. [419]

Crown contracts

13-089

> "The King's grant is taken most strongly against the grantee, and most favourably for the King, although the thing which he grants came to the King by purchase or descent." [420]

This ancient rule is still applicable to grants of land or of an interest in land, [421] but it no longer applies to commercial contracts with the Crown. [422] In any event, it does not in any way override other principles of construction. [423]

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn (2011); Mitchell, *Interpretation of Contracts* (2007).

403. Verba cartarum fortius accipiuntur contra proferentem (Bac. Max. 3).

404. *Borradaile v Hunter (1843) 5 M. & G. 639*; *Birrell v Dryer (1884) 9 App. Cas. 345, 350*; *Cornish v Accident Insurance Co (1889) 23 Q.B.D. 453, 456*; *London & Lancashire Insurance v Bolands Ltd [1924] A.C. 836, 848*; *Houghton v Trafalgar Insurance Co [1954] 1 Q.B. 247*; *Lakeport Navigation Co Panama SA v Anonima Petroli Italiana [1982] 2 Lloyd's Rep. 205, 208*; *Aqua Design & Play International Ltd v Kier Regional Ltd [2002] EWCA Civ 797, [2003] B.L.R. 111*; *Tektrol Ltd v International Insurance Co of Hanover Ltd [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep. 701* at [8]; *West v Ian Finlay & Associates (a firm) [2014] EWCA Civ 316, [2014] B.L.R. 324*; *Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57, [2016] 3 W.L.R. 1422* at [6]; *Persimmon Homes Ltd v Ove Arup & Partners Ltd [2017] EWCA Civ 373, [2017] P.N.L.R. 29* at [52]–[53].

405. *Lindus v Melrose (1858) 3 H. & N. 177, 182*; *Lakeport Navigation Company Panama SA v Anonima Petroli Italiana SpA [1982] 2 Lloyd's Rep. 205, 208*; *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp [2000] 1 Lloyd's Rep. 339* at [37]; *Direct Travel Insurance v McGeown [2003] EWCA Civ 1606* at [13]; *Egan v Static Control Components (Europe) Ltd [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429* at [37]; *Cattles Plc v Welcome Financial Services Ltd [2010] EWCA Civ 599, [2010] 2 Lloyd's Rep. 514* at [43]; *AJ Building and Plastering Ltd v Turner [2013] EWHC 484, [2013] Lloyd's Rep. I.R. 629* (see below, Vol.II, para.42-088, n.592); *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd [2015] EWCA Civ 401*; *Hut Group Ltd v Nobahar-Cookson [2016] EWCA Civ 128* (although note the difference of view between Briggs L.J. (who at [12]–[21] invoked the contra proferentem rule) and Hallett L.J. and Moylan J. who did not (see paras [40] and [41]).

406. *K/S Victoria Street v House of Fraser (Stores Management) Ltd [2011] EWCA Civ 904, [2012] Ch. 497*; *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd [2015]*

EWCA Civ 401, [2015] 2 Lloyd's Rep. 1 at [69]-[71]; *Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372* at [20].

407. *Taylor v St Helens Corp (1877) 6 Ch. D. 264, 270*, per Jessel M.R., but the cases on which he relies turned upon the construction of wills. In more modern times cases can be found in which doubts have been expressed about the significance of the rule for commercial contracts (see, for example, *K/S Victoria Street v House of Fraser (Stores Management) Ltd [2011] EWCA Civ 904, [2012] Ch. 497* at [68]).

408. *Manchester College v Trafford (1679) 2 Show. 31*; *Johnson v Edgware, etc., Ry (1866) 35 Beav. 480, 484*; *Neill v Duke of Devonshire (1882) 8 App. Cas. 135, 149*; *Homburg Houtimport BV v Agrosin Private Ltd [2003] UKHL 12, [2004] 1 A.C. 715* at [144]; *Dairy Containers Ltd v Tasman Orient Line CV [2004] UKPC 22, [2005] 1 W.L.R. 215* at [12]. The principle is now mandatory in respect of certain consumer contracts by reg.7 of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) or, for contracts made on or after October 1, 2015, s.69 of the Consumer Rights Act 2015: see below, Vol.II, para.38-385.

409. Co.Litt. 36a, 183a, 183b.

410. *John Lee & Son (Grantham) Ltd v Railway Executive [1949] 2 All E.R. 581, 583*.

411. *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd [1996] 2 B.C.L.C. 69, 77* (Lord Mustill), applied in *Lexi Holdings Plc v Stainforth [2006] EWCA Civ 988*.

412. *Hargreave v Smee (1829) 6 Bing. 244, 248*; *Adams v Richardson & Starling Ltd [1969] 1 W.L.R. 1645, 1653*; *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd [1996] 2 B.C.L.C. 69*; *Coutts & Co v Stock [2000] 1 W.L.R. 906, 914*. But see *Egan v Static Control Components (Europe) Ltd [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429* at [37] and Vol.II, para.45-062.

413. *Munn v Baker (1817) 2 Stark. 255*.

414. *Crumpston v Haigh (1836) 2 Scott 684*.

415. *Edis v Bury (1827) 6 B. & C. 433*; *Lloyd v Oliver (1852) 18 Q.B. 471*.

416. *Blackett v Royal Exchange Assurance Co (1832) 2 Cr. & J. 244*; *Petros M. Nomikos Ltd v Robertson (1939) 64 Ll.L. Rep. 45*; *Tektrol Ltd v International Insurance Co of Hanover Ltd [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep. 701* at [8]; *Atlas Navios-Navegacao Lda v Navigators Insurance Co Ltd [2012] EWHC 802 (Comm), [2012] 1 Lloyd's Rep. 629* at [26]; and see Vol.II, para.42-077. See also *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [26].

417. *Board of Trade (Minister of Materials) v Steel Bus. & Co Ltd [1952] 1 Lloyd's Rep. 87*; *Pera Shipping Corp v Petroship SA [1985] 2 Lloyd's Rep. 103*.

418. ! See below, para.15-012. There is a possibility that the rule in its application to exclusion clauses might now develop separately from the contra proferentem rule. Instead of searching for the proferens to whom the rule may be applicable, the courts may regard the rule as a general rule of construction applicable to exclusion clauses according to which ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law: *Hut Group Ltd v Nobahar-Cookson [2016] EWCA Civ 128* at [18].

419. ! It has, however, been pointed out by Staughton L.J. in *Pera Shipping Corp v Petroship SA [1984] 2 Lloyd's Rep. 363, 365*, and in *Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep. 127, 134*, in relation to the application of the maxim, that the proferens is sometimes regarded as the draftsman of the document and sometimes as the party who seeks to rely on the protection of its provisions. These may not coincide. But note that in *Bloomberg LP v Sandberg*

(A Firm) [2015] EWHC 2858 (TCC), [2016] B.L.R. 72 at [24] Fraser J. held that the rule was of "no assistance" because he could not identify the proferens.

420. *Willion v Berkley (1562) 1 Plow. 223, 243*; *Att-Gen v Ewelme Hospital (1853) 17 Beav. 366, 385* ; *Feather v the Queen (1865) 6 B. & S. 257, 283, 284*; *Viscountess Rhondda's Claim [1922] A.C. 359, 353*; *Earl of Lonsdale v Att-Gen [1982] 1 W.L.R. 887, 901*.

421. *Earl of Lonsdale v Att-Gen [1982] 1 W.L.R. 887*.

422. *Lonrho Exports Ltd v Export Credit Guarantee Department [1999] Ch. 158*.

423. *Att-Gen v Ewelme Hospital (1853) 17 Beav. 366, 386*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(f) - Ejusdem Generis Principle

Ejusdem generis principle

13-090

The so-called "rule" which is laid down with reference to the construction of statutes, namely, that where several words preceding a general word point to a confined meaning the general word shall not extend in its effect beyond subjects ejusdem generis (of the same class), [424] applies in principle to the construction of contracts. [425] The principle depends on the assumed intention of the framer of the instrument, i.e. that the general words were only intended to guard against some accidental omission in the objects of the kind mentioned and were not intended to extend to objects of a wholly different kind. Indeed, this principle follows as a corollary of the principle that the whole contract is to be considered, [426] being simply that every word shall be taken in conjunction with the words that accompany it. [427] Therefore the words "all the perils" in the ordinary form of marine insurance policy include only perils of the sea or perils ejusdem generis therewith, because their meaning is restricted by the subject matter, i.e. marine risks, and by the genus of perils mentioned specifically in the policy. [428] General words such as "other accidents beyond the charterer's control" occurring at the end of a list of specific exceptions in a charterparty are construed to cover only accidents similar to those expressly mentioned. [429] Where a lease contained a proviso for an abatement of rent in case the demised premises should at any time during the term "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident", it was held that the words "inevitable accident" must be construed by the principle of ejusdem generis, that is, they must be taken to mean accident of a similar kind to "fire, flood, storm, or tempest", and not to include accidents occasioned by the acts or defaults of the contracting parties. [430]

No common category

13-091

The ejusdem generis principle cannot, however, be applied unless there is a class to which the general words can be restricted. Therefore, where the matters specifically referred to are so various that they fall into no common category the meaning of subsequent general words is not limited by relation to them. For instance, liability was repudiated in the event of "deficiency of men or owner's stores, breakdown of machinery, or damage to hull *or other accident*". It was held that the matters specifically referred to made up no common category, so that the general words "or other accident" extended to delay caused by stranding. [431] The class need not be definable with logical or scientific exactitude, provided it is reasonably clear what it includes and what it excludes; for example, "war and disturbance" sufficiently indicate a class that excludes damage from ice. [432] It has been held that where only one matter is specifically referred to, the principle cannot be applied, because a single species cannot constitute a class [433]; but there is no reason why in such a case the general words should not be limited with respect to the subject matter in relation to which they are used. [434] In a commercial contract, if a class cannot be found, that is one factor indicating that the parties did not intend to restrict the meaning of the words; but it is not universally true that, whenever a class cannot

be found, the words must have been intended to have their literal meaning, whatever other indications there may be to the contrary. [435]

Canon of construction

13-092

The ejusdem generis principle is not a rigid technical rule, but a mere canon of construction. It has been held that, in a commercial contract, where general words follow an enumeration of particular things, those words are prima facie to be construed as having their natural and larger meaning, and are not to be restricted to things ejusdem generis with those previously enumerated, unless there is something in the instrument which shows an intention so to restrict them. [436] Also where a charterparty contained an exemption from liability arising from "frost, flood, strikes … and any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo", it was held that the parties, by inserting the words, "of what kind soever", intended to exclude the ejusdem generis principle, and that the contract was to be construed so as to exclude delays caused by a block of other shipping at the loading port. [437] On the other hand, the words "or otherwise" may be subject to the ejusdem generis principle. [438]

13-093

Where specific words follow general words instead of preceding them, the House of Lords has held that, as a general rule, the generality of the earlier should not be restricted by the insertion of the subsequent words, which may be regarded simply as examples of what was meant by the general words. [439] Similarly, even if the specific words precede the general words, they may be regarded as examples of what is comprehended in the general words. [440]

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn (2011); Mitchell, *Interpretation of Contracts* (2007).

424. *Sandiman v Breach (1827) 7 B. & C. 96, 100*; *R. v Nevill (1846) 8 Q.B. 452*; *Re Stockport Ragged Schools [1898] 2 Ch. 687*; *Att-Gen v Brown [1920] 1 K.B. 773*.

425. *Cullen v Butler (1816) 5 M. & S. 461*; *Harrison v Blackburn (1864) 17 C.B.(N.S.) 678*; *Sun Fire Office v Hart (1889) 14 App. Cas. 98, 103*.

426. See above, paras 13-065—13-073.

427. The maxim is *noscitur a sociis: Newby v Sharpe (1878) 8 Ch. D. 39, 52*.

428. *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co (1887) 12 App. Cas. 494, 490*; *Bolivia Republic v Indemnity Mutual Marine Assurance Co [1909] 1 K.B. 785*; *Stott (Baltic) Steamers v Marten [1916] 1 A.C. 304*; Marine Insurance Act 1906 Sch.I r.12.

429. *Fenwick v Schmalz (1868) L.R. 3 C.P. 313*; *Re Richardsons and Samuel [1898] 1 Q.B. 261*; *Mudie v Strick (1909) 100 L.T. 701*; *Thorman v Dowgate Steamship Co [1910] 1 K.B. 410*; *Hadjipateras v S. Weigall & Co (1918) 34 T.L.R. 360*; *Aktieselskabet Frank v Namague Copper Co (1920) 25 Com. Cas. 212*; *Jones v Oceanic Steam Navigation Co [1924] 2 K.B. 730* (passage ticket); *Andre & Cie SA v Orient Shipping (Rotterdam) BV [1997] 1 Lloyd's Rep. 139*; *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd [2010] EWHC 1340 (Comm), [2011] 1 Lloyd's Rep. 187*. But see the cases on force majeure clauses in commercial contracts cited below, para.13-092 n.426.

430. *Saner v Bilton (1878) 7 Ch. D. 815*; *Manchester Bonded Warehouse Co v Carr (1880) 5 C.P.D.*

507; *Barking and Dagenham LBC v Stamford Asphalt Co Ltd, The Times, April 10, 1997*.

431. *S.S. Magnhild v McIntyre Bros & Co [1920] 3 K.B. 321; [1921] 2 K.B. 97*; *Tillmanns v S.S. Knutsford [1908] 2 K.B. 385, 395, 403, 409; affirmed [1908] A.C. 406*.

432. *Tillmanns v S.S. Knutsford [1908] 2 K.B. 385*; *Thorman v Dowgate S.S. Co [1910] 1 K.B. 410*; *Re Richardsons and Samuel [1898] 1 Q.B. 261*.

433. *R. v Special Commissioners [1923] 1 K.B. 393*; *Re Ellwood [1927] 1 Ch. 455*.

434. See above, para.13-064; *Newby v Sharpe (1878) 8 Ch. D. 39, 52*; *Foscolo Mango & Co Ltd v Stag Line Ltd [1931] 2 K.B. 48*.

435. *Chandris v Isbrandtsen-Moller Co Inc [1951] 1 K.B. 240, 246*.

436. *Andersen v Andersen [1895] 1 Q.B. 749*; *Chandris v Isbrandtsen-Moller Co Inc [1951] 1 K.B. 240*; *P.J. Vander Zijden Wildhandel NV v Tucker & Cross Ltd [1975] 2 Lloyd's Rep. 240*. Contrast *Tillmanns Co v S.S. Knutsford [1908] 2 K.B. 385*; *Crompton v Jarratt (1885) 30 Ch. D. 298* where the contrary presumption is said to be correct.

437. *Larsen v Sylvester & Co [1908] A.C. 295*; *Earl of Jersey v Neath Poor Law Union (1889) 22 Q.B.D. 555*; *Belcore Maritime Corp v Filli Moretti Cereali SpA [1983] 2 Lloyd's Rep. 66, 68*; *CA Venezolana de Navegacion v BankLine [1987] 2 Lloyd's Rep. 498, 507*; see also *Archbishop of Canterbury's Case (1596) 2 Co. Rep. 46a* (general words following particular words will not be taken to include anything of a superior class to that to which the particular words belong).

438. *Re Kershaw, Whittaker v Kershaw (1890) 45 Ch. D. 320*; cf. *Keeble v Keeble [1956] 1 W.L.R. 94*.

439. *Ambatielos v Anton Jurgens Margarine Works [1923] A.C. 175*. cf. *Herman v Morris (1919) 35 T.L.R. 328; affirmed (1919) 35 T.L.R. 574*.

440. *Stornvaart Maatschappij Sophie H. v Merchants' Marine Insurance Co Ltd (1919) 89 L.J.K.B. 834 HL*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(g) - Restriction by Express Provisions

Expressio unius

13-094

The express mention in an instrument of a particular person, power or thing may show an intention to exclude any other similar person, power or thing: expressio unius est exclusio alterius. [441] Thus, where a deed conveyed to a mortgagee an iron foundry and two dwelling-houses, and the appurtenances, together with the fixtures in and about the said houses, it was held that the specification of the fixtures in the dwelling-houses showed that those in the foundry were not intended to pass, although they would have passed had the other not been mentioned. [442] This maxim has, however, been said to be a valuable servant but a bad master in the construction of documents. Failure to complete the expressio may be accidental [443] and the maxim can only be applied if the instrument can be considered to contain all the terms agreed upon by the parties. [444] But, even with this qualification, arguments based on the maxim seem unlikely to carry much weight at the present day. [445] At most it can be only a presumption and subject always to the ascertainment of the true meaning of the contract.

Expressum facit cessare tacitum

13-095

It has also been said that, where there is an express covenant in an instrument on a particular matter, no implication of any other covenant on the same subject matter can be raised [446]:

> "Where the parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." [447]

But again it is doubtful whether this principle has any serious role to play in the modern law.

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn (2011); Mitchell, *Interpretation of Contracts* (2007).

441. Co.Litt. 210a; *Blackburn v Flavelle (1881) 6 App. Cas. 628, 634*.

442. *Hare v Horton (1833) 5 B. & Ad. 715*. See also *Wood v Rowcliffe (1851) 6 Exch. 407*; *Miller v Emcer Products Ltd [1956] Ch. 304*; *Tropwind v Jade Enterprises Ltd [1977] 1 Lloyd's Rep. 397, 401*; *Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 W.L.R. 588*; *Shell UK Ltd v Total UK Ltd [2010] EWCA Civ 180, [2010] 2 Lloyd's Rep. 467* at [15].

443. *Colquhoun v Brooks (1887) 19 Q.B.D. 400, 406; affirmed (1889) 14 App. Cas. 493*.

444. *Devonald v Rosser & Sons [1906] 2 K.B. 728, 745*.

445. *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd [1999] A.C. 266, 275*; *National Grid Co Plc v Mayes [2001] UKHL 20, [2001] 1 W.L.R. 864* at [55], [67].

446. Co.Litt. 183, 210a; *Mathew v Blackmore (1857) 1 H. & N. 762, 772*.

447. *Aspdin v Austin (1844) 5 Q.B. 671, 684*; *Stephens v Junior Army and Navy Stores Ltd [1914] 2 Ch. 516*. See also *Broome v Pardess Co-operative Society Ltd [1940] 1 All E.R. 603, 612* (no implied term).

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 3. - Construction of Terms [209]

(h) - Stipulations as to Time

Time in contracts

13-096

Generally, the words "till" and "until" are considered to be ambiguous and may be either exclusive or inclusive, according to the subject matter and context [448]; "from" may be taken to be either inclusive or exclusive, [449] although the general assumption is that the day of the date, act or event is to be excluded in the computation. [450] This principle, however, is not an absolute one, and the wording of the contract or the factual background may indicate a contrary construction. [451]

13-097

"On" or "upon" may mean either before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation with reference to the context, and the subject matter of the agreement. [452]

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209. See generally, Odgers, *Odgers' Construction of Deeds and Statutes*, 5th edn (1967); Norton, *Norton on Deeds*, 2nd edn (1928); Lewison, *The Interpretation of Contracts*, 6th edn (2015); McMeel, *The Construction of Contracts: Interpretation, Rectification and Implication*, 2nd edn (2011); Mitchell, *Interpretation of Contracts* (2007).

448. *R. v Stevens (1804) 5 East 244*; *Dakins v Wagner (1835) 3 Dowl. 535, 536*; *Kerr v Jeston (1842) 1 Dowl.(N.S.) 538, 539*; *Startup v Macdonald (1843) 6 M. & G. 593*; *Rogers v Davis (1845) 8 Ir.L.R. 399, 400*; *Bellhouse v Mellor, Proudman & Mellor (1859) 4 H. & N. 116, 123*; *Isaacs v Royal Insurance Co (1870) L.R. 5 Ex. 296*; *Heinrich Hirdes GmbH v Edmund [1991] 2 Lloyd's Rep. 546*.

449. *Lester v Garland (1808) 15 Ves. Jun. 248, 258*; *Wilkinson v Gaston (1846) 9 Q.B. 137, 145*; *Re North [1895] 2 Q.B. 264, 269*; *Sheffield Corp v Sheffield Electric Light Co [1898] 1 Ch. 203, 209*; *Scottish Metropolitan Assurance Co v Stewart (1923) 14 Ll.L. Rep. 55*; *Carapanayoti & Co Ltd v Comptoir Commercial André & Cie SA [1972] 1 Lloyd's Rep. 139*.

450. *Lester v Garland (1808) 15 Ves. Jun. 248*; *Ackland v Lutley (1839) 9 A. & E. 879, 894*; *South Staffordshire Tramways Co v Sickness and Accident Association [1891] 1 Q.B. 402*; *Radcliffe v Bartholomew [1892] 1 Q.B. 161*; *Goldsmiths' Co v West Metropolitan Ry [1904] 1 K.B. 1, 5*; *Stewart v Chapman [1951] 2 K.B. 792*; *Cartwright v MacCormack [1963] 1 W.L.R. 18*; *Re Figgis [1969] Ch. 123*; *London and Overseas Freighters Ltd v Timber Shipping Co SA [1972] A.C. 1*; *Alma Shipping Corp of Monrovia v Mantovani [1975] 1 Lloyd's Rep. 115*; *Dodds v Walker [1981] 1 W.L.R. 1027*; *Zoan v Rouamba [2000] 1 W.L.R. 1509*. See also the "clear day" principle: *Young v Higgon (1840) 6 M. & W. 49*; *Thompson v Stimpson [1961] 1 Q.B. 195*; *Carapanayoti*

& Co Ltd v Comptoir Commercial André & Cie SA [1972] 1 Lloyd's Rep. 139. See also below, para.21-025.

451. *Pugh v Duke of Leeds (1777) 2 Cowp. 714*; *Cornfoot v Royal Exchange Assurance Corp [1904] 1 K.B. 40*; *English v Cliff [1914] 2 Ch. 376*; *Hare v Gocher [1962] 2 Q.B. 641*; *Trow v Ind Coope (West Midlands) Ltd [1967] 2 Q.B. 299*; *Bevan Ashford v Malin [1995] I.R.L.R. 360*; *Zoan v Rouamba [2000] 1 W.L.R. 1509* (statute).

452. *R. v Humphery (1839) 10 A. & E. 335, 370*; *R. v Arkwright (1848) 12 Q.B. 960, 970*; *Paynter v James (1867) L.R. 2 C.P. 348, 354*; *Wm. Cory & Son Ltd v IRC [1964] 1 W.L.R. 529 (affirmed [1965] A.C. 1088*); *Kuratau Land Co Ltd v Kahu Te Kuru [1966] N.Z.L.R. 544, 547*; *Air New Zealand Ltd v Nippon Credit Bank Ltd [1997] 1 N.Z.L.R. 218, 221-222*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 4. - Admissibility of Extrinsic Evidence

Written documents

13-098

Where the parties appear to have embodied their agreement in a written document, [453] the question arises whether extrinsic evidence, that is to say, evidence of matters outside the document, is admissible so as to affect its content. Two issues are involved: first, whether it is permissible to adduce extrinsic evidence of terms other than those included, expressly or by reference, in the document; secondly, whether extrinsic evidence may be admitted to explain or interpret the words used in the document.

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453. For computerised “documents”, see above, para.13-049.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 4. - Admissibility of Extrinsic Evidence

(a) - The Parol Evidence Rule

Whether document conclusive: the "parol evidence" rule

13-099

It is often said to be a rule of law that:

> "If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given … so as to add to or subtract from, or in any manner to vary or qualify the written contract." [454]

Indeed, in 1897, Lord Morris [455] accepted that:

> "… parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract."

This rule is usually known as the "parol evidence" rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing, such as drafts, [456] preliminary agreements, [457] and letters of negotiation. [458] The rule has been justified on the ground that it upholds the value of written proof, [459] effectuates the finality intended by the parties in recording their contract in written form, [460] and eliminates "great inconvenience and troublesome litigation in many instances". [461]

Exceptions to the rule

13-100

However, the parol evidence rule is and has long been subject to a number of exceptions. [462] In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. [463] So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. [464] In *Gillespie Bros & Co v Cheney, Eggar & Co*, [465] Lord Russell C.J. stated:

> "… although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there

> was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

It cannot therefore be asserted that the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document:

> "The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties." [466]

Scope of the rule

13-101

It follows that the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties' agreement are wholly contained in the written document. The rule:

> "… only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement." [467]

Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. It is therefore always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the contract. If, on that evidence, the court finds that terms additional to those in the document were agreed and intended by the parties to form part of the contract, then the court will have found that the contract consists partly of the terms contained in the document and partly of the terms agreed outside of it. The parol evidence rule will not apply. If, on the other hand, the court finds that the document is a complete record of the contract, then it will reject the evidence of additional terms. But it will do so, not because it is required to ignore the additional terms or the evidence said to prove them, but because such evidence is inconsistent with its finding that the document does contain the entire terms of the parties' agreement. [468] No doubt, in practice, where a document is produced which appears to be a complete contract, a party will experience considerable difficulty in proving, on the balance of probabilities, that further contractual terms were agreed outside the written terms of the document. But extrinsic evidence of such terms is not ipso facto excluded. [469]

Law Commission Report

13-102

In 1986, the Law Commission considered [470] whether it should recommend that the parol evidence rule be abolished or amended by statute. For this purpose, it was necessary for the Commission to analyse the rule in detail as to its applicability, width and effect. The Commission expressed the opinion [471] that:

> "… although a proposition of law can be stated which can be described as the 'parol evidence' rule it is not a rule of law which, correctly applied, could lead to evidence being

> unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: [W]hen it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract."

The general conclusion [472] reached by the Commission was:

> "… that there is no *rule of law* that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law."

It is submitted that this general conclusion is correct. [473]

Extrinsic evidence to contradict document

13-103

More justification [474] might, however, be found for the parol evidence rule if deployed to prevent extrinsic evidence being adduced to vary or contradict the terms of a written document. It could be said then to fulfil a useful purpose in that it would emphasise the primacy traditionally accorded to the written text of complete contractual documents, where these exist. [475] But, where it appears that the parties did not intend to record all the terms of their agreement in a particular document, then on the same analysis extrinsic evidence would be admissible to prove other terms even if they varied or contradicted those in the document. [476] Thus if the terms of a document stipulated that payment should be made on a certain day, evidence would be admissible of a contemporaneous agreement outside the document that payment was to be deferred until a later day. [477] Or if the terms of the document provided that one party was to have the unqualified right to terminate the contract upon one month's notice in writing, evidence would be admissible to prove a contractual agreement outside the document that the contract should only determine by effluxion of time. [478] If there is an inconsistency, that is, if effect cannot fairly be given to both terms, then the court might reject that term which least accords with the meaning of the contract as ascertained from the whole of the agreement. [479] Of such a situation the Law Commission said [480]:

> "… it is no different in principle from that in which the parties agree two inconsistent terms both of which are set out in the same document. The court will have to decide which of the inconsistent terms more nearly represents the intention of the parties."

However, the difficulty of proving that the written document did not express the true and complete agreement of the parties may lead the party who alleges a promise or assurance inconsistent with the document to seek to establish a collateral contract or warranty [481] or (in appropriate cases) to seek rectification of the document on the ground that it did not express the concurrent intentions of the parties at the time of its execution. [482]

Contracts required to be in writing

13-104

Certain contracts are required by law to be in writing. [483] The effect of this requirement will be to exclude *oral* evidence which is offered for no other purpose than to contradict, vary, add to or subtract

from the contract as contained in writing. In particular, the contracts of the various parties to a bill of exchange or promissory note must be in writing. [484] It is well established that, even as between immediate parties to a bill or note, evidence will not be admitted to prove an oral agreement to qualify the absolute undertaking of a party on the instrument, for example, to show that his liability is to be enforceable against him only in certain contingencies or that it is to be postponed to a time later than that expressed on the face of the instrument. [485] But:

> "… a written agreement on a distinct paper, to renew, or in other respects to qualify, the liability of the maker or acceptor, is good as between the original parties." [486]

Indeed it would seem that, as between immediate parties, evidence may always be given of a contemporaneous *written* agreement to vary the effect of the instrument and regulate their rights between themselves. [487] However, in the case of a contract for the sale or other disposition of an interest in land which is required by the Law of Property (Miscellaneous Provisions) Act 1989 [488] to be made in writing and signed by or on behalf of each party to the contract, all the terms which the parties have expressly agreed must be incorporated in one document (or, where contracts are exchanged, in each). [489] Terms may be incorporated in a document either by being set out in it or by reference to some other document. [490] But, in the absence of such a reference in the signed document, evidence will not be admissible to prove that other terms were agreed in writing in addition to those set out in the document, [491] except to show that the document does not satisfy the statutory requirements. [492]

Contracts required to be evidenced in writing

13-105

Where the contract is one which by statute must be evidenced by a note or memorandum in writing signed by the party to be charged or his agent, as in the case of a contract of guarantee, [493] the memorandum must contain a statement of the material terms of the contract. [494] Extrinsic evidence is not admissible to prove that the parties orally agreed material terms which ought to have been, but were not, included in the memorandum, since the admission of such evidence would plainly not satisfy the statute. [495] Parol evidence is, however, admissible to connect two or more documents, provided that the document which is signed by the party to be charged expressly or by implication refers to the other document or documents, [496] but not otherwise. [497]

Collateral contracts

13-106

Even though the parties intended to express the whole of their agreement in a particular document, extrinsic evidence will nevertheless be admitted to prove a contract or warranty collateral to that agreement. [498] The reason is that "the parol agreement neither alters nor adds to the written one, but is an independent agreement". [499] Such evidence is certainly admissible in respect of a matter on which the written contract is silent. [500] In a number of older cases it was stated that evidence of such a contract or warranty must not contradict the express terms of the written contract. [501] However, more recently, the courts have admitted evidence to prove an overriding oral warranty [502] or to prove an oral promise that the written contract will not be enforced in accordance with its terms. [503] Thus in *City of Westminster Properties (1934) Ltd v Mudd* [504] the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not as sleeping quarters. The tenant objected to this covenant, and the landlords gave him an oral assurance that, if he signed the lease, they would not enforce it against him. The tenant signed the lease, but later the landlords sought to forfeit the lease for breach of this covenant. Harman J. held that the oral assurance constituted a separate collateral contract from which the landlords would not be permitted to resile. The collateral contract or warranty may be oral or informal [505] even though the main contract is one which is required by law to be in or evidenced by writing. [506]

"Entire agreement" clauses

13-107

The practice has developed [507] of including in written agreements of a formal character an "entire agreement" clause, for example:

> "This Agreement contains the entire and only agreement between the parties and supersedes all previous agreements between the parties respecting the subject matter hereof; each party acknowledges that in entering into this Agreement it has not relied on any representation or undertaking, whether oral or in writing, save such as are expressly incorporated herein."

The purpose of such a clause is to achieve, by a somewhat roundabout route, the exclusion of liability for statements other than those set out in the written contract. The effect of the clause will necessarily depend upon its precise wording. It has been stated [508] that an "entire agreement" clause operates "to denude what would otherwise constitute a collateral warranty of legal effect" rather than to render inadmissible extrinsic evidence to prove terms other than those in the written contract. [509] However, the language of the clause may not be apt to exclude representations [510] even if it excludes claims arising out of a collateral contract or warranty. [511] It should also not prevent use of extrinsic evidence to ascertain the meaning of an express term in the contract. [512] An entire agreement clause may be waived by a party who might otherwise have relied on it. [513]

Extrinsic evidence admissible

13-108

There are, in any event, a number of situations in which the written instrument is not conclusive evidence of the contract alleged to be embodied in it. These situations may be regarded either as exceptions to the parol evidence rule or simply as cases falling outside the rule. [514] They will now be discussed.

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454. *Goss v Lord Nugent (1833) 5 B. & Ad. 58, 64*. See also *Countess of Rutland's Case (1602) 5 Co. Rep. 25b, 26a*; *Meres v Ansell (1771) 3 Wils. 275*; *Smith v Doe d. Jersey (1821) 2 Brod. & Bing. 473, 541*; *Smith v Jeffryes (1846) 15 M. & W. 561*; *Hitchin v Groom (1848) 5 C.B. 515*; *Evans v Roe (1872) L.R. 7 C.P. 138*; *Mercantile Agency Co Ltd v Flitwick Chalybeate Co (1897) 14 T.L.R. 90*; *Newman v Gatti (1907) 24 T.L.R. 18*; *Reliance Marine Insurance v Duder [1913] 1 K.B. 256, 273*; *Hitchings & Coulthurst Co v Northern Leather Co of America and Doushkess [1914] 3 K.B. 907*; *Jacobs v Batavia and General Plantations Trust Ltd [1924] 1 Ch. 287, 295*; *Tsang Chuen v Li Po Kwai [1932] A.C. 713, 727*; *O'Connor v Hume [1954] 1 W.L.R. 824, 830*; *Rabin v Gerson Berger Association Ltd [1986] 1 W.L.R. 526, 530*; *Orion Insurance Co Plc v Sphere Drake Insurance Plc [1992] 1 Lloyd's Rep. 239, 273*.

455. *Bank of Australasia v Palmer [1897] A.C. 540, 545* (cited in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd [1972] A.C. 785, 818-819*).

456. *Miller v Travers (1832) 8 Bing. 244*; *Inglis v Buttery (1878) 3 App. Cas. 552*; *National Bank of Australasia v Falkingham & Sons [1902] A.C. 585*.

457. *Evans v Roe (1871-72) L.R. 7 C.P. 138*; *Leggott v Barrett (1880) 15 Ch. D. 306, 309, 311*; *Henderson v Arthur [1907] 1 K.B. 10*; *Newman v Gatti (1907) 24 T.L.R. 18*; *Hitchings & Coulthurst Co v Northern Leather Co of America and Doushkess [1914] 3 K.B. 907*; *Hutton v Watling [1948] Ch. 398*; *Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep. 127*. But see *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] EWCA Civ 735,*

[2001] 2 Lloyd's Rep. 161 at [83].

458. *Mercantile Bank of Sydney v Taylor [1893] A.C. 317*.

459. *Pickering v Dowson (1813) 4 Taunt. 779, 784*.

460. *Inglis v Buttery (1877-78) L.R. 3 App. Cas. 552, 577*.

461. *Mercantile Agency Co Ltd v Flitwick Chalybeate Co (1897) 14 T.L.R. 90*.

462. See below, paras 13-108 et seq.

463. *Mercantile Bank of Sydney v Taylor [1893] A.C. 317, 321*.

464. *Harris v Rickett (1859) 4 H. & N. 1*; *Malpas v L. & S.W. Ry (1866) L.R. 1 C.P. 336*; *Gillespie Bros v Cheney Eggar & Co [1896] 2 Q.B. 59*; *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078*; *Yani Haryanto v E.D. & F. Man (Sugar) Ltd [1986] 2 Lloyd's Rep. 44, 46-47*.

465. *[1896] 2 Q.B. 59, 62*.

466. *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078, 1083*.

467. *Harris v Rickett (1859) 4 H. & N. 1, 7*; *Turner v Forwood [1951] 1 All E.R. 746, 749*.

468. *Wild v Civil Aviation Authority Unreported September 25, 1987, CA*.

469. ❗*Adibe v National Westminster Bank Plc [2017] EWHC 1655 (Ch)* at [34].

470. Law Com.154, 1986, Cmnd.9700. See Marston [1986] C.L.J. 192.

471. Law Com.154, Cmnd.9700, para.2.7.

472. Law Com.154, Cmnd.9700, para.2.17.

473. ❗The Commission's Report was referred to with approval in *Wild v Civil Aviation Authority Unreported September 25, 1987, CA* and in *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 N.S.W.L.R. 170, 192*. See also *Yani Haryanto v E.D. & F. Man (Sugar) Ltd [1986] 2 Lloyd's Rep. 44, 46*; *Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep. 127, 133, 140*. Contrast the view expressed in Peel, *Treitel on The Law of Contract*, 14th edn (2015), para 6–014.

474. For modern instances of support for the rule, see *AIB Group (UK) Ltd v Martin [2001] UKHL 63, [2002] 1 W.L.R. 94* at [4]; *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [49]; *TTMI Sarl v Statoil ASA [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep. 220* at [19], [34].

475. cf. *Gillespie Brothers & Co v Cheney, Eggar & Co [1896] 2 Q.B. 59, 62*; *Wedderburn [1959] C.L.J. 58, 62* (presumption only).

476. But see e.g. *Angell v Duke (1875) 32 L.T. 320*; *Henderson v Arthur [1907] 1 K.B. 10*.

477. *Young v Austen (1869) L.R. 4 C.P. 553*; *Maillard v Page (1870) L.R. 5 Ex. 312* (in these cases the extrinsic agreement was in writing, as the contract was required to be in writing: see below, para.13-104).

478. cf. *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 N.S.W.L.R. 170, 191–192*.

479. See above, para.13-080.

480. Law Com.154, 1986, Cmnd.9700, para.2.16.

481. See below, para.13-106.

482. See above, para.3-057.

483. See above, paras 5-001 et seq.

484. Bills of Exchange Act 1882 ss.3(1) (drawer), 17(1) (acceptor), 32(1) (indorser), 83(1) (maker).

485. *Hoare v Graham (1811) 3 Camp. 57*; *Free v Hawkins (1817) 8 Taunt. 92*; *Woodbridge v Spooner (1819) 3 B. & Ald. 233*; *Campbell v Hodgson (1819) Gow 74*; *Moseley v Hanford (1830) 10 B. & C. 729*; *Foster v Jolly (1835) 1 C.M. & R. 703*; *Adams v Wordley (1836) 1 M. & W. 374*; *Besant v Cross (1851) 10 C.B. 895*; *Drain v Harvey (1855) 17 C.B. 257*; *Abrey v Crux (1869) L.R. 6 C.P. 37*; *Young v Austen (1869) L.R. 4 C.P. 553, 556*; *Maillard v Page (1870) L.R. 5 Exch. 312, 319*; *Stott v Fairlamb (1883) 52 L.J.Q.B. 420*; *New London Credit Syndicate v Neale [1898] 2 Q.B. 487*; *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushkess [1914] 3 K.B. 907*.

486. Chalmers and Guest on Bills of Exchange and Cheques, 17th edn (2009), para.2-155.

487. *Bowerbank v Monteiro (1813) 4 Taunt. 844*; *Young v Austen (1869) L.R. 4 C.P. 553*; *Maillard v Page (1870) L.R. 5 Exch. 312, 319*. But the written agreement must be supported by valuable consideration (*Bowerbank v Monteiro*; *McManus v Bark (1870) L.R. 5 Exch. 65*) and be between the same parties (*Salmon v Webb (1852) 3 H.L.C. 310*).

488. See above, para.5-013.

489. s.2(1).

490. s.2(2).

491. But such terms may have effect as a collateral contract or warranty (see below, para.13-106) or as a separate part of a composite agreement (see above para.5-029).

492. But see s.2(4) (rectification); above para.5-034.

493. Statute of Frauds 1677 s.4.

494. *Holmes v Mitchell (1859) 7 C.B. N.S. 361*. But cf. Mercantile Law Amendment Act 1856 (consideration need not be stated).

495. *Holmes v Mitchell (1859) 7 C.B. N.S. 361*; *Sheers v Thimbleby & Son (1897) 76 L.T. 709, 711*. But see *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2011] EWHC 56 (Comm), [2011] 2 All E.R. (Comm) 95* at [78] where Christopher Clarke J. suggested that all material terms need not be set out (affirmed *[2012] EWCA Civ 265, [2012] 1 W.L.R. 3674*). Also extrinsic evidence will be admitted to show that, by reason of the omission, the memorandum does *not* satisfy the statute: see, e.g. *Beckett v Nurse [1948] 1 K.B. 535* (on Law of Property Act 1925 s.40).

496. *Timmins v Moreland Street Property Co Ltd [1958] Ch. 110*; *Elias v George Sahely & Co (Barbados) Ltd [1983] A.C. 646*; cf. para.5-033 (1989 Act).

497. But cf. *Sheers v Thimbleby & Son (1897) 76 L.T. 709*.

498. See above, paras 13-004—13-006, 13-033; Wedderburn [1959] C.L.J. 58, 71.

499. *Mann v Nunn (1874) 30 L.T. 526, 527*.

500. See, e.g. *De Lassalle v Guildford [1901] 2 K.B. 515*.

501. *Lindley v Lacey (1864) 17 C.B.(N.S.) 578, 586, 587*; *Morgan v Griffith (1871) L.R. 6 Ex. 70, 73*; *Erskine v Adeane (1873) L.R. 8 Ch. App. 756, 766*; *Angell v Duke (1875) 32 L.T. 320*; *Leggott v Barrett (1880) 15 Ch. D. 306, 314*; *Newman v Gatti (1907) 24 T.L.R. 18*; *Henderson v Arthur [1907] 1 K.B. 10*; *Goldfoot v Welch [1914] 1 Ch. 213, 218*. See also *Maybury v Atlantic Union Oil Co Ltd (1953) 89 C.L.R. 507, 518*; *Donovan v Northlea Farms Ltd [1976] 1 N.Z.L.R. 180* (where the other view was adopted).

502. *Couchman v Hill [1947] K.B. 554*; *Webster v Higgin [1948] 2 All E.R. 127*; *Harling v Eddy [1951] 2 K.B. 739*; *Mendelssohn v Normand Ltd [1970] 1 Q.B. 177, 184*; *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078*.

503. *City and Westminster Properties (1934) Ltd v Mudd [1959] Ch. 129*. See also *Brikom Investments Ltd v Carr [1979] Q.B. 467*; *AS Klaveness Chartering v Pioneer Freight Futures Co Ltd [2009] EWHC 3386 (Comm), [2010] 2 Lloyd's Rep. 613*.

504. *[1959] Ch. 129*. This case was referred to with approval in *Frisby v BBC [1967] Ch. 932, 945*; *Lee-Parker v Izzett (No.2) [1972] 1 W.L.R. 775, 779*; *Atlantic Lines and Navigation Co Inc v Hallam Ltd [1983] 1 Lloyd's Rep. 188, 197*. It might be thought that the same result could be reached by application of the principle of promissory estoppel (see above, para.4-086), but it would appear that that principle may not extend to pre-contractual negotiations: see *Secretary of State for Employment v Globe Elastic Thread Co Ltd [1980] A.C. 506*. Contrast, however, *Bank Negara Indonesia v Philip Hoalim [1973] 2 M.L.J. 3, PC*; *Brikom Investments Ltd v Carr [1979] Q.B. 467, 484–485*; *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 N.S.W.L.R. 171*.

505. Unless its subject matter is such that it is itself required to be in or evidenced by writing: *Daulia Ltd v Four Millbank Nominees Ltd [1978] Ch. 231*.

506. See, e.g. *Angell v Duke (1875) L.R. 10 Q.B. 174* (but such evidence was later rejected: *(1875) 32 L.T. 320*); *Record v Bell [1991] 1 W.L.R. 853*; *AS Klaveness Chartering v Pioneer Freight Futures Co Ltd [2009] EWHC 3386 (Comm), [2010] 2 Lloyd's Rep. 613* at [23].

507. The practice probably originated in the United States: see Uniform Commercial Code para. 2-202. See also Peden and Carter (2006) 22 J.C.L. 1; Mitchell (2006) 22 J.C.L. 222; Lewison, *The Interpretation of Contracts*, 5th edn (2011), para.3.16; McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification*, 2nd edn (2011), Ch.24.

508. *Inntrepreneur Pub Co Ltd v East Crown Ltd [2000] 2 Lloyd's Rep. 611, 614*; *Ravennavi SpA v New Century Shipbuilding Co Ltd [2006] EWHC 733 (Comm), [2006] 2 Lloyd's Rep. 280; [2007] EWCA Civ 58, [2007] 2 Lloyd's Rep. 24*; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1*; *Papanicola v Sandhu [2011] EWHC 1431 (QB), [2011] 2 B.C.L.C. 811*; *Mileform Ltd v Interserve Security Ltd [2013] EWHC 3386 (QB)*.

509. See *McGrath v Shah (1989) 57 P. & C.R. 452*; *North Eastern Properties Ltd v Coleman [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715* at [55], [82]–[83].

510. *Alman and Benson v Associated Newspapers Group Ltd Unreported June 20, 1980*; *Thomas Witter Ltd v T.B.P. Industries Ltd [1996] 2 All E.R. 573*; *Deepak Fertilisers and Petrochemicals Corp v ICI [1999] 1 Lloyd's Rep. 387, 395*; *South West Water Services Ltd v International Computers Ltd [1999] Build. L.R. 420, 424*; *Government of Zanzibar v British Aerospace (Lancaster House) Ltd [2000] 1 W.L.R. 2333, 2344*; *Sabah Shipyard (Pakistan) Ltd v Govt of Pakistan [2007] EWHC 2602 (Comm), [2008] 1 Lloyd's Rep. 240* at [130] (deceit); *Barclays Bank Plc v Unicredit Bank AG [2014] EWCA Civ 302, [2014] 2 All E.R. (Comm) 115*. It has been suggested that the clause may in any event be ineffective under s.3 of the Misrepresentation Act 1967 (as amended by s.8 of the Unfair Contract Terms Act 1977) or under s.3(2)(b)(ii) of the 1977 Act; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1* at [50]; see above, paras 7-143, 7-151. cf. *Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] B.L.R. 143, 155*. See also ss.11, 13 of the 1977 Act, and below, paras 15-070 n.384. Contrast *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd*

[2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581 at [42] (affirmed [2009] EWCA Civ 290, [2010] Q.B. 86). As to whether an entire agreement clause precludes a plea of estoppel by convention, see *Sere Holdings Ltd v Volkswagen Group UK Ltd [2004] EWHC 1551 (Comm)*; *Dubai Islamic Bank v PSI Energy Holding Co [2011] EWHC 2718 (Comm)* at [83]; *Shoreline Housing Partnership Ltd v Mears Ltd [2013] EWCA Civ 639, [2013] C.P. Rep. 39*.

511. *Deepak Fertilisers and Petrochemicals Corp v ICI*, above, at 395; *Inntrepreneur Pub Co Ltd v East Crown Ltd*, above; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133*, above; *Papanicola v Sandhu [2011] EWHC 1431 (QB), [2011] 2 B.C.L.C. 811*. See also *Exxonmobil Sales and Supply Corp v Texaco Ltd [2003] EWHC 1964 (Comm); [2003] 2 Lloyd's Rep. 686* (exclusion of implied terms based on usage or custom). cf., *Milburn Services Ltd v United Trading Group (1995) C.I.L.L. 1109* (terms implied by necessity); *Great Elephant Corp v Trafigura Beheer BV [2012] EWHC 1745 (Comm), [2013] 1 All E.R. (Comm) 415 at [89]–[91], [2013] EWCA Civ 905, [2013] 2 All E.R. 992* at [21] (clause not effective to exclude terms implied by the Sale of Goods Act 1979 s.12); *Barclays Bank Plc v Unicredit Bank AG [2014] EWCA Civ 302, [2014] 2 All E.R. (Comm) 115* at [28].

512. *Proforce Recruit Ltd v Rugby Group Ltd [2006] EWCA Civ 69* at [41], [59], [61]. See also *Air New Zealand Ltd v Nippon Credit Bank Ltd [1997] N.Z.L.R. 218, 224*.

513. *SAM Business Systems Ltd v Hedley & Co [2002] EWHC 2733 (TCC); [2003] 1 All E.R. (Comm) 465*.

514. See the Report of the Law Commission, Law Com.154, 1986, Cmnd.9700, paras 2.30, 2.31.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 4. - Admissibility of Extrinsic Evidence

(b) - Evidence as to the Validity or Effectiveness of the Written Agreement

No contract

13-109

Extrinsic evidence is admissible to show that what appears to be a valid and binding contract is in fact no contract at all. Thus evidence may be admitted to show that one or both parties contracted under a mistake, [515] or that a person who signed the document was under a misapprehension as to the real nature of the transaction into which he had entered so that it was “not his deed” in law. [516] Also it may be shown that the writing was not intended by the parties to give rise to contractual obligations [517] or that the contract is void for noncompliance with a statute. [518]

Documents that are not contracts

13-110

The parol evidence rule has in any event only been applied to an instrument which is intended itself to be the formal and conclusive expression by the parties of their agreement. [519] If the document in question is not such an instrument, then extrinsic evidence is admissible to ascertain or interpret the intentions of the parties. Thus if a document is intended to be merely an informal memorandum of an agreement previously concluded, extrinsic evidence may be admitted to show that this informal memorandum does not embody the terms contained in the previous agreement. [520] A receipt, [521] an invoice, [522] a payment instruction [523] and even bills of lading, [524] have been held to come within this exception.

Consideration

13-111

Consideration is a necessary requirement for the formation of all contracts which are not made by deed. [525] Extrinsic evidence may therefore be admitted to show want of or failure of the consideration stated to have been given in a written instrument. [526] Thus the words in a bill of exchange “for value received” do not preclude the court from finding that no consideration has in fact been given. [527] Extrinsic evidence is also admissible to prove the true consideration where no consideration, or a nominal consideration, has been stated, [528] where the expressed consideration is in general terms or ambiguously stated, [529] or where the consideration is inaccurately recorded. [530] Also an additional consideration may be proved, provided it does not contradict the stated consideration. [531]

> “The rule is that, where there is one consideration stated in a deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in

contradiction to the instrument to prove a larger consideration than that which is stated." [532]

Conditional contracts

13-112

Extrinsic evidence is admissible to show that, at the time a document was signed by the parties, they were agreed that it was not to take effect as a contract except on the fulfilment of a certain condition, [533] e.g. in the case of deeds, evidence of an escrow. [534]

Evidence of date

13-113

Extrinsic evidence is admitted to prove the actual date of delivery of a deed, [535] or the date of execution of a written instrument, [536] in contradiction of the date stated therein; and also, where it has no date, to show from what time a written instrument was intended to operate. [537] It is also admitted to show that the parties intended that an instrument should operate retrospectively from a specified date, act or event prior to the date on which the instrument was executed. [538]

Subsequent variation or discharge

13-114

The rule regarding the admissibility of extrinsic evidence applies merely to the discovery of the original intention of the parties as expressed in the instrument, and has no application to the variation [539] or discharge [540] of the contract by a subsequent agreement.

Fraud, illegality, etc

13-115

Extrinsic evidence will always be admitted to defeat a deed or written contract on the ground of fraud, [541] illegality, [542] misrepresentation, [543] mistake [544] or duress. [545] Also in the application of equitable remedies such as specific performance or the refusal thereof, [546] rectification, [547] or rescission, [548] extrinsic evidence will be admitted to prove the grounds upon which relief is sought.

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515. *Pym v Campbell (1856) 6 E. & B. 370, 374*; *Raffles v Wichelhaus (1864) 2 H. & C. 906*. See above, para.6-001.

516. See, e.g. *Foster v Mackinnon (1869) L.R. 4 C.P. 704*; *Lewis v Clay (1898) 67 L.J.Q.B. 224*; *Roe v R.A. Naylor Ltd (1918) 87 L.J.K.B. 958, 964*. Direct evidence of intention is always admissible where the factum of the instrument is impugned. See below, para.13-117 n.544.

517. *Bowes v Foster (1858) 2 H. & N. 779*; *Rogers v Hadley (1863) 2 H. & C. 227*; *Pattle v Hornibrook [1897] 1 Ch. 25*; *Orion Insurance Co Plc v Sphere Drake Insurance Plc [1992] 1 Lloyd's Rep. 239, 273, 301*.

518. *Lockett v Nicklin (1848) 2 Exch. 93*; *Campbell Discount Co Ltd v Gall [1961] 1 Q.B. 431*.

519. Or, in the case of a unilateral instrument such as a deed, the formal and conclusive expression of the intentions of the maker: *Rabin v Gerson Berger Association Ltd [1986] 1 W.L.R. 526*.

520. *Orion Insurance Co Plc v Sphere Drake Insurance Plc [1992] 1 Lloyd's Rep. 239*; cf. *Hutton v Watling [1948] Ch. 398*.

521. *Graves v Key (1832) 3 B. & Ad. 313*; *Allen v Pink (1838) 4 M. & W. 140*; *Lee v L. & Y. Ry (1871) L.R. 6 Ch. App. 527*; *Beckett v Nurse [1948] 1 K.B. 535*.

522. *Holding v Elliott (1860) 5 H. & N. 117*.

523. *Guardian Ocean Cargoes Ltd v Banco do Brasil SA [1991] 2 Lloyd's Rep. 68*.

524. *Crooks v Allan (1879) 5 Q.B.D. 38*; *Moss Steamship Co v Whinney [1912] A.C. 254, 264*; *The Ardennes [1951] 1 K.B. 55*.

525. See above, Ch.4.

526. *Abbott v Hendrix (1840) 1 M. & G. 791, 794, 796*; *Young v Austen (1869) L.R. 4 C.P. 553, 556*; *Abrey v Crux (1869) L.R. 5 C.P. 37, 45*; *Equitable Office v Ching [1907] A.C. 96*; Law of Property Act 1925 s.67. But cf. *Roberts v Security Co [1897] 1 Q.B. 111*; Law of Property Act 1925 s.68.

527. *Solly v Hinde (1834) 2 Cr. & M. 516*; *Abbott v Hendrix (1840) 1 M. & G. 791, 795*.

528. *Gale v Williamson (1841) 8 M. & W. 405*; *Clifford v Turrell (1845) 1 Y. & C.C.C. 138*; *Pott v Todhunter (1845) 2 Coll. 76*; *Re Holland [1902] 2 Ch. 360, 388*.

529. *Goldshede v Swan (1847) 1 Exch. 154*; *Hoad v Grace (1861) 7 H. & N. 494*.

530. *Booker v Seddon (1858) 1 F. & F. 196*. It is a moot point whether extrinsic evidence is admissible to prove a real (e.g. smaller) consideration inconsistent with that expressed in the instrument. See *Ridout v Bristow (1830) 9 Exch. 48*; *Abbott v Hendrix (1840) 1 M. & G. 791, 796*; *Turner v Forwood [1951] 1 All E.R. 746*. The views of Lord Hardwicke in *Peacock v Monk (1748) 1 Ves. Sen. 127, 128* must now be read with caution. See also *Woods v Wise [1955] 2 Q.B. 29*; *Peffer v Rigg [1977] 1 W.L.R. 285, 293*.

531. *Leifchild's Case (1865) L.R. 1 Eq. 231*; *Townend v Toker (1866) L.R. 1 Ch. App. 446, 459*; *Frith v Frith [1906] A.C. 254*; *Turner v Forwood [1951] 1 All E.R. 746*; *Pao On v Lau Yiu Long [1980] A.C. 614*.

532. *Clifford v Turrell (1845) 1 Y. & C.L.C. 138, 149*.

533. *Pym v Campbell (1856) 6 E. & B. 370*; *Wallis v Littell (1861) 11 C.B.(N.S.) 369*; *Lindley v Lacey (1864) 17 C.B.(N.S.) 578*; *Pattle v Hornibrook [1897] 1 Ch. 25*; cf. *Smith v Mansi [1963] 1 W.L.R. 26*.

534. *London Freehold and Leasehold Property v Lord Suffield [1897] 2 Ch. 608, 622*. See above, para.1-133.

535. *Jayne v Hughes (1854) 10 Exch. 430*.

536. *Hall v Cazenove (1804) 4 East 477*; *Pasmore v North (1811) 13 East 517*; *Armfield v Allport (1857) 27 L.J. Ex. 42*; Bills of Exchange Act 1882 s.13(1).

537. *Davis v Jones (1856) 17 C.B. 625*; Bills of Exchange Act 1882 ss.12, 20.

538. *Northern & Shell Plc v John Laing Construction Ltd [2002] EWHC 2258 (TCC), (2002) 85 Const. L.R. 179*.

539. *Goss v Lord Nugent (1833) 5 B. & Ad. 58, 64*. But a contract required by law to be in or evidenced by writing can in principle only be varied by writing: see below, para.22-023.

540. *Morris v Baron & Co Ltd [1918] A.C. 1*; below, para.22-029.

541. *Pickering v Dowson (1813) 4 Taunt. 779*; *Dobell v Stevens (1825) 3 B. & C. 623*.

542. *Collins v Blantern (1767) 2 Wils. 347*; *Doe d. Chandler v Ford (1853) 3 A. & E. 649*; *Reynell v Sprye (1852) 1 De G.M. & G. 660, 672*; *Madell v Thomas & Co [1891] 1 Q.B. 230*. See also *Woods v Wise [1955] 2 Q.B. 29* (evidence to support legality).

543. *Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All E.R. 1167*.

544. See above, para.6-001.

545. See above, para.8-001.

546. *Martin v Pycroft (1852) D.M. & G. 785*; *Webster v Cecil (1861) 30 Beav. 62*. See below, Ch.27.

547. *Druiff v Parker (1868) L.R. 5 Eq. 131*; *Olley v Fisher (1887) 34 Ch. D. 367*; *Henderson v Arthur [1907] 1 K.B. 10, 13*; *Lovell and Christmas Ltd v Wall (1911) 104 L.T. 85*; *Craddock Bros v Hunt [1923] 2 Ch. 136, 151*; *Hamed El Chiaty & Co v Thomas Cook Group Ltd [1992] 2 Lloyd's Rep. 399, 407, 408*.

548. *Paget v Marshall (1884) 28 Ch. D. 255*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 4. - Admissibility of Extrinsic Evidence

(c) - Evidence as to the True Nature of the Agreement

True nature of the agreement

13-116

Extrinsic evidence is admissible to prove the true nature of the agreement, or the legal relationship of the parties, [549] even though this may vary or add to the written instrument. [550] Thus a conveyance may be shown to be merely a mortgage, [551] a sale and hire-purchase agreement to be an unregistered bill of sale, [552] and a sale of property to be a loan on security. [553]

Evidence of agency

13-117

Extrinsic evidence may also be adduced to show that one or both of the contracting parties to an agreement were agents for other persons and acted as such in making the contract so as to give the benefit or the burden of the contract to their undisclosed principals. [554] Such evidence relates to the factum of the written instrument. [555] It is therefore a moot point whether evidence can be given which is inconsistent with the written agreement. There is authority for the view that, where an action is brought against a party who has contracted in terms indicating that he is the real and only principal, evidence cannot be given that he contracted merely as agent as this would contradict the written agreement. [556] Thus where a party was described as “owner” of a ship [557] or as “proprietor” of a building site, [558] he being, in fact, merely the agent of an undisclosed principal, it was held, in an action by the principal on the contract, that evidence could not be received to show the fact of the agency so as to give the principal a right to sue on the contract. On the other hand, these cases may be explained as cases in which the personality of the contracting party was of sufficient importance to have become a term of the contract [559] or simply that they were wrongly decided. [560] The issue is still an open one. [561]

13-118

Where a person describes himself in a contract as agent of an unnamed principal, either he or the other contracting party may bring evidence to show that, although described as agent, he is in fact the principal. [562]

Evidence of suretyship

13-119

Evidence is admissible to show that a person who signed a document did so as surety, even though it might appear that he entered into the agreement as principal debtor or on behalf of another or in some other capacity. [563]

549. *Steele v M'Kinlay (1880) 5 App. Cas. 754, 778–779*; *Macdonald v Whitfield (1883) 8 App. Cas. 733, 745*; *National Sales Corp Ltd v Bernardi [1931] 2 K.B. 188*; *McCall Bros Ltd v Hargreaves [1932] 2 K.B. 423*; *Yeoman Credit Ltd v Gregory [1963] 1 W.L.R. 343*; and see below, para.13-119.

550. Including direct evidence of intention.

551. *Re Duke of Marlborough [1894] 2 Ch. 133*.

552. *Madell v Thomas & Co [1891] 1 Q.B. 230*; *Polsky v S. & A. Services [1951] 1 All E.R. 1062*.

553. *Maas v Pepper [1905] A.C. 102*.

554. *Bateman v Phillips (1812) 15 East 272*; *Wake v Harrop (1861) 30 L.J. Ex. 273*; *McCollin v Gilpin (1881) 29 W.R. 408*; *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic [1919] A.C. 203*; *Danziger v Thompson [1944] K.B. 654*; *Epps v Rothnie [1945] K.B. 562*; *Finzel, Berry & Co v Eastcheap Dried Fruit Co [1962] 1 Lloyd's Rep. 370; affirmed [1962] 2 Lloyd's Rep. 11*; *Hamid v Francis Bradshaw Partnership [2013] EWCA Civ 470, [2013] B.L.R. 447*. See Vol.II, paras 31-063, 31-066.

555. *Young v Schuler (1883) 11 Q.B.D. 651*; *Homburg Houtimport BV v Agrosin Private Ltd [2003] UKHL 12, [2004] 1 A.C. 715* at [175]. See also *Internaut Shipping v Fercometal SARL [2003] EWCA Civ 812, [2003] 2 Lloyd's Rep. 430* (evidence of no agency).

556. *Magee v Atkinson (1837) 2 M. & W. 440*; *Higgins v Senior (1841) 8 M. & W. 834*; *Humble v Hunter (1848) 12 Q.B. 310*; *Formby Bros v Formby (1910) 102 L.T. 116*. See Vol.II, para.31-066.

557. *Humble v Hunter (1848) 12 Q.B. 310*.

558. *Formby Bros v Formby (1910) 102 L.T. 116*.

559. *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic [1919] A.C. 203, 210*; *Rederiaktiebolaget Argonaut v Hani [1918] 2 K.B. 247*; *Collins v Associated Greyhound Racecourses Ltd [1930] 1 Ch. 1*. See Vol.II, para.31-066.

560. *Killick & Co v Price & Co (1896) 12 T.L.R. 263, 274*; *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic [1919] A.C. 203*, at 209; *Epps v Rothnie [1945] K.B. 562, 565* (cases where the description was equivocal). cf. *Ferryways NV v Associated British Ports [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep. 639*.

561. *Siu Yin Kwan v Eastern Insurance Co Ltd [1994] 2 A.C. 199*. See also *Crescent Oil and Shipping Services Ltd v Importang UEE [1998] 1 W.L.R. 919, 931*; *Homburg Houtimport BV v Agrosin Private Ltd [2003] UKHL 12, [2004] 1 A.C. 715* at [175]; *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd [2004] EWHC 2871, [2004] 2 All E.R. (Comm) 129*; *Talbot Underwriting Ltd v Nausch Hogan & Murray Inc (The Jascons) [2006] EWCA Civ 889, [2006] 2 Lloyd's Rep. 195* at [55]–[68]; *Ferryways NV v Associated British Ports [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep. 638*; see Vol.II, paras 31-066, 31-067.

562. *Schmaltz v Avery (1851) 16 Q.B. 655*; *Carr v Jackson (1852) 7 Exch. 392*; *Adams v Hall (1877) 37 L.T. 70*; *Harper v Vigers [1909] 2 K.B. 549*; *Electrosteel Castings Ltd v Scan-Trans Shipping and Chartering Sdn. Bhd. [2002] EWHC 1993, (Comm); [2003] 1 Lloyd's Rep. 190* at [36]; cf. *Fairlie v Fenton (1870) L.R. 5 Ex. 169*; *Sharman v Brandt (1871) L.R. 6 Q.B. 720*. See Vol.II, paras 31-095, 31-096.

563. *Hill v Wilcox (1831) 1 M. & Rob. 58*; *Ewin v Lancaster (1865) 6 B. & S. 571*; *Overend Gurney & Co v Oriental Finance Co (1874) L.R. 7 H.L. 348*; *Macdonald v Whitfield (1883) 8 App. Cas. 733*

; *Young v Schuler (1883) 11 Q.B.D. 651*; *Gerald McDonald & Co v Nash & Co [1924] A.C. 625*; *V.H.S. Ltd and B.K.S. Air Transport Ltd v Stephens [1964] 1 Lloyd's Rep. 460*; *Sun Alliance Pensions Life & Investments Services Ltd v Webster [1991] 1 Lloyd's Rep. 410*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 4. - Admissibility of Extrinsic Evidence

(d) - Evidence to Interpret or Explain the Written Agreement

Evidence in aid of interpretation

13-120

Different considerations apply to the admissibility of extrinsic evidence to interpret or explain a written agreement. [564] Extrinsic evidence of this sort does not usurp the authority of the written document or contradict, vary, add to or subtract from its terms. It is the writing which operates. The extrinsic evidence does no more than assist in its operation by assigning a definite meaning to terms capable of such explanation or by pointing out and connecting them with the proper subject matter. [565] Accordingly, no "parol evidence rule" (in the sense referred to above) will apply to such a situation. [566] However, the nature of the evidence that may be adduced, and the purposes for which it may be used, are subject to certain restrictions imposed by the law.

Evidence of surrounding circumstances

13-121

The willingness of the courts to admit extrinsic evidence as an aid to the interpretation of a written contract was established as long ago as 1842 by Tindal C.J. in *Shore v Wilson*, [567] when he said:

> "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. … The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party."

But under the older restrictive view expressed in this statement, and endorsed in a number of subsequent cases, extrinsic evidence is admissible only where the sense and meaning of the words of the written instrument is doubtful or difficulty arises when it is sought to apply the language of the

instrument to the circumstances under consideration. If the words have a clear and fixed meaning, not capable of explanation, extrinsic evidence would not be admissible to show that the parties meant something different from what they have written. [568] The modern view, however, is that the words do not have to be vague, ambiguous or otherwise uncertain before extrinsic evidence will be admitted. Since the purpose of the inquiry is to ascertain the meaning which the words would convey to a reasonable person against the available background of the transaction in question, the court is free (subject to certain exceptions) to look to all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words which are ambiguous but even to conclude that the parties must, for whatever reason, have used the wrong words or syntax. [569] So the court is entitled (and, indeed, bound) to enquire beyond the language of the document and see what the circumstances were with reference to which words were used, and the object appearing from those circumstances which the person using them had in view. [570] The court must place itself in the same "factual matrix" as that in which the parties were. [571] In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*, [572] Lord Wilberforce said:

> "No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

He further stated [573] that, just as the intention of the parties is to be ascertained objectively, so also:

> "… when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

13-122

On the other hand, although evidence of the facts about which the parties were negotiating is admissible to assist in the interpretation of the contract, in *Chartbrook Ltd v Persimmon Homes Ltd* [574] the House of Lords confirmed the well-established principle that the court is not entitled to look at what the parties said or did whilst the matter was in negotiation for the purposes of drawing inferences about what the contract means. The same principle probably also applies to the admissibility of drafts or preliminary documents in aid of interpretation. [575] This does not exclude the use of such evidence to support a claim for rectification [576] or estoppel [577] or to establish that a fact which may be relevant as background was known to the parties. [578] However, as Lord Clarke pointed out in *Oceanbulk Shipping & Trading SA v TMT Asia Ltd*, [579] it may sometimes not be a straightforward task to distinguish between material which forms part of the pre-contractual negotiations which is part of the factual matrix and therefore admissible as an aid to interpretation [580] and material which is not part of the factual matrix and is not therefore admissible. In the former case the fact that the negotiations are "without prejudice" is immaterial. [581] Evidence will also not be admitted to show what were the parties' subjective intentions with respect to the words used [582]:

> "The general rule seems to be that all facts are admissible which tend to show the sense which the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected." [583]

In *Prenn v Simmonds*, [584] Lord Wilberforce summed up the position as follows:

> "In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of [the claimant's] intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

13-123

More difficulty may, however, be encountered in practice in determining the extent of the surrounding circumstances which may properly be admitted as an aid to interpretation. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [585] Lord Hoffmann, referring to the matrix of fact, said:

> "Subject to the requirement that it should have been reasonably available to the parties … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man". [586]

Although the range of materials which is now admissible in evidence is wide, it is not without limit. As Lord Hoffmann later observed (in response to criticisms which had been levelled against the expansive nature of the "factual matrix" [587]):

> "I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background … I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage." [588]

Special meaning of words

13-124

It has already been stated that words must be understood in their plain and ordinary sense. [589] In those cases where they are to be understood in a special sense [590] extrinsic evidence is admissible to prove that special sense. Thus evidence may be called to explain technical terms of science or art, [591] to explain contemporary meanings of the words of an ancient document [592] and to translate a document in a foreign language. [593] Extrinsic evidence is also admissible to show that words are understood by participants in a particular market to have a special meaning [594] or that they have by custom or usage a peculiar meaning. [595] Such evidence, even if derived from pre-contractual negotiations, [596] is likewise admissible to show that the parties themselves attached a special meaning to certain words or phrases in their contract, i.e. they used a "private dictionary". [597]

Identity of parties

13-125

The identity of parties may be established by extrinsic evidence where it is not clear from the written instrument to whom it refers. [598] So, where a landlord handed to his tenant a letter addressed "[d]ear Sir" in which he promised to renew a lease, extrinsic evidence was admitted to identify the proposed lessee, even though no mention of his name appeared in the agreement. [599] Extrinsic evidence will also be admitted to show in what capacity the parties contracted, e.g. to show which party was the buyer and which the seller, [600] or to correct a misnomer. [601]

Subject matter

13-126

The subject matter of the contract may similarly be identified by extrinsic evidence. [602] Thus evidence was admitted as to the quality and quantity of wool described in the written contract as "your wool", [603] as to the identity of the property which was the subject matter of a contract of sale [604] and as to its exact area, [605] as to the items of furniture assigned by a deed to which no schedule was attached [606] and as to the liability comprehended by a guarantee. [607] Extrinsic evidence is also admissible where it is sought to restrict the generality of an obligation by reference to the circumstances or the person. [608]

Equivocations

13-127

An equivocation arises when the words of the written contract are intended to refer to one person or thing only, and in fact refer to more than one person or thing. In such a case, if it cannot be ascertained from the document itself which was intended, extrinsic evidence is admissible to resolve the ambiguity. Direct evidence of the party's intention is this time admissible. Thus if a person buys goods "ex Peerless from Bombay", and it is shown that there are two vessels of that name sailing from the port of Bombay, the parties may give evidence to show which vessel they themselves intended. [609] Likewise in the case of a bill or note, where there are two payees of the same name, the drawer or maker may give evidence to identify the intended payee. [610] However, in *Dumford Trading AG v OAO Atlantrybflot*, [611] Rix L.J. explored the law relating to *misnomer* and suggested that where there are two possible entities extrinsic evidence would not be admissible to identify the entity referred to, but if there is only one possible entity then it would be possible to use extrinsic evidence to identify a misdescribed party.

Patent ambiguity

13-128

In the case of a patent ambiguity, that is to say, a defect or ambiguity appearing on the face of the document which renders the words used unintelligible or meaningless, a rule is said to exist that any reference to matters outside the document is forbidden. [612] It is doubtful, however, whether such a principle applies today in respect of written contracts, except possibly in the case of total blanks in a document, [613] although evidence will not be admitted to show what the author himself intended to say. [614] The view has been expressed that evidence is admissible to give sense to words that are meaningless, but only:

> "… within the range of meaning which the words are capable of bearing in their ordinary and natural sense having regard to the aim and purpose of the transaction." [615]

On the other hand the language employed may, of course, be so vague or contradictory as to be incurable.

Subsequent acts

13-129

The admissibility of evidence to show that the parties have acted upon an instrument in a particular sense is probably confined to ancient documents. [616] Evidence of user, and of acts done in pursuance of an instrument, has been admitted to explain old, or obsolete, or even imperfect expressions to be

found in ancient documents. [617] Attempts were, however made to extend admissibility to cases where the document was modern and the ambiguity patent. [618] The acts and conduct of the parties under the agreement were admitted to show the sense in which the parties to it used the language they employed, and their intention in executing the instrument as revealed by their language interpreted in this sense. [619] The House of Lords has decisively rejected this extension and has held that:

> "… it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made." [620]

Subsequent actions are therefore inadmissible to interpret a written agreement, although there are certain exceptions to this rule: (i) where the contract is oral or partly oral [621]; (ii) where a conveyance is unclear or ambiguous with respect to the land conveyed by it [622]; (iii) to show that an agreement, or a term of an agreement, is a sham [623]; (iv) to show whether there was a contract and what the terms of the contract were [624]; (v) to show that the terms of a contract have been varied or enlarged [625]; (vi) to found an estoppel [626]; (vii) to infer the governing law [627]; and (viii) where the contract between the parties has been made by conduct. [628]

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564. See Law Com.No.154, 1986, Cmnd.9700, para.1.2; referred to with approval in *Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep. 127, 140*.

565. *Thorpe v Brumfitt (1873) L.R. 8 Ch. App. 650*; *Johnstone v Holdway [1963] 1 Q.B. 601*; *The Shannon Ltd v Venner Ltd [1965] Ch. 682*; *Perrylease Ltd v Imecar A.G. [1988] 1 W.L.R. 463*.

566. *Colpoys v Colpoys (1822) Jac. 451*.

567. *(1842) 9 Cl. & Fin. 355, 565*.

568. *Bank of New Zealand v Simpson [1900] A.C. 182, 188*. See also *Blackett v Royal Exchange Co (1832) 2 C. & J. 244*; *Inglis v Buttery (1878) 3 App. Cas. 552*; *Edward Lloyd Ltd v Sturgeon Falls Pulp Co (1901) 85 L.T. 162*; *Lovell & Christmas Ltd v Wall (1911) 104 L.T. 85*; *Kinlen v Ennis [1916] 2 Ir.R. 299*; *G.W. Ry v Bristol Corp (1918) 87 L.J.Ch. 414*; *London CC v Henry Boot & Sons Ltd [1959] 1 W.L.R. 133, 1069*; *Codelfa Construction Pty Ltd v State Railway Authority of New South Wales (1982) 149 C.L.R. 337, 352*; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570, 591*; *Hamed El Chiaty & Co v Thomas Cook Group Ltd [1992] 2 Lloyd's Rep. 399, 407*; *Adams v British Airways Plc [1995] I.R.L.R. 577*.

569. *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd [1997] A.C. 749, 774*; *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 913*; *Simon Container Machinery Ltd v Emba Machinery Ltd [1998] 2 Lloyd's Rep. 429, 433*; *R. (Westminster CC) v National Asylum Support Service [2002] UKHL 38, [2002] 1 W.L.R. 2956* at [5]; cf. *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 261*; *Zeus Tradition Marine Ltd v Bell [1999] 1 Lloyd's Rep. 703, 706–707*; *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 1552 (TCC), [2009] B.L.R. 505* at [28].

570. *Smith v Thompson (1849) 8 C.B. 44*; *Burges v Wickham (1863) B. & S. 669*; *The Curfew [1891] P. 131*; *River Wear Commissioners v Adamson (1877) 2 App. Cas. 743, 763*; *Mackill v Wright (1888) 14 App. Cas. 106, 114, 116, 120*; *Bank of New Zealand v Simpson [1900] A.C. 182*; *Charrington & Co Ltd v Wooder [1914] A.C. 71, 77, 80, 82*; *A/S Tankexpress v Compagnie Financière Belge des Petroles SA [1949] A.C. 76*; *Prenn v Simmonds [1971] 1 W.L.R. 1381, 1383, 1384*; *Moschi v Lep Air Services Ltd [1973] A.C. 351, 354*; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, 995, 997*; *Bunge v Kruse [1977] 1 Lloyd's Rep. 492, 495, 497, 498*; *Harmony Shipping Co SA v Saudi-Europe Line Ltd [1981] 1 Lloyd's Rep. 377, 417*; *Shell Tankers (UK) Ltd v Astro Comino Armadora SA [1981] 2 Lloyd's Rep. 40, 44, 45* ; *Wace v Pan Atlantic Group Inc [1981] 2 Lloyd's Rep. 339, 343*; *Perrylease Ltd v Imecar A.G.*

[1988] 1 W.L.R. 463, 470; *Vitol BV v Compagnie Europeenne des Petroles [1988] 1 Lloyd's Rep. 574, 576*; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 2 Lloyd's Rep. 570, 590*; *Forsikringsaktieselskapet Vesta v J.N.E. Butcher, Bain Dawes Ltd [1989] 1 Lloyd's Rep. 330, 345*; *Anangel Atlas Compania Naviera SA v I.H.I. Co Ltd [1990] 2 Lloyd's Rep. 526, 552*; *Bankers Trust Co v State Bank of India [1991] 2 Lloyd's Rep. 443, 456*; *Levett v Barclays Bank [1995] 1 W.L.R. 1260*; *International Fina Services AG v Katrina Shipping Ltd [1995] 2 Lloyd's Rep. 344, 350*; *Cresspark Ltd v Wymering Mansions Ltd [1996] E.G.C.S. 63*; *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd [1997] A.C. 749, 775*; *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 912*; *Don King Productions Ltd v Warren [1998] 2 Lloyd's Rep. 176, 189*; *Ringway Roadmarking v Adbruj [1998] 2 B.C.L.C. 625, 643*; *NLA Group Ltd v Bowers [1999] 1 Lloyd's Rep. 109, 110*; *C. Itoh & Co Ltd v Companhia de Navegacao Lloyd Brasileiro and Steamship Mutual Underwriting Association (Bermuda) Ltd [1999] 1 Lloyd's Rep. 115, 118*; *Eridania SpA v Rudolf A Oetker [2000] 2 Lloyd's Rep. 209, 217*; *Static Control Components (Europe) Ltd v Egan [2004] EWCA 392, [2004] 2 Lloyd's Rep. 429*; *UCB Corporate Services Ltd v Thomason [2004] 2 All E.R. (Comm) 774*; *Sirius International Insurance (Publ) v FAI General Insurance Ltd [2004] UKHL 43, [2004] 1 W.L.R. 3251* at [20]; *Canmer International Inc v Mutual Steamship Assurance Association (Bermuda) Ltd [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep. 49* at [22]; *Barclays Bank Plc v Kingston [2006] EWHC 533 (QB), [2006] 2 Lloyd's Rep. 59* at [29]; *Gastronome (UK) Ltd v Anglo-Dutch Meats Ltd [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587*; *Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority [2007] EWCA Civ 240, [2007] B.L.G.R. 439*; *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101*; *Global Maritime Investments Ltd v STX Pan Ocean Co Ltd [2012] EWHC 2339 (Comm), [2012] 2 Lloyd's Rep. 354* at [14]; *MRI Trading AG v Erdenet Mining Corp LLC [2012] EWHC 1988 (Comm), [2012] 2 Lloyd's Rep. 465*; *Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736, [2013] Ch. 305*.

571. *Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, 997*; *Thoresen Car Ferries Ltd v Weymouth Portland BC [1977] 2 Lloyd's Rep. 156*; *Staffordshire A.H.A. v South Staffordshire Waterworks Co [1978] 1 W.L.R. 1387, 1395*; *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras [1978] 2 Lloyd's Rep. 502, 506*; *Earl of Lonsdale v Att-Gen [1982] 1 W.L.R. 887, 900*; *Gill & Duffus SA v Société pour l'Exportation des Sucres SA [1986] 1 Lloyd's Rep. 322, 325*; *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 912*; *Galaxy Energy International Ltd v Assurance foreningen Skuld [1999] 1 Lloyd's Rep. 249, 253*; *Association of British Travel Agents Ltd v British Airways Plc [2000] 2 Lloyd's Rep. 209, 217*. The court will have regard to the background knowledge reasonably available to the person or the class of persons to whom the document is addressed (*Metlife Seguros de Retiro SA v JP Morgan Chase Bank, National Association [2016] EWCA Civ 1248*). The background knowledge that the neutral, reasonable person employs when understanding a commercial document can include knowledge of the relevant law (*Gloucester Place Music Ltd v Le Bon [2016] EWHC 3091 (Ch), [2017] F.S.R. 27* at [28]). The factual matrix takes account of facts and circumstances known or reasonably available to both parties at the time of entry into the contract but not a fact or circumstance known to, or reasonably available to, only one of the parties: *Arnold v Britton [2015] UKSC 36, [2015] A.C. 1619* at [21] and *Jomast Accommodation Ltd v G4S Care and Justice Services (UK) Ltd [2017] EWHC 200 (Ch)* at [122].

572. *[1976] 1 W.L.R. 989, 995–996*.

573. *[1976] 1 W.L.R. 989, 996*. See also *Hvalfangerselskapet Polaris Aktieselskap Ltd v Unilever Ltd (1933) 39 Com. Cas. 1, 3, 19, 25*; *Anangel Atlas Compania Naviera SA v I.H.I. Co Ltd [1990] 2 Lloyd's Rep. 526, 553*.

574. *[2009] UKHL 38, [2009] 1 A.C. 1101*. See *Inglis v Buttery (1878) 3 App. Cas. 552, 558*; *Leggott v Barrett (1880) 15 Ch. D. 306, 311*; *Millbourn v Lyons [1914] 2 Ch. 231, 240*; *Davis Contractors Ltd v Fareham U.D.C. [1956] A.C. 696*; *Prenn v Simmonds [1971] 1 W.L.R. 1381, 1385*; *Moschi v Lep Air Services Ltd [1973] A.C. 331, 354*; *L.G. Schuler A.G. v Wickman Machine Tools Ltd [1974] A.C. 235*; *Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's Rep. 98, 101, 103, 105*; *The Raven [1980] 2 Lloyd's Rep. 266, 270*; *Sudatlantica Navegacion SA v Devamar Shipping Corp [1985] 2 Lloyd's Rep. 271, 274*; *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, 913*; *Aqua Design & Play International Ltd v Kier Regional Ltd [2002] EWCA Civ 797, [2003] B.L.R. 111*; *P&S Platt Ltd v Crouch [2003] EWCA*

Civ 1110, [2004] 1 P. & C.R. 18; *NBTY Europe Ltd v Nutricia International BV [2005] EWHC 734 (Comm), [2005] 2 Lloyd's Rep. 350* at [29]–[32]; *Absalom v TCRU Ltd [2005] EWHC 1090 (Comm), [2005] 2 Lloyd's Rep. 735* at [25]; *Beazer Homes Ltd v Stroude [2005] EWCA Civ 265, [2005] N.P.C. 45*; *Dornoch Ltd v Mauritius Union Assurance Co Ltd [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475* at [31]–[37]; *Nearfield Ltd v Lincoln Nominees Ltd [2006] EWHC 2421 (Ch), [2007] 1 All E.R. (Comm) 441*; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [9]; *ING Lease (UK) Ltd v Harwood [2007] EWHC 2292 (QB), [2008] Bus. L.R. 762*; *Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44, [2011] 1 Lloyd's Rep. 96* at [46]; *Ted Baker Plc v AXA Insurance UK Plc [2012] EWHC 1406 (Comm)*. But see *Canterbury Golf International Ltd v Yoshimoto [2001] N.Z.L.R. 523, [2002] UKPC 40* at [25]; and the observations of Lord Nicholls in *Bank of Credit and Commerce International v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [25], and in *Bank of Credit and Commerce International v Ali (2005) 121 L.Q.R. 577* at 582–588; *Proforce Recruit Ltd v Rugby Group Ltd [2006] EWCA Civ 69* at [33]–[35]; McMeel (2003) 119 L.Q.R. 272. For the procedure to be adopted where evidence of pre-contractual negotiations is sought to be adduced, see *Anglo-Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd [2009] EWCA Civ 218, [2009] C.P. Rep. 30*.

575. *Inglis v Buttery (1878) 3 App. Cas. 552*; *National Bank of Australasia v Falkingham [1902] A.C. 585, 591*; *Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep. 127*. But an earlier contract may be looked at as part of the factual background for the purpose of interpreting a later contract, although this may be of limited utility where the later contract is intended to supersede the earlier one: *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161* at [83]; *Electrosteel Castings Ltd v Scan-Trans Shipping [2002] EWHC 1993 (Comm); [2003] 1 Lloyd's Rep. 190* at [198]; *Egan v Static Control Components (Europe) Ltd [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429* at [35]; *Multiplex Constructions (UK) Ltd v Cleveland Bridge (UK) Ltd (No.2) [2007] EWHC 145 (TCC), (2007) 111 Const. L.R. 48* at [150]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396* at [61]. cf. *Nearfield Ltd v Lincoln Nominees Ltd [2006] EWHC 2421* at [68]–[70].

576. See above, para.3-057.

577. See above, para.4-108. cf. *Ted Baker Plc v AXA Insurance UK Plc [2012] EWHC 1406 (Comm)* at [118].

578. *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [42]; *Tartsinis v Navona Management Co [2015] EWHC 57 (Comm)* at [14]. For this purpose a fact known to both parties means "some objective part of the background matrix of fact other than a mere negotiating position taken by one of the parties, however vigorously expressed": *Northrop Grumman Missions Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd [2015] EWCA Civ 844* at [31].

579. *[2010] UKSC 44, [2011] 1 Lloyd's Rep. 96* at [39].

580. *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [45]; *Azimut-Benetti SpA v Healey [2010] EWHC 2234 (Comm), [2010] T.C.L.R. 7*; *Proteus Property Partners Ltd v South Africa Property Opportunities Plc [2011] EWHC 768 (QB)*; *Oceanbulk Shipping & Trading SA v TMT Asia Ltd [2010] UKSC 44, [2011] 1 Lloyd's Rep. 96*; *Dean & Dean Solicitors v Dionissiou-Moussaoui [2011] EWCA Civ 1331, [2012] 2 Costs L.O. 94*.

581. *Oceanbulk Shipping & Trading SA v TMT Asia Ltd [2010] UKSC 44, [2011] 1 Lloyd's Rep. 96*.

582. *IRC v Raphael [1935] A.C. 96, 142*; *Prenn v Simmonds [1971] 1 W.L.R. 1381, 1385*; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, 996*; *Harmony Shipping Co SA v Saudi-Europe Line Ltd [1981] 1 Lloyd's Rep. 377, 416*; *Nearfield Ltd v Lincoln Nominees Ltd [2006] EWHC 2421 (Ch), [2007] 1 All E.R. (Comm) 421* at [63]; *Scottish Power UK Plc v BP Exploration Operating Co Ltd [2015] EWHC 2658 (Comm), [2016] 1 All E.R. (Comm) 536* at [21]; *BP Gas Marketing Ltd v La Societe Sonatrach [2016] EWHC 2461 (Comm), 169 Con. L.R. 141* at [37]. In *Rabin v Gerson Berger Association Ltd [1986] 1 W.L.R. 526*, opinions of tax

counsel given shortly before or at the time of execution of certain trust deeds were held inadmissible; cf. McMeel (2003) 119 L.Q.R. 272.

583. *Grant v Grant (1870) L.R. 5 C.P. 727, 728*; approved in *London CC v Henry Boot & Sons Ltd [1959] 1 W.L.R. 133, 138, CA and [1959] 1 W.L.R. 1069, 1075*.

584. *[1971] 1 W.L.R. 1381*.

585. *[1998] 1 W.L.R. 896*.

586. *[1988] 1 W.L.R. 896, 912–913*.

587. In particular the judgment of Staughton L.J. in *Scottish Power Plc v Britoil (Exploration) Ltd The Times, December 2, 1997*. See also *NLA Group Ltd v Bowers [1999] 1 Lloyd's Rep. 109, 112*.

588. *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 A.C. 251* at [39]. See also Lord Steyn in *Mannai Investment Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749, 768*; *Pratt v Aigaion Insurance Co SA [2008] EWCA Civ 1314, [2009] 1 Lloyd's Rep. 225* at [10]; *Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321* at [133].

589. See above, para.13-052.

590. See above, paras 13-053, 13-062.

591. *Shore v Wilson (1842) 9 Cl. & Fin. 355, 511*. See also *L.G. Schuler A.G. v Wickman Machine Tools Sales Ltd [1974] A.C. 235, 261* ("technical expressions").

592. *Shore v Wilson (1842) 9 Cl. & Fin 355, 501, 527, 545, 555–556*; *Earl of Lonsdale v Att-Gen [1982] 1 W.L.R. 887*.

593. *Shore v Wilson (1842) 9 Cl. & Fin 355, 555–556*; *Di Sora v Phillips (1863) 10 H.L.C. 624, 633, 638*.

594. *Zeus Tradition Marine Ltd v Bell [1999] 1 Lloyd's Rep. 703, 706–707*.

595. See below, paras 13-130—13-136.

596. See above para.13-122. In *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] A.C. 1101* at [45] Lord Hoffmann stated that he did not consider this an exception to the rule excluding evidence of previous negotiations since "it does not matter whether the evidence of usage by the parties was in the course of negotiations or on any other occasion".

597. *Partenreederei M.S. Karen Oltmann v Sausdale Shipping Co Ltd [1976] 2 Lloyd's Rep. 708, 712* (criticised in *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] A.C. 1101* at [45]–[47]); *Proforce Recruit Ltd v Rugby Group Ltd [2006] EWCA Civ 69* ("preferred supplier status"). This may depend on an estoppel: *Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5*.

598. *Rossiter v Miller (1878) 3 App. Cas. 1124*; *Chapman v Smith [1907] 2 Ch. 97*; *Stokes v Whicher [1920] 1 Ch. 411*; *Estor Ltd v Multifit (UK) Ltd [2009] EWHC 2108 (TCC), 126 Con. L.R. 40*; *Fairstate Ltd v General Enterprise and Management Ltd [2010] EWHC 3072 (QB), [2011] 2 All E.R. (Comm) 497* at [75]. cf. *Jarrett v Hunter (1887) 34 Ch. D. 182*; *OTV Birwelco Ltd v Technical and General Guarantee Co [2002] EWHC 2240 (TCC), [2002] 4 All E.R. 668* at [12].

599. *Carr v Lynch [1900] 1 Ch. 613*.

600. *Newell v Radford (1867) L.R. 3 C.P. 52*. See also above, para.13-117 (agency); *Hamid v Francis Bradshaw Partnership [2013] EWCA Civ 470, [2013] B.L.R. 447*.

601. *Willis v Barrett (1816) 2 Stark. 29*; *Dermatine Co Ltd v Ashworth (1905) 21 T.L.R. 510*; *Bird & Co v Thomas Cook & Son [1937] 2 All E.R. 227, 230–231*. But contrast *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [49]; *Dumford Trading AG v OAO Atlantrybflot [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289* at [32]. See also *Gastronome (UK) Ltd v Anglo-Dutch Meats Ltd [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587* at [16] and below, para.13-127; *Almatrans SA v Steamship Mutual Underwriting Association (Bermuda) Ltd [2006] EWHC 2223 (Comm), [2007] 1 Lloyd's Rep. 104*; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761* at [81]–[91].

602. *L.G. Schuler A.G. v Wickman Machine Tools Sales Ltd [1974] A.C. 235, 261*; cf. *Compagnie Noga d'Importation et d'Exportation SA v Abacha [2003] EWCA Civ 1100, [2003] 2 All E.R. (Comm) 915*.

603. *Macdonald v Longbottom (1860) 1 E. & E. 977, 987*.

604. *Ogilvie v Foljambe (1817) 3 Mer. 53, 61*; *Owen v Thomas (1834) My. & K. 353*; *Bleakley v Smith (1840) 11 Sim. 150*; *Cowley v Watts (1853) 17 Jur. 172*; *Wood v Scarth (1855) 2 K. & J. 33*; *Shardlow v Cotterell (1881) 20 Ch. D. 90*; *Plant v Bourne [1897] 2 Ch. 281*; *Harewood v Retese [1990] 1 W.L.R. 333*; *Freeguard v Rogers [1999] 1 W.L.R. 375*. cf. *Doe d. Norton v Webster (1840) 12 A. & E. 442*.

605. *Scarfe v Adams [1981] 1 All E.R. 843*.

606. *England v Downs (1840) 2 Beav. 522*; *McCollin v Gilpin (1881) 6 Q.B.D. 516*. See also *Burges v Wickham (1863) 3 B. & S. 669, 698*; *Savory v World of Golf [1914] 2 Ch. 566*; *Auerbach v Nelson [1919] 2 Ch. 383*; *L.G. Schuler v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 261* . cf. *Caddick v Skidmore (1857) 2 De G. & J. 52*.

607. *Heffield v Meadows (1869) L.R. 4 C.P. 595*; *Perrylease Ltd v Imecar A.G. [1988] 1 W.L.R. 463*; cf. *Holmes v Mitchell (1859) 7 C.B.N.S. 361*.

608. See above, para.13-064.

609. *Raffles v Wichelhaus (1864) 2 H. & C. 906*.

610. *Sweeting v Fowler (1815) 1 Stark. 106*; *Stebbing v Spicer (1849) 8 C.B. 827*.

611. *[2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289* at [32]; *Almatrans SA v Steamship Mutual Underwriting Association (Bermuda) Ltd [2006] EWHC 2223 (Comm), [2007] 1 Lloyd's Rep. 104* . cf. *Gastronome (UK) Ltd v Anglo-Dutch Meats Ltd [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587* at [16]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761* at [72], [81], [91], [92], [108].

612. Bacon, *Law Tracts*, p.99; *Colpoys v Colpoys (1822) Jacob 451*; *Great Western Ry v Bristol Corp (1918) 87 L.J. Ch. 414, 429*; cf. *Watcham v Att-Gen of East African Protectorate [1919] A.C. 533* (but see below, para.13-129 n.608).

613. *R. v Ryan (1811) Russ. & Ry 195*; *In the Goods of De Rosaz (1877) 2 P.D. 66, 69*; cf. Bills of Exchange Act 1882 s.20. In *Westville Properties Ltd v Dow Properties Ltd [2010] EWHC 30 (Ch), [2010] 2 P. & C.R. 19*, a contractual blank was filled on the basis of the remaining terms of the contract and the factual matrix.

614. *Clayton v Lord Nugent (1844) 13 M. & W. 200* (will).

615. *Zeus Tradition Marine Ltd v Bell [1999] 1 Lloyd's Rep. 703, 707*.

616. *Att-Gen v Parker (1747) 3 Atk. 576, 577*; *Lord Waterpark v Fennell (1859) 7 H.L.C. 650*; *North Eastern Ry v Lord Hastings [1900] A.C. 260, 269*; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 261, 270* (but see at 252, 261, 269, 272, questions of title to land).

617. *Duke of Beaufort v Swansea Corp (1849) 3 Exch. 413, 425*; *Earl de la Warr v Miles (1880) 17 Ch. D. 535, 573*; *Neill v Duke of Devonshire (1882) 8 App. Cas. 135, 156*.

618. *Doe d. Pearson v Ries (1832) 8 Bing. 178, 184*; *Chapman v Bluck (1838) 4 Bing.N.C. 187*; *Van Diemen's Land Co v Table Cape Marine Board [1906] A.C. 92, 96, 98*; *Watcham v Att-Gen of East African Protectorate [1919] A.C. 533*.

619. *Watcham v Att-Gen of East African Protectorate [1919] A.C. 533, 538*. The authority of this case is now extremely fragile: *Gaisberg v Storr [1950] 1 K.B. 107, 114*; *Sussex Caravan Parks Ltd v Richardson [1961] 1 W.L.R. 561, 568*; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 261, 272*.

620. *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 572, 603*. See also 606, 611, 614; *Prenn v Simmonds [1971] 1 W.L.R. 1381*; *English Industrial Estates Corp v George Wimpey & Co Ltd [1973] 1 Lloyd's Rep. 118*; *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601, 611*; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 252, 260, 265–270, 272*; *Bushwall Properties Ltd v Vortex Properties Ltd [1976] 1 W.L.R. 591, 603*; *Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's Rep. 98*; *Harmony Shipping Co SA v Saudi-Europe Line Ltd [1981] 1 Lloyd's Rep. 409, 416*; *Haydon v Lo & Lo [1997] 1 W.L.R. 198, 205*; *Full Metal Jacket Ltd v Gowlain Building Group Ltd [2005] EWCA Civ 1809* at [17]; *Proteus Property Partners Ltd v South Africa Property Opportunities Plc [2011] EWHC 768 (QB)* at [46]; *Hyundai Merchant Marine Co Ltd v Trafigura Beheer BV [2011] EWHC 3108 (Comm)* at [13]. Contrast *Wholesale Distributors Ltd v Gibbons Holdings Ltd [2007] NZSC 37*; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons [1977] 2 Lloyd's Rep. 5, 11*; cf. McMeel (2003) 119 L.Q.R. 272.

621. *Carmichael v National Power Plc [1999] 1 W.L.R. 2042, 2051*; *Maggs v Marsh [2006] EWCA Civ 1058, [2006] B.L.R. 395*; *Kellogg Brown and Roof Inc v Concordia Maritime AG [2006] EWHC 3358 (Comm)*; *Kier Regional Ltd v City and General (Holborn) Ltd [2008] EWHC 2454 (TCC), [2009] B.L.R. 90*; *Crema v Cenkos Securities Plc [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066* at [33]–[34]; *BVM Management Ltd v Roger Yeomans [2011] EWCA Civ 1254*.

622. *Ali v Lane [2007] EWCA Civ 1532, [2007] 1 P. & C.R. 26*; *Haycocks v Neville [2007] EWCA Civ 78, [2007] 12 E.G. 56*.

623. *Antoniades v Villiers [1990] 1 A.C. 417, 475*; *Bankway Properties Ltd v Pensfold-Dunsford [2001] EWCA Civ 528, [2001] 1 W.L.R. 1369* at [44].

624. *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 572, 603, 615*; *Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 261*; *Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 W.L.R. 1213, 1221, 1229*; *Liverpool City Council v Irwin [1977] A.C. 239, 283*; *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons [1977] 2 Lloyd's Rep. 5, 11*; *Wilson v Maynard Shipbuilding Consultants AB [1978] Q.B. 665, 675, 677*; *Todd v British Midland Airways Ltd [1978] I.C.R. 959, 964, 967*; *Mears v Safecar Security Ltd [1983] Q.B. 54, 77*; *Great North Eastern Ry Ltd v Avon Insurance Plc [2001] EWCA Civ 780, [2001] 2 Lloyd's Rep. 649* at [29]; *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2012] EWHC 1188 (QB), [2012] 2 Lloyd's Rep. 25* at [12], [47]; *Reveille Independent LLC v Anotech International (UK) Ltd [2016] EWCA Civ 443* at [41].

625. *Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 W.L.R. 1213*; *Carmichael v National Power Plc [1999] 1 W.L.R. 2042, 2051*.

626. *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] 2 Q.B. 84, 119* (estoppel by convention); *Carmichael v National Power Plc [1999] 1 W.L.R. 2042, 2051*.

627. *F.R. Larssen Werft GmbH & Co KG v Halle [2009] EWHC 2607 (Comm), [2010] 2 Lloyd's Rep. 20* at [38].

628. *Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch)* at [28].

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 4 - The Terms of Contract

Chapter 13 - Express Terms

Section 4. - Admissibility of Extrinsic Evidence

(e) - Evidence of Custom or Mercantile Usage

Generally

13-130

Extrinsic evidence is also admissible to show the custom of a particular locality or the usage of a particular trade. Evidence may therefore be adduced: (1) to prove that the words of a contract are used in a peculiar sense and different from the sense which they ordinarily bear [629]; and (2) to annex incidents to the contract upon which the contract is silent. [630] The former is admitted on the ground that:

> "… the intention of the parties, though perfectly well known to themselves, would often be defeated if the language were construed according to its ordinary import in the world" [631];

the latter because the parties commonly reduce into writing the special particulars of their agreement, but omit to specify the custom or usage, which is included, however, as of course by mutual understanding: "[t]he contract in truth is partly express and in writing, partly implied or understood and unwritten". [632]

Conflict with written instrument

13-131

It has frequently been stated [633] that both of these principles are subject to the qualification that the peculiar sense or incident which it is proposed by the evidence to attach to the terms of the contract must not vary or contradict the terms of the written instrument. But the principle as to whether evidence is admitted to vary a written instrument is perhaps easier to state than to apply, because in a sense any such evidence varies the written agreement:

> "The contract construed without the custom will be different from what it is if construed with the custom, and in that sense every admission of custom varies the written contract." [634]

Yet in interpretation, the custom or usage is being used merely as "a dictionary to explain what words in the contract mean" [635]; in annexing incidents, it is being used to imply a term as to which the contract is silent. Perhaps the best test is still that suggested by Lord Campbell C.J. [636]:

> "To fall within the exception of repugnancy, the incident must be such as if expressed in

the written contract would make it insensible or inconsistent."

Nevertheless the distinction is by no means always easy to draw in practice. [637]

Requirements

13-132

No custom or usage will be considered by the court on the construction of a contract, unless it is notorious, certain and reasonable [638] and does not offend against the intention of any legislative enactment. [639] The notoriety of a custom or usage is a matter to be proved in evidence; but there are certain usages, which are so well known that judicial notice will be taken of them. [640] Mere trade practice is insufficient to amount to custom [641] but may nevertheless be relevant as part of the factual matrix in aid of interpretation. [642]

Custom to interpret instrument

13-133

Evidence of the custom prevailing in a particular place or locality has been admitted to show that, in Suffolk, "one thousand" rabbits meant 1,200 [643] and what was meant by "regular turns of loading" according to the usage of the ports of the Tyne. [644] Evidence was also held to be admissible for the purpose of proving at what time, according to the custom of the port of Liverpool, a ship chartered to that port with a cargo of timber, should be deemed to have arrived at her place of discharge within the meaning of the charterparty [645] and to show, for example, the meaning of "alongside" and "delivery", [646] "discharge" [647] or "working day" [648] at a particular port.

Custom to annex terms

13-134

Terms have also been annexed by custom, [649] one case being the "customs of the country" which relate to a tenant's rights at the end of his tenancy. [650] Evidence of these is admissible.

Usage to interpret instrument

13-135

The invariable, certain and general usage of a particular trade has frequently been admitted to interpret the terms of a written contract. [651] Thus, where a contract was in these words, "sold eighteen pockets Kent hops at 100s.", and it appeared that a pocket contained more than a hundred weight, evidence was admitted to show that by the usage of the trade a contract so worded was understood to mean £5 per cwt. [652] Where a theatrical manager contracted with an actress to engage her for "three years" at a certain salary, it was held that extrinsic evidence might be given to show that, according to the uniform usage of that profession, the claimant was to be paid only during the theatrical season of each of those years. [653] Evidence of usage has similarly been admitted to resolve ambiguities. [654]

Usage to annex terms

13-136

Usage has also been employed to annex terms to the contract. [655] So, where goods are sold by

sample, evidence of a custom of the trade as to returning or making an allowance for such of the goods as do not answer the sample is admissible. [656] In particular, evidence may be adduced to show that where a broker sells or buys goods without disclosing his principals, he is, according to the usage of the trade, himself liable as vendor or purchaser. [657]

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629. See above, paras 13-060—13-061.

630. See below, paras 13-134, 13-136, 14-021.

631. *Brown v Byrne (1854) 3 E. & B. 703, 715*.

632. *Brown v Byrne (1854) 3 E. & B. 703*.

633. See, e.g. *Yates v Pym (1816) 6 Taunt. 446*; *Roberts v Barker (1833) 1 Cr. & M. 808*; *Cockburn v Alexander (1848) 6 C.B. 791*; *Spartali v Benecke (1850) 10 C.B. 212, 223*; *Brown v Byrne (1854) 3 E. & B. 703, 715*; *Re L. Sutro & Co and Heilbut, Symons & Co [1917] 2 K.B. 348*; *Westcott v Hahn [1918] 1 K.B. 495*; *London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd [1958] 1 W.L.R. 661, 675*; *Danowski v Henry Moore Foundation, The Times, March 19, 1996*; *Phillips v Syndicate 992 Gunner [2003] EWHC 48, [2003] 2 C.L.C. 152* at [25]. See below, para.14-026.

634. *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd [1917] 1 K.B. 320, 330*; *Humfrey v Dale (1857) 7 E. & B. 266, 275*.

635. *[1917] 1 K.B. 320, 330*.

636. *Humfrey v Dale (1857) 7 E. & B. 266, 275*.

637. Contrast *Palgrave, Brown & Sons v S.S. Turid [1922] 1 A.C. 397*, with *Smith, Hogg & Co v Louis Bamberger & Sons [1929] 1 K.B. 150*.

638. *Devonald v Rosser & Sons [1906] 2 K.B. 728, 743*; *Three Rivers Trading Co v Gwinear and District Farmers (1967) 111 S.J. 831*. See also the cases cited in para.14-021, below.

639. *Daun v City of London Brewery Co (1869) L.R. 8 Eq. 155, 161*.

640. *George v Davies [1911] 2 K.B. 445*.

641. *Cunliffe-Owen v Teather and Greenwood [1967] 1 W.L.R. 1421, 1438*; *Vitol SA v Phibro Energy A.G. [1990] 2 Lloyd's Rep. 84, 90*; *Pryke v Gibbs Hartley Cooper Ltd [1991] 1 Lloyd's Rep. 602, 615*; *Sucre Export SA v Northern Shipping Ltd [1994] 2 Lloyd's Rep. 266*.

642. *Crema v Cenkos Securities Plc [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066* at [42]–[48].

643. *Smith v Wilson (1832) 3 B. & Ad. 728*. See above, para.13-060.

644. *Leidemann v Schultz (1853) 14 C.B. 38*.

645. *Norden S.S. Co v Dempsey (1876) 1 C.P.D. 654*.

646. *Aktieselskab Helios v Ekman (1872) 2 Q.B.D. 83*.

647. *Petersen v Freebody [1895] 2 Q.B. 294*.

648. *British and Mexican Shipping Co Ltd v Lockett Brothers & Co Ltd [1911] 1 K.B. 264*; *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food [1963] A.C. 691, 726*.

649. See below, para.14-021.

650. *Hutton v Warren (1836) 1 M. & W. 466*; *Dashwood v Magniac [1891] 3 Ch. 306*.

651. See above, para.13-059.

652. *Spicer v Cooper (1841) 1 Q.B. 424*.

653. *Grant v Maddox (1846) 15 M. & W. 737*. See also *Hutchinson v Bowker (1839) 5 M. & W. 535*; *Myers v Sarl (1860) 3 E. & E. 306*; *Davis v Temco [1992] C.L.Y. 2064*.

654. *Bold v Rayner (1836) 1 M. & W. 343*.

655. *R. v Inhabitants of Stoke-on-Trent (1843) 8 Q.B. 303*; *Syers v Jonas (1848) 2 Exch. 111*; *Re Walkers, Winser & Hamm and Shaw, Son & Co [1904] 2 K.B. 152*; *Produce Brokers Co Ltd v Olympic Oil & Cake Co Ltd [1916] 1 A.C. 314*. See below, para.14-021.

656. *Cooke v Riddelien (1844) 1 C. & K. 561*.

657. *Humfrey v Dale (1858) E.B. & E. 1004*; *Fleet v Murton (1871) L.R. 7 Q.B. 126*; *Hutchinson v Thatham (1873) L.R. 8 C.P. 482*; *Pike v Ongley (1887) 18 Q.B.D. 708*. Contrast *Trueman v Loder (1840) 11 A. & E. 589*; *Robinson v Mollett (1875) L.R. 7 H.L. 802*; *Miller, Gibb & Co v Smith & Tyrer [1917] 2 K.B. 141*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

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.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(b) - Genuine Pre-estimate of the Likely Loss

Genuine pre-estimate test

26-182

What has been referred to above as the "traditional" test, which for many years was considered to have been the only test applicable, [1010] was summed up by Lord Dunedin in delivering his opinion in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1011] in the following propositions:

> "(1)
>
> Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages …. [1012]
>
> (2)
>
> The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine pre-estimate of damage. [1013]
>
> (3)
>
> The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of at the time of the making of the contract, not as at the time of the breach. [1014]
>
> (4)
>
> To assist this task of construction various tests have been suggested which, if applicable to the case under consideration, may prove helpful or even conclusive. [1015] Such are:

(a)

It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach. [1016]

(b)

It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid …. [1017]

(c)

There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.' [1018]

On the other hand:

(d)

It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise preestimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties." [1019]

In this case, dealers in tyres had agreed not to resell any tyres bought from the manufacturers to any private customers at less than the manufacturers' current list prices, not to supply them to persons whose supplies the manufacturers had decided to suspend, not to exhibit or export them without the manufacturers' consent, and to pay £5 by way of liquidated damages for every tyre sold or offered in breach of the agreement. It was held that the £5 was not a penalty and thus was recoverable as liquidated damages.

The basis of the decision in the Dunlop case

26-183

The traditional approach treated Lord Dunedin's second proposition as an exhaustive dichotomy, [1020] and had thus concentrated on whether the clause was a genuine pre-estimate of the loss that the payee was likely to suffer. A clause would be regarded as in terrorem if it provided for a greater sum, or at least an extravagantly greater sum, than the loss the payee was likely to suffer. [1021] In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [1022] the Supreme Court pointed out that other judges in the Dunlop case had decided the case on a wider basis [1023]; and as the result of the Supreme Court's decision in those cases, a clause may also be justified on the basis that the party who would benefit from it has a legitimate interest in securing performance rather

than damages, and the amount payable or other consequence if the contract is broken is not extravagant and unconscionable in comparison to that interest. [1024] However, as Lords Neuberger and Sumption said:

> "In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity." [1025]

Thus if the party cannot demonstrate a legitimate interest in securing performance rather than damages, or does not seek to do so, the clause may still be valid under the "genuine pre-estimate" test, and therefore that test is explored in more detail in this section.

An objective approach

26-184

Asking whether a clause was a genuine pre-estimate of the loss might suggest a subjective approach, so that whether the clause is liquidated damages or a penalty depends on an assessment of what the parties thought they were agreeing on. However, there are clearly objective elements to a test which depends on whether the amount is "extravagant and unconscionable in comparison with the greatest loss" [1026]; and it has been held that:

> "… the test does not turn upon the genuineness or honesty of the party or parties who made the pre-estimate. The test is primarily an objective one." [1027]

A substantial discrepancy

26-185

In *Murray v Leisureplay Plc* [1028] the Court of Appeal emphasised that a clause will not be a penalty merely because it is not a precise pre-estimate of the loss. [1029] Arden L.J. said that a contractual provision does not become a penalty simply because it results in overpayment in particular circumstances: "The parties are allowed a generous margin". [1030]

Pre-estimate of damage

26-186

The word "damage" must mean "net loss" after taking account of the claimant's expected ability to mitigate his loss. The comparison is to be made to the loss that the innocent party would be entitled to recover by way of damages, not to the possibly greater actual loss. [1031] If the clause is a genuine pre-estimate of the loss, [1032] there is no scope for arguing that the claimant could in fact have mitigated the loss: the purpose of the clause is to make proof of the actual loss unnecessary and irrelevant [1033]; but the mitigation principle must be taken into account in deciding whether or not the clause was a genuine pre-estimate in the first place. [1034] A genuine pre-estimate may include

loss that would be too remote [1035] unless notice of its possibility had been given to the party in breach at the time the contract was made. [1036] It has been suggested that a party may stipulate for liquidated damages in order to ensure it is compensated for some idiosyncratic loss that might not otherwise be recoverable, such as sentimental value attached to property. [1037] It must be the case that a genuine pre-estimate can include damages for loss of amenity or distress when the purpose of the contract is to provide that amenity or freedom from distress [1038]; it seems unlikely that such loss be a legitimate part of a pre-estimate when the loss would not be recoverable by way of unliquidated damages, [1039] but a genuine concern about such loss would presumably give rise to a legitimate interest that could be protected under the alternative basis set out in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*. [1040] If, as it seems, "hypothetical bargain damages" allowing the innocent party to recover a share of the profit made by the other party through his breach of contract [1041] may be recoverable in addition to other damages, [1042] presumably a genuine pre-estimate of the loss may include such a figure if, at the time the contract was made, it is likely that the type of breach to which the agreed damages clause applies will lead to the party in breach making a profit from it. The claimant's chance to bargain with the defendant might constitute a legitimate interest [1043] but it is probably unnecessary for the claimant to show this if the amount agreed falls within a genuine preestimate. On the traditional account of liquidated damages, the fact that the damage is difficult to assess with precision strengthened the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial. [1044] It seems that the risk of this kind of difficulty will now be treated as giving the claimant a legitimate interest in deterring breach. [1045]

Fluctuating sums

26-187

Although a valid agreed damages clause may specify a graduated scale of sums payable according to the varying extent of the expected loss, [1046] a sum which is liable to fluctuate according to extraneous circumstances will not be classified as liquidated damages. [1047] In a railway construction contract it was provided that in the event of a breach by the contractor he should forfeit "as and for liquidated damages" certain percentages retained by the government of money payable for work done as a guarantee fund to answer for defective work, and also certain security money lodged with the government. [1048] The Judicial Committee held that this was a penalty, since it was not a definite sum, but was:

> "… liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract. It is obvious that the amount of retained money … depended entirely on the progress of those contracts, and that further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available … could not in any way be estimated as a fixed sum." [1049]

Minimum payment clause

26-188

A "minimum payment" clause in a hire-purchase or hiring agreement that applies when the hirer is

will usually be held to fail the genuine preestimate test if it provides for the same total sum to be payable by the hirer irrespective of how long the agreement has been in force. [1051]

Single sum payable upon different breaches

26-189

The mere fact that the same amount is made payable upon the breach of several undertakings of varying importance is by no means conclusive. [1052] It may be that the amount is not disproportionate to the least important of these undertakings, and therefore represents a genuine attempt at an agreed estimate of real damage [1053]; or, if the loss is hard to assess, the test seemed to be satisfied if a modest sum was used; but a clause setting a very high amount would not pass muster. Thus in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, [1054] the dealers had agreed not to resell any tyres bought from the manufacturers to any private customers at less than the manufacturers' current list prices, not to supply them to persons whose supplies the manufacturers had decided to suspend, not to exhibit or export them without the manufacturers' consent, and to pay £5 by way of liquidated damages for every tyre sold or offered in breach of the agreement. It was held that the £5 was not a penalty and thus was recoverable as liquidated damages. [1055] The decision seems to fall within Lord Dunedin's last proposition:

> "… the damage caused by each and every one of those events, however varying in importance, may be of such an uncertain nature that it cannot be accurately ascertained" [1056]

The clause may also be a genuine pre-estimate where the stipulated sum is taken as an average or mean figure of the losses probably incurred in the different events. [1057] In *Ford Motor Co v Armstrong*, [1058] in contrast, the retailer in a similar case agreed to pay £250 as "the agreed damage which the manufacturer will sustain" upon the breach of any one of several covenants (similar to those in the *Dunlop* case, above), and the Court of Appeal by a majority held that this (in 1915) was a penalty, since it was an arbitrary and substantial sum, and made payable for various breaches differing in kind, some of which might cause only trifling damage. The high amount of the agreed sum in this case showed that it could not be a genuine pre-estimate of loss.

Breach may cause varying loss

26-190

A different case is where the sum is payable for any breach of a particular term of the contract, but the loss that follows may vary significantly from case to case. This seems to fall within Lord Dunedin's heading 4(a):

> "It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach." [1059]

It is not clear that the converse proposition, that the sum will not be unconscionable if it is no more than the greatest possible loss, follows. Lord Parker said that loss caused by a breach of a non-solicitation covenant might vary according to where or not the solicitation was successful;

nonetheless,

> "whatever damage there is must be the same in kind for every possible breach, and the fact that it may vary in amount for each particular breach has never been held to raise any presumption or inference that the sum agreed to be paid is a penalty, at any rate in cases where the parties have referred to it as agreed or liquidated damages." [1060]

That might be taken to suggest that provided the sum stipulated is not extravagant and unconscionable in relation to the greatest loss that might follow, it will not be a penalty even though the loss might well be much less and therefore the sum could not strictly be described as a genuine pre-estimate of the likely loss. [1061] On occasion Lord Dunedin's statement has been applied literally, [1062] and it was repeated by Lord Hodge in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*. [1063] However, in the past it has been held a clause may be penal under the "genuine pre-estimate test" even though the sum does not exceed the greatest possible loss. [1064] In *Bridge v Campbell Discount Co Ltd* a clause in a hire-purchase providing for a minimum payment if the hirer defaulted in paying was held to be a penalty because the loss to the finance company would differ according to how long the hirer kept the vehicle. [1065] True, in that case the amount payable under the clause would also vary according to how much of the price the hirer had already paid, so that the two situations are technically distinguishable, but it is thought that the result in the *Bridge* case would have been the same if the clause had simply stated a fixed sum that the hirer must pay however much he had paid already. So it is better to treat Lord Dunedin's and Lord Parker's statements quoted above as no more than a presumption to be used when the genuine pre-estimate test is being applied [1066]; and to note that when the claimant has a legitimate interest in obtaining performance rather than damages, an agreed sum that is not extravagant and unconscionable in relation to the greatest loss that might follow is likely to be treated as valid. [1067]

Graduated damages

26-191

In building contracts and other similar contracts the courts have upheld as liquidated damages a system of graduated sums which increase in proportion to the seriousness of the breach, e.g. so much per week for delay in performance, [1068] or so much according to the number of items in question. [1069] If in a building contract there is no such graduation the sum fixed is less likely to be held to be a genuine pre-estimate. [1070] The sum must be graduated so that it changes in the right direction. Depreciation obviously increases over time, so a sum said to be compensation for depreciation is not a genuine preestimate of loss if it *decreases* over time as a hirer pays more instalments. [1071]

Damages following termination by the innocent party under an express term

26-192

Where the hirer has neither repudiated the hiring (or hire-purchase) agreement, nor committed a "fundamental breach" of it, but the owner terminates it in the exercise of an express power to do so conferred by the agreement, the owner's damages are limited to loss suffered through any breaches up to the date of the termination. [1072] This is, in effect, the measure of loss defined by law and the parties are not free to define it otherwise. A clause that provides for a larger sum to be paid, such as a "minimum payment" clause or one providing for recovery of the amount of future payments, even with

deductions for any savings made, [1073] ! will (under the genuine pre-estimate test) be void as a penalty. [1074] ! It should be noted, however, that this principle does not apply where the contract made the broken term into a condition, any breach of which entitled the innocent party to terminate (e.g. a clause making compliance with time "of the essence" [1075] !). In this case the innocent party may both terminate the contract and recover damages for the loss of the bargain (viz in respect of all the outstanding obligations of the other party). [1076] ! A clause that makes the hirer liable for a genuine pre-estimate of the owners' full loss in such a case will be valid.

1010. !In *Cavendish Square Holding BV v Makdessi [2015] UKSC 67* at [22] Lords Neuberger and Sumption described it as having "achieved the status of a quasi-statutory code".

1011. ![1915] A.C. 79, 86–88*.

1012. !"But no case … decides that the term used by the parties themselves is to be altogether disregarded, and I should say that, where the parties themselves call the sum made payable a 'penalty,' the onus lies on those who seek to show that it is to be payable as liquidated damages": *Willson v Love [1896] 1 Q.B. 626, 630*. See *Alder v Moore [1961] 2 Q.B. 57, 65*; *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd [1962] 1 W.L.R. 34*. cf. *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] A.C. 573, 579*.

1013. !*Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6*. See also *Bridge v Campbell Discount Co Ltd [1962] A.C. 600, 622*; *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 850*; *Cameron-Head v Cameron & Co (1919) S.C. 627*; the *Workers Trust case [1993] A.C. 573*. It should be noted that by s.24 of the Agricultural Holdings Act 1986 "notwithstanding any provision in a contract of tenancy of an agricultural holding making the tenant liable to pay a higher rent or other liquidated damages" for breach of covenant, etc. the landlord may not recover for any such breach any sum "in excess of the damage actually suffered".

1014. !*Commissioner of Public Works v Hills [1906] A.C. 368, 376*; *Webster v Bosanquet [1912] A.C. 394*. If the contract was varied in a way that will affect the likely loss, the validity of the clause should be judged by the time of the variation: *Unaoil Ltd v Leighton Offshore Pte Ltd [2014] EWHC 2965 (Comm)* at [75].

1015. !*Pye v British Automobile Commercial Syndicate Ltd [1906] 1 K.B. 425*.

1016. !*Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6, 17*; *Webster v Bosanquet [1912] A.C. 394*; *Cooden Engineering Co Ltd v Stanford [1953] 1 Q.B. 86*; cf. *Bridge v Campbell Discount Co Ltd [1962] A.C. 600* (below, para.26-216C).

1017. !*Kemble v Farren (1829) 6 Bing. 141*. See also *Astley v Weldon (1801) 2 B. & P. 346*; *Wallis v Smith (1882) 21 Ch. D. 243, 256–257*. The breach may involve more than a failure to pay: *Thos. P. Gonzales Corp v F. R. Waring (International) Pty Ltd [1986] 2 Lloyd's Rep. 160, 163*. A discount for prompt payment, however, was held not make the undiscounted sum a penalty; nor was it a penalty where a loan agreement provides for a modest increase in the rate of interest, which operates only from the date of the borrower's default: *Lordsvale Finance Plc v Bank of Zambia [1996] Q.B. 752* (a 1 per cent increase: if, however, the increase operated retrospectively, it might be a penalty. On this case see further below, paras 26-193—26-194); cf. *Jeancharm Ltd v Barnet Football Club Ltd [2003] EWCA Civ 58, [2003] 92 Con. L.R. 26* (interest rate for late payment of 5 per cent per week held to be a penalty).

1018. *Lord Elphinstone v Monkland Iron & Coal Co Ltd (1886) 11 App. Cas. 332, 342*. See *Kemble v Farren (1829) 6 Bing. 141, 148*; *Magee v Lavell (1874) L.R. 9 C.P. 107, 115*; *Ford Motor Co v Armstrong (1915) 31 T.L.R. 267* (see below, para.26-189); *Michel Habib Raji Ayoub v Sheikh Suleiman [1941] 1 All E.R. 507, 510*; *Cooden Engineering Co Ltd v Stanford [1953] 1 Q.B. 86, 98*; *Interoffice Telephones Ltd v Robert Freeman Co Ltd [1958] 1 Q.B. 190, 194*. The parties, in such a case, should fix separate sums for the various possible breaches: *Imperial Tobacco Co v Parslay [1936] 2 All E.R. 515*.

1019. See *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6, 11*; *Webster v Bosanquet [1912] A.C. 394, 398*; *English Hop Growers Ltd v Dering [1928] 2 K.B. 174*; *Imperial Tobacco Co v Parslay [1936] 2 All E.R. 515, 519*; *Philips Hong Kong Ltd v Att-Gen of Hong Kong (1993) 61 Build. L.R. 49, 60 PC* (the impact of delay by one contractor on other contracts). Some of the clauses that were justified under this category in particular, including the *Dunlop* case itself, may now be better viewed as cases of legitimate deterrence: see below, para.26-197.

1020. cf. *United International Pictures v Cine Bes Filmcilik ve Yapimcilik AS [2003] EWCA Civ 1669* at [15].

1021. "That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred". *Lordsvale Finance Plc v Bank of Zambia [1996] Q.B. 752, 762*, Colman J.

1022. *[2015] UKSC 67, [2015] 3 W.L.R. 1373*.

1023. See below, para.26-197.

1024. See below, para.26-197.

1025. *[2015] UKSC 67* at [32].

1026. Lord Dunedin's proposition (4)(a) above, para.26-182.

1027. *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] Build. L.R. 271 (TCC)* at [48] (Jackson J.).

1028. *[2005] EWCA Civ 963, [2005] I.R.L.R. 946*.

1029. See also Jackson J. in *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] Build. L.R. 271 (TCC)* at [48].

1030. *[2005] EWCA Civ 963* at [43]; see too the judgments of Clarke and Buxton L.JJ. at [105] and [114] respectively. See also *Cleeve Link Ltd v Bryla [2014] I.R.L.R. 86 EAT*.

1031. *Lansat Shipping Co Ltd v Glencore Grain BV (The Paragon) [2009] EWHC 551 (Comm), [2009] 1 Lloyd's Rep. 658* at [24]. See also para.26-197.

1032. Note that under the approach taken in the *Cavendish Square* and *ParkingEye* cases, a clause may be valid even if it is not a genuine pre-estimate of the loss: see below, para.26-197.

1033. *MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2015] EWHC 283 (Comm)* at [70]–[71], referring to dicta in *Abrahams v Performing Rights Society Ltd [1995] I.C.R. 1028,*

1040–1041. However, in a contract in which the liquidated damages were only payable while the contract remained on foot, the innocent party was not entitled to ignore a repudiation and keep the contract alive so as to be able to continue to claim liquidated damages, as they would have no legitimate interest is doing so: at [94]–[105]. The Court of Appeal *[2016] EWCA Civ 789* agreed (at [43]) though it decided the case on other grounds: see above, para.26-106.

1034. *MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2015] EWHC 283 (Comm)* at [113]. If the relevant clause purported to give the innocent party an unfettered right to ignore the repudiation when it had no legitimate interest is doing so, the clause would be a penalty: *[2015] EWHC 283 (Comm) at [116] (aff'd without reference to this point, [2016] EWCA Civ 789)*. In *Bunge SA v Nidera BV [2015] UKSC 43* Lord Sumption said the Default Clause in a GAFTA sale contract differs from the common law paradigm in that the injured party is not required to mitigate by going into the market and buying or selling against the defaulter, but has a discretion whether to do so (at [28]). He did not discuss whether this might amount to a penalty, merely remarking that there is a difference between a clause prescribing a fixed measure of loss (such as a liquidated damages clause) and a clause providing a mechanical formula in place of the more nuanced and fact-sensitive approach of the common law (such as the GAFTA clause) (at [26]). With respect, a formula for measuring damages may also amount to a penalty if it produces results that are much greater than the damages that would be recoverable at common law: *Lombard North Central Plc v Butterworth [1987] Q.B. 527*. In contrast, Lord Toulson (with whom the other members of the Court agreed) did not think the GAFTA formula excluded the duty to mitigate (at [62]). In *Novasen SA v Alimenta SA [2013] EWHC 345 (Comm), [2013] 1 Lloyd's Rep. 648* at [18], Popplewell J. said that the Default Clause did not constitute a penalty clause, applying his dicta in *Imam-Sadeque v Bluebay Asset Management (Services) Ltd [2012] EWHC 3511 (QB)*.

1035. See Vol.I, paras 26-107—26-134.

1036. *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428, 1447–1448* (Diplock L.J.). The agreed sum may take account of loss likely to be suffered which may not fall within the normal remoteness test: *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd [1962] 1 W.L.R. 34, 39*; *Philips Hong Kong Ltd v Att-Gen of Hong Kong (1993) 61 Build. L.R. 49, 60–61* (the agreed sum may be justified by knowledge of "special circumstances").

1037. Goetz & Scott (1977) Columbia L.R. 554, 572–573.

1038. See Vol.I, paras 26-144—26-146.

1039. The question whether the parties may give their own meaning to "loss" is mentioned below, para.26-192, text after n.994.

1040. *[2015] UKSC 67, [2016] A.C. 1172*; see below, paras 26-196 et seq.

1041. See Vol.I, paras 26-051—26-054.

1042. See Vol.I, para.26-053, n.295.

1043. See below, para.26-197.

1044. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79*; *English Hop Growers Ltd v Dering [1928] 2 K.B. 174*; *Imperial Tobacco Co v Parslay [1936] 2 All E.R. 515*; *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428, 1447*; *Philips Hong Kong Ltd v Att-Gen of Hong Kong (1993) 61 Build. L.R. 49* (the loss to a governmental body caused by delay in construction was especially difficult to assess).

1045. See below, para.26-197.

1046. See below, para.26-191, for graduated damages.

1047. *Commissioner of Public Works v Hills [1906] A.C. 368, 376*.

1048. On the question of the application of the penalty rules to this kind of clause, see below, para.26-216, esp. at n.1118m.

1049. *Commissioner of Public Works v Hills [1906] A.C. 368, 376* (followed in *Jobson v Johnson [1989] 1 W.L.R. 1026, 1036*).

1050. Compare the situation where the hirer exercises an option, below, para.26-216C.

1051. *Lamdon Trust Ltd v Hurrell [1955] 1 W.L.R. 391*; *Bridge v Campbell Discount Co Ltd [1962] A.C. 600*. ("It is a sliding scale of compensation, but a scale that slides in the wrong direction": at 623.) See also *Anglo-Auto Finance Co Ltd v James [1963] 1 W.L.R. 1042*; *United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 Q.B. 54*.

1052. See r.4(c) in Lord Dunedin's propositions, above, para.26-182. See *Makdessi v Cavendish Square Holdings BV [2013] EWCA Civ 1539* at [64]–[74].

1053. *Wallis v Smith (1882) 21 Ch. D. 243*; *Pye v British Automobile Commercial Syndicate Ltd [1906] 1 K.B. 425*; *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79* ; *Philips Hong Kong Ltd v Att-Gen of Hong Kong (1993) 61 Build. L.R. 49, 62–63* (Privy Council refers to: "… the error of assuming that, because in some hypothetical situation the loss suffered will be less than the sum quantified in accordance with the liquidated damage provision, that provision must be a penalty"). This suggests that the validity of a clause should be judged by its normal operation: Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–131.

1054. *[1915] A.C. 79*.

1055. The House of Lords took the view that the £5 did not apply to the second and third obligations (not to sell to prohibited person, and not to exhibit without permission).

1056. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79, 95–96*. See also *Galsworthy v Strutt (1848) 1 Ex. 659, 666–667*. Again, in some cases of this type the claimant may now be seen as having a legitimate interest in deterring breach, see below, para.26-197.

1057. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79, 99*; *English Hop Growers Ltd v Dering [1928] 2 K.B. 174, 182*.

1058. *(1915) 31 T.L.R. 267*.

1059. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79, 87*.

1060. *[1915] A.C. 79, 98*.

1061. The cases on covenants in restraint of trade, such as *Crisdee v Bolton (1827) 3 C. & P. 240*;

Price v Green (1847) 16 M. & W. 346, 354; *Reynolds v Bridge (1856) 6 E. & B. 528, 541*, have generally treated the sum payable for a breach as a sum stipulated for the breach of a single obligation, although it "is capable of being broken more than once, or in more ways than one": *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79, 98* (see also at 92–93); *Law v Redditch Local Board [1892] 1 Q.B. 127, 136*.

1062. *Cleeve Link Ltd v Bryla [2014] I.R.L.R. 86 (EAT)* (clause upheld when not extravagant in relation to maximum loss, though loss would vary significantly depending on how soon breach occurred).

1063. *[2015] UKSC 67, [2016] A.C. 1172* at [255].

1064. *Makdessi v Cavendish Square Holdings BV [2013] EWCA Civ 1539* at [73]–[74].

1065. *[1962] A.C. 600*. ("It is a sliding scale of compensation, but a scale that slides in the wrong direction": at 623.)

1066. See *Makdessi v Cavendish Square Holdings BV [2013] EWCA Civ 1539* at [72], where Christopher Clarke L.J. added that "there may be some tension between" the two speeches.

1067. See further below, paras 26-196 et seq.

1068. *Clydebank Engineering Co v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6*; *Philips Hong Kong Ltd v Att-Gen of Hong Kong (1993) 61 Build. L.R. 49, 60 (PC)*; *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] Build. L.R. 271 (TCC)*. See also *Law v Redditch Local Board [1892] 1 Q.B. 127*; *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd [1933] A.C. 20* (above, para.26-180). The party entitled to the benefit of a liquidated damages clause in the event of failure to complete on time cannot take advantage of it if the delay is partly due to his own fault: *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1971) 69 L.G.R. 1, 11, 16*. Demurrage under a charterparty is a case of graduated liquidated damages: *President of India v Lips Maritime Corp [1988] A.C. 395, 422–423*.

1069. *Lord Elphinstone v Monkland Iron and Coal Co (1886) 11 App. Cas. 332*; *Diestal v Stevenson [1906] 2 K.B. 345*.

1070. e.g. *Commissioner of Public Works v Hills [1906] A.C. 368* (above, para.26-188). See also *Re Newman (1876) 4 Ch. D. 724*.

1071. *Bridge v Campbell Discount Co Ltd [1962] A.C. 600*. ("It is a sliding scale of compensation, but a scale that slides in the wrong direction": at 623.) If it slides in the right direction, the clause is more likely to be held valid: *Phonographic Equipment (1958) Ltd v Muslu [1961] 1 W.L.R. 1379*. cf. *Lombank Ltd v Excell [1964] 1 Q.B. 415*.

1072. *Financings Ltd v Baldock [1963] 2 Q.B. 104*. The principle stated in the text has been regularly followed by the Court of Appeal: *Brady v St Margaret's Trust Ltd [1963] 2 Q.B. 494*; *Charterhouse Credit Co Ltd v Tolly [1963] 2 Q.B. 683*; *United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 Q.B. 54*; *Capital Finance Co Ltd v Donati (1977) 121 S.J. 270*; *Lombard North Central Plc v Butterworth [1987] Q.B. 527*. See also the Australian cases cited, below, para.26-216A, n.1118p.

1073. In *Lombard North Central Plc v Butterworth [1987] Q.B. 527* the contract contained a formula under which the owner was entitled to arrears, all future instalments that would have fallen due had and agreement not been terminated less a discount for accelerated payment. It omitted an allowance for the resale value of the repossessed goods. This would have prevented it being a

genuine preestimate of the loss, but it was held that even had it provided for an allowance, the clause would have been a penalty for the reason stated in the text.

1074. *Lombard North Central Plc v Butterworth [1987] Q.B. 527*.

1075. See Vol.I, paras 21-011 et seq.

1076. The *Lombard case [1987] Q.B. 527*. See Treitel [1987] L.M.C.L.Q. 143; Beale (1988) 104 L.Q.R. 355.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(c) - Commercially Justified but not a Deterrent

"Genuine pre-estimate" and "whether imposed in terrorem"

26-193

Before the decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [1077] there were a number of dicta to the effect that a clause that was not a genuine pre-estimate at all might nonetheless be valid if it was "commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach". [1078] In *Makdessi v Cavendish Square Holdings BV* [1079] Makdessi had sold shares in his advertising and marketing business to another company, with payment to be made in stages. Ultimately Cavendish was substituted for the original purchaser by a novation agreement and ended up holding 60 per cent of the shares, Makdessi retaining 40 per cent. The purchaser had an option to buy the remaining shares. Makdessi entered various non-competition covenants. Clause 5.1 provided that if Makdessi was in breach of the non-competition clauses, he would not be entitled to further instalments of the price; and clause 5.6 provided that, in the same circumstances, the purchaser could require him to transfer his remaining shares at a price that was much lower than the option price, being based on asset value alone and ignoring any element of good will. Cavendish argued that Makdessi was in breach, refused to pay the outstanding instalments of the price and demanded that he transfer the remaining shares at the reduced value. Makdessi argued that clauses 5.1 and 5.6 were penalty clauses and unenforceable. Christopher Clarke L.J., with whom the other members of the court agreed, distinguished the traditional "genuine pre-estimate" approach from the "new approach" and said that the recent cases:

> "… show the court adopting the broader test of whether the clause was extravagant and unconscionable with a predominant function of deterrence; and robustly declining to do so in circumstances where there was a commercial justification for the clause. That this is a reversion to the foundation of the doctrine is apparent from the observations of Lord Halsbury in *Clydebank Engineering* when he asked of the relevant clause:
>
> > 'whether it is, what I think gave the jurisdiction to the Courts in both countries to interfere at all in an agreement between the parties, unconscionable and extravagant, and one which no Court ought to allow to be enforced'." [1080]

Christopher Clarke L.J. made it clear that in his view, deterrence is not recognised as a commercial justification. [1081] He then applied the two tests sequentially. [1082] The clauses, which would

result in the seller of a business who had broken various undertakings not to compete receiving millions of dollars less in consideration, were held to be neither a genuine pre-estimate of the buyers' likely loss [1083] nor commercially justified. Although it had been argued that the clauses were part of a commercial bargain, reached after extensive negotiation, as to the price at which shares in the Company were to change hands:

> "The underlying rationale of the doctrine of penalties is that the Court will grant relief against the enforcement of provisions for payment (or the loss of rights or the compulsory transfer of property at nil or an undervalue) in the event of breach, where the amount to be paid or lost is out of all proportion to the loss attributable to the breach. If that is so, the provisions are likely to be regarded as penal because their function is to act as a deterrent.
>
> That seems to me the position here. The payment terms of clauses 5.1 and 5.6 do not serve to fulfil some justifiable commercial or economic function such as is exemplified in the cases—a modest extra interest in respect of a defaulting loan; a provision for the payment of the costs of earlier litigation; a generous measure of damages for wrongful dismissal; an allocation of credit risk; or the provision of capital which would be needed if a promised guarantee of a loan was not forthcoming …" [1084]

As will be seen in the next section, the Supreme Court [1085] reversed this decision, holding that a clause may be valid even if it clearly has a deterrent function, provided that the party to whom the sum will be paid has a legitimate interest in securing performance rather than damages, and the amount payable or other consequence if the contract is broken is not extravagant and unconscionable in comparison to that interest. [1086]

"Commercial justifications" and "legitimate interests"

26-194

It seems likely that the "commercial justifications" given in the cases referred to in this section and listed by Christopher Clarke L.J. in the passage cited in the previous paragraph, would also constitute legitimate interests [1087] within the meaning of the Supreme Court's new test. [1088] If that is correct, there is no further need to refer to "commercial justification" as a test of whether an agreed damages or similar clause is valid or a penalty.

1077. *[2015] UKSC 67, [2016] A.C. 1172*.

1078. *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]; and semble, Arden L.J. in *Murray v Leisureplay Plc [2005] EWCA Civ 963, [2005] I.R.L.R. 946* (Clarke and Buxton L.JJ. preferred to decide the case on the basis that given the difficulty of forecasting the possible effect on the claimant's employability and how quickly he would be able to obtain other employment, the sum payable was not, in the words of Lord Dunedin in the Dunlop case, "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach" see *[2005] EWCA Civ 963* at [105] and [114]–[115]). See also *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*.

1079. *[2013] EWCA Civ 1539*; for an account of the Supreme Court decision in this case, *[2015] UKSC 67*, see below, para.26-197.

1080. *[2013] EWCA Civ 1539* at [104]. The reference is to *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6*.

1081. *[2013] EWCA Civ 1539* at [125].

1082. *[2013] EWCA Civ 1539* at [105]–[117] and [118]–[123].

1083. *[2013] EWCA Civ 1539* at [105]–[117].

1084. *[2013] EWCA Civ 1539* at [120]–[121].

1085. *[2015] UKSC 67, [2016] A.C. 1172*.

1086. See below, para.26-197.

1087. On what constitutes a legitimate interest see below, para.26-198.

1088. Lord Hodge said that the broader approach adopted in this group of cases "involves a correct analysis of the law" (at [225]; see also at [246]).

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(d) - Deterrence to Protect a Legitimate Interest

Permissible deterrence in protecting broader interests

26-195

The first modern decision that a clause requiring a sum that is not a genuine pre-estimate of the loss that will be suffered by the other party, and which is clearly aimed at deterrence, may nonetheless be a valid liquidated damages clause was the decision of the Court of Appeal in *ParkingEye Ltd v Beavis*. [1089] The claimants operated a car park at a retail park on behalf of the owners. Motorists were allowed to park free of charge for up to two hours after which they should leave, but a "failure to comply" would result in a parking charge of £85. Moore-Bick L.J., with whom the other members of the court agreed, said the claimants would suffer no direct loss if the motorists overstayed the two hours; it had only an indirect commercial interest in that if it did not deliver the service required by the owners of the retail park it might lose its contract and its reputation. [1090] There was also a social interest, [1091] in that consumers and retailers would benefit from having free parking for limited periods. [1092] Although it was clear that the principal purpose of the parking charge was to deter motorists from overstaying, a charge designed to protect a combination of indirect commercial interests and social interests might be valid, provided that it was not manifestly excessive. The judge at first instance had taken the correct approach when he held that the charge was neither improper in its purpose nor manifestly excessive in its amount, having regard to the level of charges imposed by local authorities and others for overstaying in public car parks. [1093] While in a purely commercial context [1094] a "dominant purpose of deterrence" had been equated to extravagance and unconscionability, in the context of the case that was not the case. [1095] An appeal in the *ParkingEye* case was heard by the Supreme Court along with the appeal in the *Makdessi* case [1096]; as will be explained in the next paragraph, the Supreme Court [1097] rejected the appeal in the *ParkingEye* case, upholding the £85 charge on an even wider ground than had the Court of Appeal.

Penalty doctrine confirmed

26-196

The appeals from *Makdessi v Cavendish Square Holdings BV* [1098] and *ParkingEye Ltd v Beavis* [1099] were heard together by a seven-justice panel of the Supreme Court. [1100] The Court did not accept the argument made by counsel for Cavendish that the rule against penalty clauses should be

or confined to cases in which the parties did not meet "on an equal playing field" [1102]; although consumers are protected by the statutory power to strike down terms that are unfair, the doctrine serves a useful role in business to business contracts. [1103] In particular small businesses might need the protection offered by the doctrine. [1104] To abolish the doctrine would be inconsistent with the provisional recommendations of the Law Commission and the recommendations of the Scottish Law Commissions, [1105] and out of line with other jurisdictions both elsewhere in the common law world and in Europe. [1106]

Protecting legitimate interests

26-197

However, the Supreme Court in *Cavendish Square* and *ParkingEye* [1107] was unanimous that the decision in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, [1108] had been interpreted too narrowly. Lord Dunedin had not intended to lay down a strict code, and the other Lords had not adopted to his reasoning in full. In particular Lord Atkinson had upheld the clause requiring payment of £5 for every tyre sold at less than the list price not because it was hard to estimate the loss from the particular breach but because Dunlop had a broader interest to protect, namely its system of price maintenance. [1109] As Lord Mance put it [1110]:

> "It is clear … that a concern can protect a system which it operates across its whole business by imposing an undertaking on all its counterparties to respect the system, coupled with a provision requiring payment of an agreed sum in the event of any breach of such undertaking. The impossibility of measuring loss from any particular breach is a reason for upholding, not for striking down, such a provision. The qualification and safeguard is that the agreed sum must not have been extravagant, unconscionable or incommensurate with any possible interest in the maintenance of the system, this being for the party in breach to show."

A clause may be valid even if it does not represent a genuine pre-estimate of the loss, and even though it is aimed at deterring a party from breaking the contract, provided that the other party can show a legitimate commercial interest in deterring the breach rather than simply being entitled to damages [1111] and that the clause is not extravagant or unconscionable in proportion to that interest. Lords Neuberger and Sumption said:

> "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations." [1112]

Cavendish had a legitimate interest in preserving the good will for which it was paying such a large amount [1113]; it would be hard to prove the loss flowing from any breach of the non-competition

covenants; the seller's loyalty was critical and indivisible [1114] and therefore it was legitimate to deter Makdessi from any breach. Likewise, in the *ParkingEye* case there was clearly a legitimate interest in ensuring that motorists did not stay longer than two hours. [1115] Therefore Cavendish's appeal succeeded but Beavis' failed.

"Legitimate interest"

26-198

In *Makdessi v Cavendish Square Holdings BV* and *ParkingEye Ltd v Beavis* [1116] the Supreme Court held that an agreed damages clause or other type of clause that falls within the scope of the penalty doctrine [1117] will be valid if it is designed to protect a legitimate interest of the innocent party and the amount involved is not extravagant or unconscionable in proportion to that interest. [1118] Punishment of the party in breach is not a legitimate purpose. [1119] The Supreme Court decided that when shares in a company that has been purchased will be of little value to the buyer if the seller is not loyal, as in the *Cavendish Square* case, or if a perfectly lawful scheme will not work unless there is an effective deterrent, as in the *ParkingEye* case, and damages will not provide an adequate sanction, there is a legitimate interest in deterrence and a sum that is designed to deter will not be penal, provided that it is not extravagant or unconscionable compared to the relevant legitimate interest. [1120] What general factors are relevant to whether the claimant has a legitimate interest for this purpose?

Difficulty of proving loss

26-199

Lords Neuberger and Sumption referred to a legitimate interest in obtaining performance rather than merely damages [1121]; and, in support of their argument that in fashioning the rules on remedies the law takes into account legitimate interests, referred to the rule that specific performance may be available (subject to other constraints) if the innocent party has "a legitimate interest extending beyond pecuniary compensation for the breach". [1122] In each of the cases before the court, it seems that damages would not be adequate compensation, nor be adequate as a deterrent to breach, as it would be hard to prove what loss, if any, flowed from any particular breach. [1123] The same was true in the case of in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, [1124] in which a payment of £5 per tyre sold at below the list price was upheld.

Difficulty in detection

26-200

A related factor is that damages for each individual breach will not be an effective remedy if it will be hard for the claimant to detect breaches by the defendant. [1125]

Substitute not available

26-201

The analogy drawn with specific performance indicates that it would also suffice that the contract was for a unique piece of property, so that the claimant would be unable to purchase a substitute. [1126]

The case would presumably be even stronger if the claimant might suffer consequential loss (such as a reduction in trading profits that might have been made using a unique vessel [1127]) that is again hard to prove or quantify. It is submitted that a party may also have a legitimate interest in deterring the defendant from breaching a contract to provide services if it will be difficult for the claimant to obtain the services from a replacement contractor, even though specific performance of the contract might not be granted for other reasons, such as that because it would involve personal service [1128] or because it might require the court to supervise performance. [1129]

Loss suffered by third party

26-202

In the *ParkingEye* case, there was an additional reason for damages being inadequate: the loss caused by the motorist overstaying the two hours free parking would be suffered not by ParkingEye Ltd but by the operator of the retail park and by members of the public who wished to use it. It is not only the legitimate interests of the contracting party that count for this purpose. [1130] It may be added that this appears to be a form of consequential loss that would not be recoverable under the principles that exceptionally permit a party to a contract to recover damages on the basis that the promisee has not received the benefit that he contracted for, [1131] nor to be within the cases that have permitted a promisee to recover for loss that is suffered by a third party. [1132] In *Beswick v Beswick* [1133] the majority considered that the promisee could recover only nominal damages, while the third party suffered the real loss, and that therefore specific performance was an appropriate remedy. It seems the presence of similar factors will mean that the promisee has a legitimate interest in securing performance rather than relying on the remedy of damages.

Insolvency risk

26-203

The possible insolvency of either party may also be a relevant factor, at least when it is the claimant's solvency that is at risk. A factor that has sometimes been taken into account in deciding whether to grant specific performance (or, on the facts of the case, an injunction against breach) is that the defendant may not be able to pay any damages. [1134] It is not evident that the defendant's inability to pay damages can by itself [1135] give the claimant a legitimate interest in deterring breach by imposing liability for "deterrent" liquidated damages, which would mean the defendant paying even greater sums. Conversely, it has been said to be a relevant factor to specific performance that delay is likely to be encountered in securing the actual payment of any damages and that the claimant might become insolvent before they are paid. [1136] It is submitted that this may be relevant to an agreed damages clause. The claimant clearly has a legitimate interest in remaining solvent, and if the contract is sufficiently important to the claimant's financial state that non-performance by the defendant coupled with a likely delay in recovering the damages would put the claimant's solvency at serious risk, the claimant seems to have a legitimate interest in performance rather than damages.

Preference for performance

26-204

Specific performance will not be awarded merely because the claimant would prefer performance to damages, if damages would be (or are likely to be) an adequate remedy. Equally, it is submitted that, despite another analogy which will be considered in the next paragraph, [1137] the decision in the *Cavendish Square* case [1138] does not mean that a party who simply has a preference for performance (which would presumably include most contracting parties, unless they have come to regret entering the contract) has a legitimate interest in deterring breach sufficient to justify an agreed damages clause that is aimed at deterring breach rather than being a genuine pre-estimate of the loss. To put the point another way, whether the claimant has a legitimate interest in performance rather than damages seems to be an objective test. [1139] It is submitted further that the claimant would not be able to overcome this by showing that it had paid a higher price to the defendant than it would have had to pay had the clause not been included in the contract.

Continuing performance after a repudiation

26-205

Lords Neuberger and Sumption [1140] also referred to the line of cases, starting with a dictum of Lord Reid in *White & Carter (Councils) Ltd v McGregor*, [1141] to the effect that a party faced with a wrongful repudiation by the other party may, if he is able to continue to perform his part of the contract without the repudiating party's co-operation, ignore the repudiation, perform his part and sue for the agreed price unless he has no legitimate interest in doing so. The Court of Appeal has accepted the "no legitimate interest" restriction as part of the law. [1142] But in the context of repudiation, the concept of legitimate interest operates not as a reason for allowing an additional remedy but as a restriction on the right to keep the contract in force, a restriction that allows the right to be exercised except in fairly extreme cases. Facts that have been mentioned as possibly justifying an innocent party in continuing to perform and claiming the price despite the repudiation have included that the shipowner faced with a wrongful repudiation by the charterer would, if the owner could not claim the hire, be left with the burden of re-letting the ship rather than the charterer having to find a use for it [1143]; that the charter hire might have been assigned to a bank as security for a loan [1144]; that if the innocent party had to claim damages from a repudiating party who was in financial difficulties, the defendant's funds might have been directed elsewhere before the damages were paid [1145]; and the fact that an innocent ship owner would be left "in a difficult market where a substitute time charter was impossible, and trading on the spot market very difficult". [1146] The innocent party has been held to have a legitimate interest in performing "unless maintaining the contract can be described as 'wholly unreasonable', [1147] 'extremely unreasonable' or, as Popplewell J. put it after surveying the cases, "perhaps, in my words, 'perverse"'. [1148] An arbitrator's decision that the shipowner had no legitimate interest in continuing to claim the hire under a charter because the owner could re-let the ship on the spot market and claim damages from the charter was held to be a misapplication of the law. [1149] So it is not clear that the analogy of the *White & Carter* cases will provide helpful guidance on the meaning of legitimate interest in the context of the penalty rule. The Supreme Court seemed to regard a legitimate interest in obtaining performance rather than recovering damages as exceptional, [1150] not as applying unless seeking to obtaining performance would be wholly unreasonable. It is submitted that the fact that the claimant would be faced with having to go into an uncertain market in order to mitigate its loss does not give it a legitimate interest sufficient to support a clause that is aimed at deterring breach rather than being a pre-estimate of loss. However, when the amount of loss is hard to predict the claimant will no doubt still be given a "generous margin" [1151] before the pre-estimate will be treated as extravagant or unconscionable and therefore a penalty.

Analogy to account of profits

26-206

A further possible analogy, though not mentioned by the Supreme Court in the *Cavendish Square* case, [1152] are the cases in which a claimant is permitted to recover an account of the profit [1153] or, at least damages on the "*Wrotham Park*" basis, [1154] in other words, a share of the profit that the defendant has made through breaking the contract. An account of profit was awarded in *Att-Gen v Blake* [1155] after Blake had written and published a book in breach of the confidentiality agreement made by him when he entered the Secret Intelligence Service. The circumstances were said to be "exceptional", but Lord Nicholls said:

> "The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.
>
> It would be difficult, and unwise, to attempt to be more specific …" [1156]

Presumably the government would equally have had a sufficient legitimate interest to justify a clause requiring ex-employees who broke the confidentiality agreement to pay a sum that was designed to be a deterrent. Later cases have emphasised that for an account of profits to be appropriate the circumstances must be exceptional, and this has been taken to mean that an account of profits will not normally be appropriate in a commercial case, [1157] though it is certainly possible. [1158] To date an account of profits has been awarded in commercial circumstances only in one case at first instance. In *Esso Petroleum Co Ltd v Niad Ltd* [1159] the defendant had agreed to participate in a "Price Watch" scheme under which participating petrol stations agreed not to sell at above set prices. The defendant broke the agreement by selling at higher prices. The claimants were unable to show what loss this had caused them but it was held that they had a strong interest in performance and an account of profits was ordered. Though Esso's aim was to prevent dealers from selling petrol at higher prices than permitted by the scheme, rather than to prevent sales at less than a list price, in other respects the facts are quite similar to those of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, [1160] and it seems clear that Esso would have had a sufficient legitimate interest to justify a clause requiring dealers who broke the agreement to pay a sum that was designed to be a deterrent, provided the sum set was not extravagant or unconscionable in proportion to Esso's interest. Moreover, it seems likely that an agreed damages clause that was calculated to take away any profit that the dealer might make by selling at higher than the set price would be proportionate to Esso's legitimate interest in deterring this kind of breach of contract by dealers. [1161] Beyond this, however, it is hard to gain much guidance from a class of cases that by definition are exceptional.

Analogy to "Wrotham Park" damages

26-207

In cases in which the claimant has found it impossible or difficult to show that it has suffered a loss as the result of the defendant's breach of contract, the courts have more often awarded what are often now called "*Wrotham Park*" or "hypothetical bargain" damages, in other words, damages measured by the sum that the claimant could reasonably have demanded as the price of releasing the defendant from its obligation. [1162] So where the defendant has failed to provide the services

promised but the claimant cannot show a consequential loss, if damages cannot be awarded on the simple difference in value between the services promised and those provided, [1163] an award on the hypothetical bargain basis may be made instead. [1164] The facts do not have to be exceptional in the way required if an account of profits is to be ordered, nor is it necessary that to deny *Wrotham Park* damages would produce a manifest injustice; the question is whether an award would be a just response. [1165] Some of the factors taken into account in deciding whether to award *Wrotham Park* damages seem relevant to the question of whether the claimant has a legitimate interest in securing performance rather than damages. [1166] These include difficulty in showing loss, even if it would be possible for the court to make an award of general damages assessed "in a robust manner". [1167] Although it had been said that "the inability to demonstrate identifiable financial loss of the conventional sort is a pre-condition to the award of such damages", [1168] in *One Step (Support) Ltd v Morris-Garner* the Court of Appeal declined to follow this dictum and held that *Wrotham Park* damages may be awarded when it will be very difficult to prove the loss that has been caused by the breach. [1169] It may also be relevant that it would be difficult for the claimant to obtain interim relief. [1170] These factors seem to reflect similar ones that were suggested earlier. In any event, it was suggested earlier that loss of a hypothetical bargain is a kind of loss that may form part of a genuine pre-estimate of the loss. [1171] If that is correct, no further legitimate interest need be shown to justify an agreed damages clause that is designed to deter breach in circumstances in which "*Wrotham Park* " damages might be available.

Capturing any profit from breach

26-208

A further possible reason for including an agreed damages clause that fixes the sum to be paid at a sum much greater than the pre-estimated loss is that, even though damages will in other respects be an adequate remedy for the claimant's losses, the claimant considers that the defendant may break the contract in order to make a greater profit and wants to be able to claim the whole of the profit, not just a share of it as under the approach discussed in the last paragraph. If damages would be adequate, [1172] it seems unlikely that the claimant would be treated as having a legitimate interest in capturing the whole of the defendant's profit. In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1173] Lord Hoffmann expressed the concern that in some circumstances an award of specific performance may allow "the plaintiff to enrich himself at the defendant's expense" by negotiating an excessive price for releasing the defendant from performance; one that "exceeds the value of performance to the plaintiff and approaches the cost of performance to the defendant". [1174] A similar concern would prevent a court holding that a claimant has a legitimate interest in a clause that is designed to capture the whole of, or a large share in, any profit that the defendant might make. [1175]

Part of a legitimate scheme

26-209

The decision in the *ParkingEye* case [1176] may also be explained, without having to show that a breach of the contract would cause the claimant to suffer a loss that would not be compensable (or indeed, any loss at all) on the basis that the charge was an essential part of a lawful scheme. [1177]

Conclusion on legitimate interest

26-210

It is submitted that a claimant will have a sufficient legitimate interest in obtaining performance rather than damages to justify an agreed damages clause that is intended to deter breach, rather than as a pre-estimate of loss, in the following situations:

– if the claimant would face serious difficulties in proving what loss, if any, flowed from the breach [1178];

– if the claimant would face serious difficulties in detecting whether there has been a breach [1179];

– if damages will not be an adequate remedy because, if the defendant fails to perform, the claimant will not be able to obtain substitute goods, other property or services (irrespective of the fact that specific performance of the contract might not be available for other reasons) [1180];

– if loss will be suffered by a third party rather than by, or in addition to, the claimant [1181];

– if having to claim damages from the defendant would put the claimant's solvency at risk [1182];

– if that even though neither the claimant nor a third party will suffer any loss through the defendant's breach but the claimant has an exceptional interest in ensuring that defendant performs such that the court would award an account of profits, as in *Att-Gen v Blake* [1183]; or

– more generally, if deterrence is an essential element of a lawful scheme. [1184]

In contrast, the claimant does not have a legitimate interest in obtaining more than damages, or agreed damages that are substantially more than a genuine preestimate of the likely loss, merely because the claimant would have to incur time and expense in arranging a substitute transaction, or simply would prefer performance to claiming damages [1185]; nor because it hopes to secure a large share of any profit the defendant might make through breaking the contract, when damages would otherwise be an adequate remedy. [1186]

“Not extravagant or unconscionable”

26-211

Even if the claimant can show that it has a legitimate interest in obtaining actual performance instead of damages in lieu of performance, an agreed damages clause or other clause that is within the penalty clause rules will not be valid if it is extravagant or unconscionable compared to the legitimate interest. Lord Mance’s reference to the sum being “not … incommensurate” [1187] and Lord Hodge’s to whether it is “wholly disproportionate” [1188] to the interest to be protected are helpful to show what is meant.

Proportionate

26-212

“Not extravagant or unconscionable compared to the legitimate interest”, and “not incommensurate” or “not disproportionate”, appears to mean that a sum agreed to be payable upon breach must not be substantially more than is required in order to deter the defendant from breach. How is this to be determined? Since the decision in *ParkingEye Ltd v Beavis*, [1189] there have been anecdotal reports [1190] of parking companies charging motorists who overstay the period of “free parking” as much as £300. Is that unconscionable or disproportionate? It does not seem to matter that the loss may vary from breach to breach. Though there is no necessary connection between deterrence and the amount of the loss caused by a breach, a motorist who overstays by ten minutes presumably causes less loss to the landowner and less inconvenience to the public, and is therefore less of a threat to the claimant’s “legitimate interests” than one who overstays by six hours, but there is no suggestion in the case that the agreed sum needs to be gradated according to the length of the overstay in order to avoid being classed as a penalty. [1191] Some motorists will be more attentive than others to notices setting out charges for overstaying and other breaches of the rules, and some will be deterred more readily than others. Will a charge remain “proportionate” unless it is higher than is needed to make even the most inattentive motorist sufficiently aware of the charges to “stop and think” and to deter even the most thoughtless or perverse? This was not discussed in the *ParkingEye* case. Rather, there were references to proportionality in another sense, their Lordships pointing out that the £85 charge was not much greater than the fine for overstaying in many car parks operated by local authorities, and the latter do not usually allow a period of free parking. [1192] The difficulty of deciding what is not unconscionable or wholly disproportionate seems greater still when the breaches that will trigger the agreed damages or other clause [1193] may be quite various in nature. A seller of a business might breach a non-competition covenant by no more than continuing to make a few small transactions with no intent to compete further, which would probably pose no real threat to the buyer of the business; yet in the *Cavendish Square* case it was not treated as disproportionate to impose a price reduction of millions of dollars for any breach of the covenants. The Supreme Court’s decision in *Cavendish Square* case may suggest that deterrent sums will only be disproportionate if they are excessive even for the “worst case scenario”. However, it is submitted that the decision may be explained on the basis that the parties were of equal bargaining power and would not have agreed on a more draconian clause than was reasonably necessary to protect the buyer’s interests. [1194] Had the parties been less equal, the “not extravagant or unconscionable” test might have been applied in a less generous way. If the sum is payable for any one of many different possible breaches, some of which may be comparatively minor, it is likely to be disproportionate. [1195]

“Not … extravagant”

26-213

The word “extravagant” can be taken to mean that disproportion will not be judged harshly; as in “pre-estimate” cases, [1196] the parties will be allowed “a generous margin of error”. But otherwise it seems “usually to amount to the same thing” as “unconscionable”. [1197]

“Not … unconscionable”

26-214

It is not clear whether the word “unconscionable”, which recurs in all the judgments, was intended to have any independent effect. Lord Toulson clearly thought “unconscionable” added nothing to “extravagant”, [1198] but Lord Hodge twice refers to it as a separate requirement. [1199] Lords Neuberger and Sumption said [1200]

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

Lord Mance also said that [1201]

> “… the extent to which the parties were negotiating at arm’s length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor.”

These statements do not appear to mean that there is a separate requirement of procedural fairness. It seems more likely that all Lords Neuberger, Sumption and Mance meant was that if the parties meet on more-or-less equal terms, the nonbreaching party is less likely to get away with a provision that is disproportionate to what it needs if there is no effective bargaining pressure from the other party. This may well be one reason [1202] why the court did not question whether the provisions in the *Cavendish Square* case were proportionate to the buyer’s legitimate interest. [1203]

1089. *[2015] EWCA Civ 402*.

1090. *[2015] EWCA Civ 402* at [25].

1091. *[2015] EWCA Civ 402* at [27].

1092. *[2015] EWCA Civ 402* at [30].

1093. *[2015] EWCA Civ 402* at [26].

1094. Or, as Sir Timothy Lloyd put it, “where the transaction between the contracting parties can be assessed in monetary terms, as can the effects of a breach of the contract by one party or the other” (at [44]). To prohibit this provision would “fail to take account of the nature of the contract,

with its gratuitous but valuable benefit of two hours' free parking, and of the entirely legitimate reason for limiting that facility to a two hour period" (at [49]).

1095. *[2015] EWCA Civ 402* at [27]. The Court also held that the term was not unfair under the Unfair Terms in Consumer Contracts Regulations 1999: see below, para.38-251A.

1096. See above, para.26-193.

1097. *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172*.

1098. *[2013] EWCA Civ 1539*; for the facts, see the account of the Court of Appeal decision in this case, above, para.26-193.

1099. *[2015] EWCA Civ 402*; for the facts, see above, para.26-195.

1100. *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172*, noted by Conte (2016) 132 L.Q.R. 382, Morgan [2016] C.L.J. 11, Fisher [2016] L.M.C.L.Q. 169 and Dawson [2016] L.M.C.L.Q. 207.

1101. See *[2015] UKSC 67* at [36], [162] (Lord Mance), [218] and [256] (Lord Hodge).

1102. See Lord Hodge *[2015] UKSC 67* at [256] and [267].

1103. *[2015] UKSC 67* at [38], [260].

1104. Lord Mance *[2015] UKSC 67* at [167]; Lord Hodge at [263].

1105. See Lord Mance *[2015] UKSC 67* at [163]; Lord Hodge at [263].

1106. See *[2015] UKSC 67* at [164]–[167] (Lords Neuberger and Sumption) and [264]–[265] (Lord Hodge).

1107. *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172*.

1108. *[1915] A.C. 79*.

1109. *[2015] UKSC 67* at [22]–[23], [135]–[139], referring to *[1915] A.C. 79, 90–93*. Lord Mance (at [132]–[134]) also referred to the words of Lord Robertson in *Clydebank Engineering & Shipbuilding Co Ltd v Yzquierdo y Castaneda [1905] A.C. 6, 19*.

1110. *[2015] UKSC 67* at [143].

1111. *[2015] UKSC 67* at [28]; cf. at [248]–[249] (Lord Hodge).

1112. *[2015] UKSC 67* at [32]. cf. Lord Hodge at [255], [275]. As Lord Carnwath and, on this point, Lord Clarke (see at [291]) agreed with Lords Neuberger and Sumption, this statement may be taken as the authoritative statement of the penalty rule. Lord Mance and Lord Hodge, with both of whom Lord Toulson agreed on this issue (see at [292]), each gave slightly different accounts but it is not thought that the differences between the judgments on this issue are substantial.

1113. *[2015] UKSC 67* at [75].

1114. *[2015] UKSC 67* at [75]; and see Lord Hodge at [272]. Lord Mance's analysis does not seem essentially different: he said that cl.5.1 should be judged in the light of the general interest being protected: at [179]–[180], and likewise cl.5.6 "must be viewed in nature and impact as a composite whole as well as in context".

1115. *[2015] UKSC 67* at [99] (Lords Neuberger and Sumption, with whom Lords Carnwath and, on this point, Clarke, agreed), [184] (Lord Mance) and [285]–[286] (Lord Hodge). Lord Toulson, who considered that the clause in the *ParkingEye* case was unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 (see below, para.38-251A), declined to discuss whether it also amounted to a penalty at common law (at [316]).

1116. *[2015] UKSC 67*: see above, para.26-197.

1117. See below, paras 26-216 et seq.

1118. This test was applied in *Hayfin Opal Luxco 3 SARL v Windermere VII CMBS Plc [2016] EWHC 782 (Ch)* at [142] and in *BHL v Leumi Abl Ltd [2017] EWHC 1871 (QB)* at [44]. In *First Personnel Services Ltd v Halfords Ltd [2016] EWHC 3220 (Ch)* no evidence was given to justify a rate of interest on late payment far above both the usual commercial rate and what was payable under the Late Payment of Commercial Debts (Interest) Act 1998; it was not justified by the creditor's interest in securing punctual payment having regard to its own liability to pay employees (at [163]).

1119. See *[2015] UKSC 67* at [13] and [30] (Lords Neuberger and Sumption), [148] (Lord Mance), [243] (Lord Hodge).

1120. See *[2015] UKSC 67* at [99].

1121. *[2015] UKSC 67* at [28]. In *Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch)* Timothy Fancourt QC, sitting as a Deputy Judge of the High Court, said the test is whether the claimant has a legitimate interest beyond pecuniary compensation for any loss caused by the particular breach, so as to justify the secondary obligation (at [49]). The interest must in performance of the tenant's obligations, not merely in being able to claim the higher rent that became payable in the event of the tenant failing to comply with one of its obligations (at [52]). On the facts, the term that required the tenant, in the event of any non-trivial breach of its obligations, to pay a substantially higher rent was out of all proportion to the lessor's interest in having the tenant perform every one of its obligations rather than pay compensation for any breaches (at [63]), especially as the increased rent was payable in addition to damages for any loss caused by the breach. The increased rent was payable with retroactive effect from the start of the lease, but even if it had been purely prospective it would have been a penalty (at [65]).

1122. *[2015] UKSC 67* at [30].

1123. cf. Vol.I, para.27-008 (difficulty in quantifying damages may mean damages inadequate).

1124. *[1915] A.C. 79*.

1125. See Lord Mance *[2015] UKSC 67* at [172].

1126. On the "adequacy of damages" test and the availability of a substitute, see Vol.I, paras

27-010 et seq.

1127. cf. Vol.I, para.27-012 n.61.

1128. See Vol.I, paras 27-024 et seq.

1129. See Vol.I, paras 27-030 et seq.

1130. *[2015] UKSC 67* at [99].

1131. The "broader principle" suggested by Lord Griffiths in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 A.C. 85*. Further, even the cost of performance may be recoverable by the promisee only if he would be able and likely to remedy the breach: see Vol.I, para.18-056 and paras 18-063—18-068.

1132. e.g. when the parties contemplated that the property would be transferred to a third party, the ground of the majority decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 A.C. 85*: see Vol.I, paras 18-057 et seq.

1133. *[1968] A.C. 58*; see Vol.I, paras 18-022 and 18-051 et seq.

1134. *Evans Marshall & Co v Bertola SA (No.1) [1973] 1 W.L.R. 349, 367* (Kerr J. at first instance) and 385 (Edmund Davies L.J.)

1135. Insolvency of the defendant is not a ground for refusing specific performance where the remedy is normally available as a matter of course: *AMEC Properties v Planning Research & Systems [1992] 1 E.G.L.R. 70*. See Vol.I, para.27-013.

1136. *Thames Valley Power Ltd v Total Gas and Power Ltd [2006] 1 Lloyd's Rep. 441* at [64]; see Vol.I, para.27-016 at n.95.

1137. See below, para.26-205.

1138. *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172*.

1139. cf. above, para.26-184.

1140. *[2015] UKSC 67* at [29].

1141. *[1962] A.C. 413, 431*: see Vol.I, para.26-106.

1142. See Vol.I, para.26-106.

1143. *Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld) [1978] 2 Lloyd's Rep. 357, 374*. A similar point was made in respect of a landlord faced with a repudiation of a lease by a tenant: *Reichman v Beveridge [2006] EWCA Civ 1659* at [31], though in that case the court also held it was reasonable for the landlord to continue to claim the rent given that there was uncertainty over whether English law permits a landlord who has terminated the lease to claim damages for loss of rent (at [28]), an uncertainty that does not arise in relation to contracts in general.

1144. *Clea Shipping Corp v Bulk Oil International (The Alaskan Trader) (No.2) [1984] 1 All E.R. 129, 137*.

1145. *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith) [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61* at [47].

1146. *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith) [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61* at [56].

1147. *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA (The Odenfeld) [1978] 2 Lloyd's Rep 357, 373* .

1148. *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith) [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61* at [44]. In *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago) [1976] 1 Lloyd's Rep. 250* the innocent party has been held to have no legitimate interest in claiming the hire of a chartered ship until it was returned fully repaired, when the vessel was beyond economic repair; and in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2016] EWCA Civ 789* the court said there would be no legitimate interest in claiming the demurrage in respect of containers that were being detained by a third party with no end in sight, so that the contractual venture had become frustrated (at [43]): see above, para.26-106.

1149. *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith) [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61* at [42]. Popplewell J. seemed to doubt the decision of Lloyd J. in *Clea Shipping Corp v Bulk Oil International (The Alaskan Trader) (No.2) [1983] 2 Lloyd's Rep. 645*, of which Popplewell J. said: "Lloyd J found it impossible to interfere with the decision of the experienced commercial arbitrator who could not be shown to have applied the wrong test when finding that the owners' election to maintain the time charter (which had included 10 months of service, followed by six months of off-hire repairs) for a balance of eight months following premature re-delivery was a commercial absurdity".

1150. It is probably for the claimant to show that it has a legitimate interest, whereas in the repudiation situation it is for the party in breach to show that the innocent party has no legitimate interest in performing: *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic) [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep. 693* at [23].

1151. cf. above, para.26-185.

1152. *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373*.

1153. See Vol.I, para.26-055.

1154. See Vol.I, paras 26-046 et seq.

1155. *[2001] 1 A.C. 268*. See Vol.I, paras 26-055 et seq.

1156. *[2001] 1 A.C. 268, 285* (per Lord Nicholls). For a more detailed consideration of the relevant facts see Vol.I. para.26-055.

1157. See Vol.I. para.26-055.

1158. See the discussion in *Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830*.

1159. *[2001] All E.R. (D) 324 (Nov)*.

1160. *[1915] A.C. 79*.

1161. See further below, para.26-208.

1162. See Vol.I, paras 26-051 et seq.

1163. See Vol.I, para.26-041.

1164. *Giedo van der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB)*. Hamblen J. pointed out that an award was not "precluded by any of the following factors: (i) that the claimants advanced no claim for an injunction or specific performance, or the fact that there would have been no prospect of such an order being granted; (ii) the fact that damages are not claimed under Lord Cairns' Act in lieu of an injunction; (iii) the fact that the claim is not based on a breach of a restrictive covenant; and (iv) the fact that the claim is based on breach of contract rather than invasion of property rights" (at [533]). On the facts of the case, the loss assessed on this basis would be same amount as the difference in value (at [559]).

1165. *One Step (Support) Ltd v Morris-Garner [2016] EWCA Civ 180* at [122] and [145]–[146].

1166. Other facts taken into account do not seem relevant. In *Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830* at [36], [44], [54] and [58] the Court of Appeal used some of the factors relevant to the granting of an account of profits as also relevant to their discretion to grant *Wrotham Park* damages, taking into account the fact that the defendant "did do the very thing it had contracted not to do"; that the defendant "knew that it was doing something which it had contracted not to do"; that it was a "deliberate breach", a "flagrant contravention" of the defendant's obligation. These factors do not seem relevant to whether or not the claimant had a legitimate interest in deterring the defendant from breach.

1167. *[2016] EWCA Civ 180* at [123].

1168. *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd [2013] EWHC 1414 (Ch)* at [225].

1169. *[2016] EWCA Civ 180* at [122] and [145]–[146]. It is submitted that *Wrotham Park* damages may also be awarded when the conventional measure of damages would leave the claimant undercompensated: see Vol.I, para.26-053.

1170. cf. Longmore L.J. in *One Step (Support) Ltd v Morris-Garner [2016] EWCA Civ 180* at [151] (another wrongful competition case, in which the defendant's furtive conduct deprived claimant of opportunity to obtain interim relief).

1171. See above, para.26-186.

1172. As opposed to a case like *Esso Petroleum Co Ltd v Niad Ltd [2001] All E.R. (D) 324 (Nov)*, discussed above, para.26-206, in which the loss to the petrol supplier would be hard to prove.

1173. *[1998] A.C. 1*.

1174. *[1998] A.C. 1, 15*, citing Sharpe, *Studies in Contract Law* (1980), 129.

1175. It should be noted that "*Wrotham Park*" damages, though they compensate the innocent party for its loss of opportunity to negotiate a price for releasing the defendant from the relevant contractual obligations, do not have the same effect of allowing the claimant to hold out for a large share of the profit, at least if the damages are fixed at a fairly modest share of the profit. In *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 W.L.R. 2370* Lord Walker said that "Damages under this head … represent 'such a sum of money as might reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right]" (at [48]); the court should consider a hypothetical negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages), both parties to be assumed to act reasonably, so that the fact that one or other would have refused to make a deal is to be ignored. But the fact that the alternative project could not proceed unless the negative rights were bought out can properly be taken into account (at [53]). See Vol.I, paras 26-052—26-054.

1176. *ParkingEye Ltd v Beavis [2015] UKSC 67, 2016] A.C. 1172*.

1177. See *[2015] UKSC 67* at [99], [199].

1178. See above, para.26-199.

1179. See above, para.26-200.

1180. See above, para.26-201.

1181. See above, para.26-202.

1182. See above, para.26-203.

1183. See above, para.26-206.

1184. As in the *ParkingEye* case, see above, para.26-197.

1185. See above, para.26-205.

1186. See above, para.26-208.

1187. *[2015] UKSC 67* at [143].

1188. *[2015] UKSC 67* at [226]–[227], [255].

1189. *[2015] UKSC 67*.

1190. Information received during seminars on the case at the Judicial College.

1191. Nor, according to the majority, to avoid it being unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 (and now the Consumer Rights Act 2015), but see the dissent on this point by Lord Toulson. This aspect of the case is discussed below, para.38-251A.

1192. *[2015] UKSC 67* at [100].

1193. For the kinds of clause that are within the penalty rule, see below, paras 26-215 et seq.

1194. See below, para.26-214.

1195. *Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch)*.

1196. See above, para.26-185.

1197. Lords Neuberger and Sumption *[2015] UKSC 67* at [31].

1198. *[2015] UKSC 67* at [293].

1199. Lord Hodge does not seem to have been referring to the general doctrine of unconscionable bargains, which normally requires claimants to show they were suffering from an identifiable bargaining weakness: see Vol.I, paras 8-133 and 8-135. The possible application of the doctrine in cases like *Cavendish Square* is considered above, para.8-135.

1200. *[2015] UKSC 67* at [35].

1201. *[2015] UKSC 67* at [152].

1202. Lords Neuberger and Sumption's approach may also have been affected by their view that the clauses were not subject to the penalty rules at all because they were "primary obligations": see below, para.26-216H.

1203. See above, para.26-212.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(e) - Scope of the Law of Penalties

Sums payable on and other consequences of breach

26-215

The penalty rules apply to sums that are payable on breach of contract by the defendant and to a variety of other clauses that will have an adverse consequence for a defendant who is in breach the contract, such as a clause that disentitles a defendant who is in breach from receiving the full amount of the price that would otherwise be paid. [1204] The law on penalties is not applicable to many sums of money payable under a contract. Thus, it is not relevant where the claimant claims an agreed sum (a debt) which is due from the defendant in return for the claimant's performance of his obligations, [1205] or which is due upon the occurrence of an event other than a breach of the defendant's contractual duty owed to the claimant, [1206] though there have been suggestions that some such clauses may be "disguised penalties" that do fall within the rules. [1207] It has also been said that some clauses, though "triggered" by a breach by the defendant, are exempt from the rules because they reflect the "primary obligations" of the defendant, whereas the penalty rules are said to apply only to "secondary obligations". [1208]

1204. See below, para.26-216.

1205. *White & Carter (Councils) Ltd v McGregor [1962] A.C. 413* (above, para.26-104). However, in a contract in which the liquidated damages were only payable while the contract remained on foot, the innocent party was not entitled to ignore a repudiation and keep the contract alive so as to be able to continue to claim liquidated damages, as they would have no legitimate interest is doing so: *MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2015] EWHC 283 (Comm)* at [94]–[105]; the Court of Appeal *[2016] EWCA Civ 789* agreed that there was no legitimate interest in continuing to perform but because the contractual venture had been frustrated: see above, para.26-106. The contrast between a debt and liquidated damages is drawn by the House of Lords in *President of India v Lips Maritime Corp [1988] A.C. 395, 422–423, 424*.

1206. See below, para.26-216C.

1207. See below, para.26-216G.

1208. See below, para.26-216H.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(e) - Scope of the Law of Penalties

(i) - Types of Clause within the Penalty Doctrine

Types of clause within the penalty rules

26-216

In *Cavendish Square Holding BV v Makdessi* [1209] the Supreme Court held that the penalty clause rules apply not only to agreed damages clauses but also to provisions that would prevent a party who breaks the contract from receiving a sum to which it would otherwise be entitled, [1210] and also provisions that require a party in breach to transfer property to the other party at less than its full value. [1211] The Supreme Court also stated that the penalty rules also apply to deposits and forfeiture clauses; these will be considered in a separate section. [1212]

Acceleration clauses

26-216A

An "acceleration" clause is often found in contracts providing for payment by instalments: on default in paying one instalment, all future instalments become immediately payable as one sum. Although the operation of these clauses produces results which may be "penal", the courts have usually enforced them on the ground that they do not increase the contractbreaker's overall obligation. [1213] The Court of Appeal has held that it is not a penalty for an acceleration clause in a contract of loan to provide that, upon failure to pay an agreed instalment, the whole capital of the loan becomes immediately due and repayable. [1214] But it might be held to be a penalty if it provided that, upon such failure, future interest (viz on payments not yet due) should be payable immediately. [1215]

Termination for breach of condition

26-216B

As explained earlier, [1216] where the hirer has neither repudiated the hiring (or hire-purchase) agreement, nor committed a "fundamental breach" of it, but the owner terminates it in the exercise of an express power to do so conferred by the agreement, the owner's damages are limited to loss suffered through any breaches up to the date of the termination. [1217] It was noted, however, that this principle does not apply where the contract made the broken term into a condition, any breach of

which entitled the innocent party to terminate (e.g. a clause making compliance with time "of the essence" [1218]). In this case the innocent party may both terminate the contract and recover damages for the loss of the bargain (viz in respect of all the outstanding obligations of the other party). [1219] A clause that makes the hirer liable for a genuine pre-estimate of the owners' full loss in such a case will be valid. The Court of Appeal decided that the clause making prompt payment "of the essence" when it would not be so otherwise [1220] is not itself subject to the law on penalties. [1221] The difference between the two types of clause (viz an express power to terminate, and a clause making time of the essence) is "one of drafting form and wholly without substance". [1222] The result is that the position of the parties may be changed by a simple, small change in the terminology of the contract which makes every term a "condition" in the sense of a term any breach of which entitles the promisee to terminate. [1223] This follows, however, not from the law on penalties but from the firmly established rule that the parties are free to agree that any term of the contract is a condition. [1224]

1209. *[2015] UKSC 67, [2016] A.C. 1172*.

1210. See *[2015] UKSC 67* at [170] (Lord Mance); [226] (Lord Hodge); Lord Toulson agreed with both of them (at [292]). Lords Neuberger and Sumption were prepared to assume this without deciding it (at [73]); they considered that cl.5.1 of the agreement in the *Cavendish Square* case was part of the parties' primary obligations and therefore altogether outside the penalty rules: see below, para.26-216H. However, Lord Clarke preferred to leave this question open; he must therefore have held that the penalty rules do apply to clauses of this type. In *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] A.C. 689* the House of Lords had considered a clause entitling the contractor to "suspend or withhold" the payment of money due to the subcontractor on any breach of contract. It had been conceded that the clause fell within the doctrine, but a majority of the House appeared to consider that the concession was correct: see *[2015] UKSC 67* at [70], [154] and [226].

1211. See at [170] and [183] (Lord Mance); [230] and [280] (Lord Hodge). On this point Lord Clarke (at [291]) agreed with Lord Hodge and Lord Toulson (at [292]) with both Lord Mance and Lord Hodge.

1212. See below, paras 26-216N et seq.

1213. *Protector Endowment Loan Co v Grice (1880) 5 Q.B.D. 592* (a loan case); *Wallingford v Mutual Society (1880) 5 App. Cas. 685*. See Goode [1982] J. Bus. L. 148; cf. *Wadham Stringer Finance Ltd v Meaney [1981] 1 W.L.R. 39, 48* (see Vol.II, para.39-272); *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV [2015] EWHC 150 (Comm)* at [67], citing this paragraph as it appeared in the 31st edition; the Court of Appeal, *[2016] EWCA Civ 412*, did not comment on this point. The High Court of Australia has sometimes upheld acceleration clauses (*IAC (Leasing) Ltd v Humphrey (1972) 126 C.L.R. 131* (see also Vol.II, para.39-353)) but sometimes not (holding them to be penalties): *O'Dea v Allstates Leasing Systems (WA) Pty Ltd (1983) 152 C.L.R. 359*; Muir (1985) 10 Sydney L.R. 503; *AMEV-UDC Finance Ltd v Austin (1986) 162 C.L.R. 170*; cf. *Esanda Finance Corp Ltd v Plessing (1989) 166 C.L.R. 131*.

1214. *The Angelic Star [1988] 1 Lloyd's Rep. 122, 125, 127*.

1215. *The Angelic Star [1988] 1 Lloyd's Rep. 122*. cf. *Lordsvale Finance Plc v Bank of Zambia [1996] Q.B. 752* (see above, para.26-193).

1216. See above, para.26-192.

1217. *Financings Ltd v Baldock [1963] 2 Q.B. 104*. (A "minimum payment" clause specifying a larger sum will be held to be a penalty: see above, para.26-192.) The principle stated in the text has been regularly followed by the Court of Appeal: *Brady v St Margaret's Trust Ltd [1963] 2 Q.B. 494*; *Charterhouse Credit Co Ltd v Tolly [1963] 2 Q.B. 683*; *United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 Q.B. 54*; *Capital Finance Co Ltd v Donati (1977) 121 S.J. 270*; *Lombard North Central Plc v Butterworth [1987] Q.B. 527*. See also the Australian cases cited, above, para.26-216A, n.1118p.

1218. See paras 21-011 et seq.

1219. The *Lombard case [1987] Q.B. 527*. See Treitel [1987] L.M.C.L.Q. 143; Beale (1988) 104 L.Q.R. 355.

1220. In the *Lombard case [1987] Q.B. 527*, it was held that, according to common law principles, the hirer had not committed a repudiatory breach of the contract: at 543–545. The court nevertheless awarded as damages at common law almost the same sum which it had previously found not to be a genuine pre-estimate of loss (a penalty).

1221. The *Lombard case [1987] Q.B. 527, 536–537*.

1222. The *Lombard case [1987] Q.B. 527, 546*.

1223. Would the law uphold a clause providing expressly that for any breach, however trivial, the damages shall be assessed on the basis that the whole benefit of the contract has been lost by the other party? cf. decisions on mitigation, such as *The Solholt [1983] 1 Lloyd's Rep. 605* (Vol.I, para.26-093).

1224. See Vol.I, para.13-026.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(e) - Scope of the Law of Penalties

(ii) - Events other than Breach

Sum payable on event other than breach

26-216C

In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [1225] the Supreme Court endorsed the view that the penalty clause rules apply only to sums payable, and equivalent consequences, [1226] that follow from a breach of contract. Previous authority was not wholly clear. In *Campbell Discount Co Ltd v Bridge*, [1227] a hire-purchase agreement permitted the hirer at his option to terminate the hiring during the period of the agreement, and provided that the hirer should thereupon pay a sum by way of agreed compensation for the depreciation of the chattel; the Court of Appeal held that the owner could recover the agreed sum, since being payable upon an event not constituting a breach of the agreement, it fell outside the scope of the law as to penalties. In the House of Lords [1228] the decision was based on a different view of the facts, [1229] but four of their Lordships expressed obiter their views on the ruling of the Court of Appeal; two agreed that the law as to penalties was inapplicable, but two were prepared to hold that the hirer was entitled to some relief. The later decision of the House of Lords in the *Export Credits Guarantee* case [1230] appeared to support the restriction of the scope of the law on penalties to payments [1231] triggered by a breach of contract. The House held that the law did not apply to a clause providing for the contractbreaker (the defendant) to pay a specified sum to the plaintiff upon the happening of a certain event which was *not* the breach of a contractual duty owed by the defendant to the plaintiff. So it could not be a penalty where the defendant had agreed to reimburse the plaintiff the amount paid by the plaintiff to third parties under a guarantee (even where the plaintiff's obligation to meet the guarantee arose on the occasion of the defendant's breach of his contractual duties owed to other parties). [1232] Although the case concerned a guarantee in a complex commercial arrangement and the plaintiff was claiming only the sum it had actually lost, their Lordships' limitation on the scope of the law on penalties was expressed in such wide terms that it would prevent many other clauses from being subject to that law, for example a sum payable by one party should it exercise an option as to perform at a later date than anticipated (but not required). [1233] Although statutory protection is available in some cases [1234] the common law position has been thought unsatisfactory; for instance, an honest business hirer, who terminates his hire-purchase agreement when he finds that he cannot keep up the instalments, is in a worse position than the hirer who simply breaks his agreement by failing to pay the instalments. [1235] The High Court of Australia had not followed the *Export Credits Guarantee* case, [1236] holding that a clause may be a penalty:

> "if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party." [1237]

However in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [1238] the Supreme Court [1239] rejected this approach, which in any event they regarded as unworkable, [1240] and said that the penalty rules only come into play when a clause is triggered by a breach. [1241]

Sums payable on exercise of an option under the contract

26-216D

Thus the law does not apply where one party to the contract is given an option to choose a particular method of performance, subject to his making a stipulated payment to the other [1242]; or where a member of a pooling agreement failed to pay his levy to finance litigation and was excluded from sharing in the proceeds of the litigation. [1243] It does not apply to an employee's loss of contingent future interests in fund units to which he would have been entitled had his employment continued. [1244] In the Court of Appeal in the *ParkingEye* case it was said that the penalty rules would not apply to an £85 charge for overstaying in an otherwise free parking facility if the arrangement were expressed in terms of a licence to use the car park subject to conditions coupled with an agreement to pay the charge if the conditions are not adhered to. [1245]

Reimbursement is not a penalty

26-216E

If a contract provides that in a certain event a sum of money paid under the contract is to be repaid to the original payer, the reimbursement cannot be a penalty. [1246] So where the defendant received an insurance payment on the basis of his permanent disablement the insurers were able to enforce his undertaking to pay them "a penalty" of the same amount if he took part in a specified sport in future. [1247]

Incentive payments

26-216F

The reverse of an agreed damages clause is an incentive payment such as an extra payment for early completion. The law on penalties does not apply to a clause providing for an *increase* in the price if certain targets in the contract are bettered or if costs are reduced; similarly, the price for a specially-manufactured machine may be graduated according to its efficiency in operation. A Government report has recommended that in building contracts incentive payments should be preferred to agreed damages clauses. [1248]

Disguised penalties

26-216G

Some doubt is thrown on the division between sums payable upon breach and sums payable on other events by the suggestion by some of their Lordships in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [1249] that certain clauses may amount to "disguised penalties". This follows a suggestion by Bingham L.J. in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1250] that the clause in that case, which required a party who had hired photographic slides to pay a much higher charge if the slides were not returned within a fixed period, might be a "disguised penalty". [1251] It is hard to find any support for such a concept in earlier cases, and it is unclear how a disguised penalty differs from other sums payable if the party exercises an option under the contract. The only possible distinction seems to be that the amount of the payment is out of proportion to the claimant's interest in obtaining performance—in which case the "disguised penalty" rule would have the effect that the penalty clause rules (including the new "legitimate deterrent rule") would after all apply to a clause setting a price on an option that the defendant has chosen to exercise.

1225. *[2015] UKSC 67, [2016] A.C. 1172*.

1226. See above, para.26-216.

1227. *[1961] 1 Q.B. 445* (following *Associated Distributors Ltd v Hall [1938] 2 K.B. 83*); see Vol.II, paras 39-349—39-354. The decision is based on the non-statutory law. For statutory regulation of hire-purchase agreements, see Vol.II, paras 39-356 et seq.

1228. *[1962] A.C. 600*.

1229. viz that the hirer had committed a breach. The law on penalties applies to a minimum payment clause if the agreement is in fact terminated on the ground of the hirer's breach: *Cooden Engineering Co Ltd v Stanford [1953] 1 Q.B. 86*; *Lamdon Trust Ltd v Hurrell [1955] 1 W.L.R. 391*. See Vol.II, paras 39-349—39-354.

1230. *Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 W.L.R. 399*. It is unfortunate that the short speech in this case made no attempt to discuss the opinions expressed in the *Campbell Discount case [1962] A.C. 600*. See also *Euro London Appointments Ltd v Claessens International Ltd [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep. 436* (a condition precedent imposing no obligation).

1231. And similar events: see above, para.26-216 and below, paras 26-216N et seq.

1232. *Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 W.L.R. 399*.

1233. See also *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV [2015] EWHC 150 (Comm); [2016] EWCA Civ 412*. In *Berg v Blackburn Rovers Football Club & Athletic Plc [2013] EWHC 1070 (Ch), [2013] I.R.L.R. 537* it was held that the penalty rules did not apply to a payment due when one party to a fixed-term employment contract exercised a right to terminate it early. In *M&J Polymers Ltd v Imerys Minerals Ltd [2008] EWHC 344 (Comm), [2008] All E.R. (D) 445 (Feb)* it was held that a "take or pay" clause is subject to the penalty rules (though it was held on the facts not to be a penalty). It is submitted that this will depend on the form of the clause. It will not be subject to the penalty rules if the buyer is simply obliged to pay for a minimum quantity with an option whether or not to take delivery of all the goods. On the facts of

the case, however, it was held that the buyer was in breach of an obligation to order a certain quantity (at [41]). See also *E-Nik Ltd v Secretary of State for Communities and Local Government [2012] EWHC 3027 (Comm)* at [25] (clause requiring a customer to pay for a minimum amount of services was treated as being subject to the penalty rules but nonetheless upheld). In *Associated British Ports v Ferryways NV [2008] EWHC 1265 (Comm), [2008] 2 Lloyd's Rep. 353 (affirmed on other grounds [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595)* it was held that the penalty rules did not apply to sums due under a "minimum through-put" clause.

1234. In particular under the Unfair Terms in Consumer Contracts Regulations 1999 or Consumer Rights Act 2015 s.62: see below, Vol.II, paras 38-201 et seq. and 38-334 et seq. When the term provides for the forfeiture of a deposit or other sum, see below, paras 26-216N et seq.

1235. See the Law Commission's Working Paper No.61 (1975), paras 17–26; *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV [2015] EWHC 150 (Comm) at [59] (rev'd on other grounds [2016] EWCA Civ 412)*.

1236. *Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 W.L.R. 399*. It is unfortunate that the short speech in this case made no attempt to discuss the opinions expressed in the *Campbell Discount case [1962] A.C. 600*. See also *Euro London Appointments Ltd v Claessens International Ltd [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep. 436* (a condition precedent imposing no obligation); *Jervis v Harris [1996] Ch. 195, 206–207*.

1237. *Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 C.L.R. 205* at [10].

1238. *[2015] UKSC 67, [2016] A.C. 1172*.

1239. Lords Neuberger and Sumption (with whom Lord Carnwath and, seemingly on this point, Lord Clarke agreed) *[2015] UKSC 67* at [42]–[43]; Lord Hodge (with whom Lord Toulson agreed) at [241]. Note however the suggestion that a clause may be "a disguised penalty", discussed below, para.26-216G. Lord Mance said that the point concerning clauses that operate on events other than breach was not up for decision but the distinction is "not without rational or logical underpinning": at [130].

1240. Lords Neuberger and Sumption *[2015] UKSC 67* at [42].

1241. If the sum is payable on one of several events, some of which are breaches and others are not, the penalty rule will apply if the event that in fact triggered the payment was a breach, but not otherwise, nor if, as on the facts of the case, it was a breach of a different contract by another party: *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV [2015] EWHC 150 (Comm)* at [60], [69]; the Court of Appeal confirmed that the penalty rule did not apply, *[2016] EWCA Civ 412* at [7]. The death or bankruptcy of a party might be another event, not constituting a breach, upon which money is to be paid. cf. *Mount v Oldham Corp [1973] Q.B. 309* (claim for a term's school fees in lieu of notice withdrawing a pupil).

1242. *Fratelli Moretti SpA v Nidera Handelscompagnie BV [1981] 2 Lloyd's Rep. 47, 53*; for another example see *BHL v Leumi Abl Ltd [2017] EWHC 1871 (QB)* at [44].

1243. *Nutting v Baldwin [1995] 1 W.L.R. 201*.

1244. *Imam-Sadeque v Bluebay Asset Management (Services) Ltd [2012] EWHC 3511 (QB)*, citing the Australian case of *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd (2008) 257 A.L.R. 292*. The provision was in any event commercially justifiable and not penal when read in the light of the contract as a whole: *[2012] EWHC 3511 (QB)* at [223]–[234].

1245. *ParkingEye Ltd v Beavis [2015] EWCA Civ 402* at [23].

1246. *Alder v Moore [1961] 2 Q.B. 57* (approving *Re Apex Supply Co Ltd [1942] Ch. 108*).

1247. *Alder v Moore [1961] 2 Q.B. 57*. Although the defendant had agreed not to take part again in professional football, the majority considered that this was not a case in which the defendant was in breach by so doing but of a condition on the defendant retaining the insurance payment: see at 65 and 77.

1248. Banwell Report (Report of the Committee on Placing and Management of Contracts for Building and Civil Engineering Work) (HMSO, 1964), para.9.22.

1249. *[2015] UKSC 67, [2016] A.C. 1172* at [77] (Lords Neuberger and Sumption) and [258] (Lord Hodge).

1250. *[1989] Q.B. 433*.

1251. *[1989] Q.B. 433, 439*. The decision rested on the ground that the clause was not incorporated into the contract: see Vol.I, para.13-015.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(e) - Scope of the Law of Penalties

(iii) - “Primary Obligations”

Primary obligations

26-216H

In *Cavendish Square Holding BV v Makdessi* [1252] Lords Neuberger and Sumption (with whom Lord Carnwath agreed) held that the clauses which provided that the seller of the business, if he was in breach of the non-competition covenants, would not receive the outstanding instalments of the price, and would require him to transfer further shares to the buyers at a much reduced value, were not subject to the penalty rules at all. Even if they were triggered by the seller’s breach, clause 5.1 bore no relation to damages; it represented the reduced price that the buyer was prepared to pay for the business if it could not count on the loyalty of the seller, and so formed part of the “primary obligations” of the parties. [1253] The analysis of clause 5.6 was essentially similar: it represented the reduced price that the purchaser was prepared to pay when it could not count on the loyalty of Makdessi. [1254] The law places controls over only the parties’ secondary obligations, not their primary obligations, [1255] and both clauses belong among the primary obligations, even if the occasion of their operation was a breach of contract. [1256] In any event, both clauses were justified by the same legitimate interest in matching the price to the value that the seller was providing. [1257] Unlike an agreed damages clause, if the clauses did not stand there is no scale by which the court could make an award. The other members of the Supreme Court either decided the case on the ground that the clauses did not amount to penalties or preferred to leave the matter open. [1258] With respect, it is unclear how a payment (or other obligation that is within the doctrine [1259]) that is “triggered” by a breach of contract by the defendant but which is a primary obligation is to is to be distinguished from an agreed damages clause. The fact that the clause is in the form of a price reduction seems to emphasise form over substance; and while it is true that ex ante there is no alternative scale by which the court could fix appropriate prices, when an agreed damages clause is held to be unenforceable the court makes an ex post assessment of the actual loss suffered by the claimant. It seems that a court could equally assess damages in terms of the reduction in value in the shares caused by a breach by the seller of a non-competition covenant, and the valuation could include an element for the risk that the seller who had been disloyal once may be disloyal again.

“Core” obligations rather than primary obligations

26-216I

One can understand the reluctance of judges to relieve a party from an obligation, whether it is

correctly analysed as primary or secondary, that was negotiated with the assistance of experts and presumably agreed to in full knowledge of its possible implications, especially one that must have been seen as a central element of the agreement. Possibly a more useful distinction might be based on an approach suggested by Lord Toulson during argument, as a possible substitute for the penalty clause doctrine (which the Court had been invited to abandon [1260]). This was to borrow from the Directive on Unfair Terms in Consumer Contracts [1261] and ask whether the provision was a "core term". [1262] "Core" terms are likely to have been considered carefully by each party, even if the parties were not of equal sophistication or bargaining power, and therefore there is less reason to interfere than with more peripheral clauses that may not have been fully taken into account by both parties. The suggestion seems to be that if the change in price is so central to the deal that the party agreeing to it must have had it in mind, it would be exempt from control as a penalty. Lord Toulson did not, however, repeat this suggestion in his judgment.

1252. *[2015] UKSC 67, [2016] A.C. 1172*.

1253. *[2015] UKSC 67* at [74]–[75]. Compare *Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch)*, in which an increased rent became payable in the event of any breach of its obligations by the tenant: the court held that the increased rent was a secondary obligation that was capable of being a penalty (at [49]).

1254. *[2015] UKSC 67* at [81].

1255. *[2015] UKSC 67* at [14] and [32].

1256. *[2015] UKSC 67* at [83].

1257. *[2015] UKSC 67* at [82].

1258. Lord Mance said that cl.5.1 had the effect of revising the price payable for the shares but he clearly considered the clause to be subject to the penalty doctrine: see *[2015] UKSC 67* at [181]; similarly, though cl.5.6 had the effect of reshaping of the parties' primary relationship (at [183]), it was valid because it was neither exorbitant or unconscionable (at [185]). Lord Hodge agreed that there were "strong arguments" for regarding each clause as primary obligations to which the doctrine does not apply: at [270] and [280]; but he decided the validity of cl.5.1 by applying the penalty doctrine, and held that cl.5.6 was a secondary obligation, adding that "if all such clauses were treated as primary obligations, there would be considerable scope for abuse". Lord Toulson agreed with the relevant parts of both Lord Mance's and Lord Hodge's judgments. Lord Clarke agreed with Lord Hodge rather than with Lords Neuberger and Sumption on these points: at [291].

1259. See above, para.26-216.

1260. See above, para.26-196.

1261. 93/13/EC: see Vol.II, paras 38-199 et seq.

1262. In other words, it is the main subject matter or concerns the adequacy of the price or other remuneration and is therefore exempt from assessment for fairness provided that it is in plain and intelligible language, see art.4(2).

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(e) - Scope of the Law of Penalties

(iv) - "Invoicing back" Clauses

"Invoicing back" clauses

26-216J

The express terms of the contract may not only exclude or limit the innocent party's right to claim damages for breach of contract, [1263] but may also provide other provisions intended to apply in the event of a breach. Subject to the law as to penalties, [1264] and to the effect of the Unfair Contract Terms Act 1977 [1265] or (if applicable) the Consumer Rights Act 2015, [1266] the courts will enforce these terms, despite the unexpected results which may occur. In one case, [1267] a clause in a contract for the sale of goods provided that if the sellers made default in shipping, the contract should "be closed by invoicing back the goods" at the closing price fixed by the London Corn Trade Association. The sellers failed to ship, and the Association declared a closing price, which, because of a fall in market price, was lower than the contract price, so that a balance was due in favour of the sellers. Nevertheless, the Court of Appeal enforced the clause, despite the fact that the sellers were the party in default. [1268] An "invoicing back" clause may not be interpreted as the exclusive remedy, [1269] e.g. the clause may not prevent the buyer obtaining damages for his loss of profits, [1270] and judges have interpreted such clauses restrictively. [1271] An "invoicing back" clause may also allow a percentage of the market price to be added to, or deducted from, the price, which if reasonable, will be upheld as liquidated damages covering items of loss not covered by the price alone. [1272]

1263. On exemption clauses, see Vol.I, Ch.15, above.

1264. Above, paras 26-178 et seq.

1265. See Vol.I, paras 15-066 et seq.

1266. See Vol.II, paras 38-334 et seq.

1267. *Lancaster v J.F. Turner & Co Ltd [1924] 2 K.B. 222* (Scrutton L.J. dissenting); followed in *J.F.*

Adair & Co Ltd v Birnbaum [1939] 2 K.B. 149 (and the earlier case noted, 173); *Podar Trading Co Ltd v Tagher [1949] 2 K.B. 277*. cf. *James Laing, Son & Co Ltd v Eastcheap Dried Fruit Co Ltd [1961] 2 Lloyd's Rep. 277*.

1268.

Some clauses are drafted differently and avoid this difficulty, e.g. the clause may apply only to the defaulting buyer, and only if the market price has fallen: *Alexandria Cotton and Trading Co (Sudan) Ltd v Cotton Co of Ethiopia Ltd [1963] 1 Lloyd's Rep. 576*.

1269.

Roth, Schmidt & Co v D. Nagase & Co Ltd (1920) 2 Ll. L. Rep. 36 CA (the clause did not expressly exclude the right to reject the goods or to recover damages upon rejection).

1270.

Re Bourgeois and Wilson Holgate & Co (1920) 25 Com. Cas. 260 (the Court of Appeal decided in this case that the seller in these circumstances could not enforce the clause against the buyer).

1271.

One judge has held that the interpretation of a clause which requires damages to be paid to the defaulting party is contrary to "natural justice": *Cassir, Moore & Co Ltd v Eastcheap Dried Fruit Co [1962] 1 Lloyd's Rep. 400, 402*. See also the qualifications suggested in *Lancaster v J.F. Turner & Co Ltd [1924] 2 K.B. 222, 231*; *J.F. Adair & Co Ltd v Birnbaum [1939] 2 K.B. 149, 169*.

1272.

Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd [1962] 1 W.L.R. 34.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(f) - Effect of Clause if a Penalty

Penalty clause is not enforceable

26-216K

As mentioned earlier, [1273] if a clause is penal because it passes neither the "genuine pre-estimate" test [1274] nor the "legitimate deterrent test, [1275] the clause will be wholly unenforceable. [1276] The court has no power to re-write the clause in order to make it valid. [1277]

Can damages exceed the sum fixed in penal clause?

26-216L

A clause which is not a genuine pre-estimate, e.g. because it stipulates for more than the likely loss, and which is therefore a penalty, may be ignored if it is for less than the actual damage suffered. Where a charterparty contained the following clause: "[p]enalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight", it was held that the clause provided a penalty and not a limitation of liability, so that the party complaining of non-performance was entitled to recover damages for his actual loss although it exceeded the estimated amount of freight. [1278] It is unsettled whether this principle applies to penalty clauses in other types of contract, so as to entitle the claimant to ignore the sum stipulated as a penalty (where it was clearly not intended to limit liability) and to sue for damages for a greater amount to compensate him for his actual loss. [1279]

1273. See above, para.26-178A.

1274. See above, para.26-182.

1275. See above, para.26-196.

1276. *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172* at [9] and at [291], where Lord Clarke expressed his agreement with this part of the Lords Neuberger and Sumption's judgment.

1277. *[2015] UKSC 67* at [84]–[86], [283] and [292], disapproving *Jobson v Johnson [1989] 1 W.L.R. 1026* on this point. Lord Mance preferred to leave this point for further argument (at [186]). In *Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch)* at [66]–[71] Timothy Fancourt QC, sitting as a Deputy Judge of the High Court, expressed the view that it is possible to sever part of a clause that makes the clause penal if the offending part can be removed without adding to or modifying the rest, the remaining terms are supported by consideration, the change does not alter the character of the contract and severance does not conflict with the public policy making the offending part unenforceable. However, the authorities cited in support are cases on restraint of trade and, with respect, it is not clear that severance can be applied to penalty clauses.

1278. *Wall v Rederiaktiebolaget Luggude [1915] 3 K.B. 66* (approved by the House of Lords in *Watts, Watts & Co Ltd v Mitsui & Co Ltd [1917] A.C. 227*). But this case may require reconsideration in the light of the *Suisse Atlantique case [1967] 1 A.C. 361* (where a demurrage clause was held to be an agreed damages clause) and the *Photo Production case [1980] A.C. 827*.

1279. In *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd [1933] A.C. 20, 26*, the House left: "… open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it or, in a suitable case, ignoring it and suing for damages". cf. dicta to the effect that the penalty fixes the maximum recoverable: *Wilbeam v Ashton (1807) 1 Camp. 78*; *Elphinstone v Monkland Iron & Coal Co (1886) L.R. 11 App. Cas. 332, 346*; *Elsley v J.G. Collins Insurance Agencies Ltd (1978) 83 D.L.R. (3d) 1, 14–16*; *W.&J. Investments Ltd v Bunting [1984] 1 N.S.W.L.R. 331, 335–336*. See also Hudson (1974) 90 L.Q.R. 31; Gordon (1974) 90 L.Q.R. 296; Hudson (1975) 91 L.Q.R. 25; Barton (1976) 92 L.Q.R. 20; Hudson (1985) 101 L.Q.R. 480; Peel, *Treitel on The Law of Contract*, 14th edn (2016), para.20–140.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

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

(g) - Consumer Contracts

Sums payable on breach in consumer contracts [1280]

26-216M

The Unfair Terms in Consumer Contracts Regulations 1999 provided that in a contract between a business and a consumer an "unfair term" that was not individually negotiated was not be binding on the consumer. For consumer contracts made after October 1, 2015, Pt 2 of the Consumer Rights Act 2015 provides that an unfair term [1281] in a consumer contract will not be binding on the consumer. The Regulations and the Act give illustrations of terms which may be regarded as unfair: relevant to clauses fixing damages is "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation". [1282] So a consumer will be able to appeal to this standard, as well as to the common law on penalties; and it has been held that a term may be unfair even though on the facts it did not amount to a penalty at common law. [1283]

1280. SI 1999/2083.

1281. Whether negotiated or not: s.62. See Vol.II, para.38-358.

1282. 1999 Regulations Sch.2 para.1(e); 2015 Act Sch.2 Pt 1 para.(6).

1283. *Munkenbeck & Marshall v Harold [2005] EWHC 356 (TCC), [2005] All E.R. (D) 227*; see below, Vol.II, para.38-280. For clauses requiring a consumer to make a payment on some event that is not a breach of contract, see above, para.26-216C.