Contract Law: Text Cases and Materials (11th edn)
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p. 266

7. Intention to Create Legal Relations

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https://doi.org/10.1093/he/9780198898047.003.0007
Published in print: 17 May 2024
Published online: August 2024

Abstract

An essential ingredient of a binding contract is that the parties must have had an intention to create legal relations. In other words, they must have had an intention to be bound by the terms of their agreement. This chapter, which examines the doctrine of intention to create legal relations, begins by considering cases involving domestic and social agreements before turning to analyse the role of intention to create legal relations in the commercial environment. The chapter also covers the role of presumptions in relation to proof of the existence of an intention to create legal relations and the relationship between the doctrine of intention to create legal relations and consideration.

Keywords: English contract law, intention to create legal relations, domestic agreement, social agreement, commercial agreement, the role of presumptions

Central Issues

1. In order to create a valid and binding contract the parties must have had an intention to create legal relations. This rule does not generally give rise to any difficulties in the context of commercial transactions because the courts presume that parties to a commercial agreement do intend to create legal relations. The presumption is not an irrebuttable one but it is not an easy one to rebut.

2. The doctrine of intention to create legal relations plays its most important role in the context of domestic and social agreements. In both contexts the courts presume that the parties to the agreement did not intend to create legal relations. Once again, this presumption is not an irrebuttable one and the factors relied upon by the courts in order to rebut the presumption are considered in this chapter.
3. It is important to consider the basis of this doctrine. Does it rest on the intention of the parties or is it based on a rule of law or public policy? It will be suggested that the initial presumption rests on a rule of law or public policy and that the intention of the parties is relevant to the rebuttal of that presumption. The policy that is articulated in the presumption is that the law should, in general, keep out of the regulation of domestic and social agreements.
4. But this leads on to another, more difficult question and that relates to the role of the presumptions and the doctrine of intention to create legal relations more generally. Should the law of contract continue to keep out of family life or is the presumption that the parties to domestic agreements do not intend to create legal relations one that is out of step with modern family life?

7.1 Introduction

A further essential ingredient of a binding contract is that the parties must have had an intention to create legal relations. In other words, they must have had an intention to be bound by the terms of their agreement.
p. 267 The doctrine of intention to create legal relations is a ↵ relatively late arrival in English contract law. As has already been noted (see 3.2.1), Professor Simpson gives the credit for the first recognition of the doctrine to the Court of Appeal in *Carlill* v. *Carbolic Smoke Ball Co Ltd* [1893] 2 QB 256. It was not, however, until the judgment of Atkin LJ in *Balfour* v. *Balfour* [1919] 2 KB 571 (7.2) that its place was firmly established in English contract law.

The impact of this doctrine is greatest outside the sphere of commercial transactions. In the case of ordinary commercial transactions the law presumes that the parties did intend to create legal relations. The presumption that the parties to a commercial transaction intended to create legal relations is not an irrebuttable one. It can be rebutted but clear evidence is required in order to do so (*Edwards* v. *Skyways Ltd* [1964] 1 WLR 349, 355). The picture is otherwise when we turn to domestic and social agreements. In these contexts the presumption operates the other way. The presumption is that the parties to domestic and social agreements do not intend to create legal relations. This presumption is not as difficult to rebut as the presumption in favour of intention to create legal relations in the context of commercial transactions. But evidence must be led in order to establish that the parties did in fact intend to create legal relations.

The intention of the parties is judged objectively and not by inquiring into their respective states of mind (see *Maple Leaf Marco Volatility Master Fund* v. *Rouvroy* [2009] EWCA Civ 1334, [2010] 2 All ER (Comm) 788, [17] and, more generally, Chapter 2). However, in the case where a party in fact knows that the other party does not intend to create legal relations, he is not entitled to assert that the parties did intend to create legal relations by

submitting that, objectively, the evidence supports the conclusion that the parties did intend to create legal relations. Just as a party cannot 'snap up' an offer he knew was not intended (see 2.3), so a party who actually knows that there was no intention to create legal relations cannot maintain that, objectively, there was such an intention (*Attrill* v. *Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] 3 All ER 607, [86]).

We shall start by considering cases concerned with agreements made in a domestic and a social context before turning to analyse the role of intention to create legal relations in the commercial environment.

7.2 Domestic Agreements

In the case of agreements entered into in a domestic context the presumption is that the parties did not intend to create legal relations. The leading case is:

Balfour v. Balfour
[1919] 2 KB 571, Court of Appeal

The defendant and plaintiff were husband and wife. They were married in 1900 and went to live in Ceylon (now Sri Lanka). They returned to England in 1915 when the defendant (the husband) had some leave from his work. When his leave came to an end he returned to Ceylon but his wife remained in England, on the advice of her doctor. Shortly before the defendant set sail for Ceylon in August 1916 the plaintiff alleged that they made an oral agreement, according to which he promised to pay her £30 per month until she returned to Ceylon. Differences then arose between them and the
p. 268 defendant wrote to the plaintiff ↵ suggesting that they should live apart. The plaintiff commenced divorce proceedings in 1918 and she obtained an order for alimony.

In the present proceedings the plaintiff sought to enforce the alleged agreement by which the defendant had promised to pay her £30 per month. The first instance judge, Sargant J, held that the defendant was under an obligation to support his wife and that effect should be given to the agreement reached by the parties. The defendant appealed to the Court of Appeal. His appeal was allowed and it was held that he was not liable to make the promised payments to the plaintiff.

Warrington LJ

[set out the facts and continued]

Those being the facts we have to say whether there is a legal contract between the parties, in other words, whether what took place between them was in the domain of a contract or whether it was merely a domestic arrangement such as may be made every day between a husband and wife who are living together in friendly intercourse. It may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case to be made between husband and wife. The question is whether such a contract was made. That can only be determined either by proving that it was made in express terms, or that there is a necessary implication from the circumstances of the parties, and the transaction generally, that such a contract was made. It is quite plain that no such contract was made in express terms, and there was no bargain on the part of the wife at all. All that took place was this: The husband and wife met in a friendly way and discussed what would be necessary for her support while she was detained in England, the husband being in Ceylon, and they came to the conclusion that £30 a month would be about right, but there is no evidence of any express bargain by the wife that she would in all the circumstances treat that as in satisfaction of the obligation of the husband to maintain her. Can we find a contract from the position of the parties? It seems to me it is quite impossible. If we were to imply such a contract in this case we should be implying on the part of the wife that whatever happened and whatever might be the change of circumstances while the husband was away she should be content with this £30 a month, and bind herself by an obligation in law not to require him to pay anything more; and on the other hand we should be implying on the part of the husband a bargain to pay £30 a month for some indefinite period whatever might be his circumstances. Then again it seems to me that it would be impossible to make any such implication. The matter really reduces itself to an absurdity when one considers it,

because if we were to hold that there was a contract in this case we should have to hold that with regard to all the more or less trivial concerns of life where a wife, at the request of her husband, makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make it, and was bound in honour to continue it so long as he was in a position to do so. The wife on the other hand, so far as I can see, made no bargain at all. That is in my opinion sufficient to dispose of the case. ...

I think the judgment of Sargant J cannot stand, the appeal ought to be allowed and judgment ought to be entered for the defendant.

Duke LJ

I agree. This is in some respects an important case, and as we differ from the judgment of the Court
p. 269 below I propose to state concisely my views and the grounds which have led me ↵ to the conclusion at which I have arrived. Substantially the question is whether the promise of the husband to the wife that while she is living absent from him he will make her a periodical allowance involves in law a consideration on the part of the wife sufficient to convert that promise into a binding agreement. In my opinion it does not. I do not dissent, as at present advised, from the proposition that the spouses in this case might have made an agreement which would have given the plaintiff a cause of action. ... But we have to see whether there is evidence of any such exchange of promises as would make the promise of the husband the basis of an agreement. It was strongly urged by [counsel for the plaintiff] that the promise being absolute in form ought to be construed as one of the mutual promises which make an agreement. It was said that a promise and an implied undertaking between strangers, such as the promise and implied undertaking alleged in this case would have founded an action on contract. That may be so, but it is impossible to disregard in this case what was the basis of the whole communications between the parties under which the alleged contract is said to have been formed. The basis of their communications was their relationship of husband and wife, a relationship which creates certain obligations, but not that which is here put in suit. There was a discussion between the parties while they were absent from one another, whether they should agree upon a separation. In the Court below the plaintiff conceded that down to the time of her suing in the Divorce Division there was no separation, and that the period of absence was a period of absence as between husband and wife living in amity. An agreement for separation when it is established does involve mutual considerations. ...

But in this case there was no separation agreement at all. The parties were husband and wife, and subject to all the conditions, in point of law, involved in that relationship. It is impossible to say that where the relationship of husband and wife exists, and promises are exchanged, they must be deemed to be promises of a contractual nature. In order to establish a contract there ought to be something more than mere mutual promises having regard to the domestic relations of the parties. It is required that the obligations arising out of that relationship shall be displaced before either of the parties can found a contract upon such promises. The formula which was stated in this case to

support the claim of the lady was this: In consideration that you will agree to give me £30 a month I will agree to forego my right to pledge your credit. … What is said on the part of the wife in this case is that her arrangement with her husband that she should assent to that which was in his discretion to do or not to do was the consideration moving from her to her husband. The giving up of that which was not a right was not a consideration. The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship, and to be a possible fruitful source of dissension and quarrelling. I cannot see that any benefit would result from it to either of the parties, but on the other hand it would lead to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind. I think, therefore, that in point of principle there is no foundation for the claim which is made here, and I am satisfied that there was no consideration moving from the wife to the husband or promise by the husband to the wife which was sufficient to sustain this action founded on contract. I think, therefore, that the appeal must be allowed.

Atkin LJ

The defence to this action on the alleged contract is that the defendant, the husband, entered into no contract with his wife, and for the determination of that it is necessary to remember that there are
p. 270 agreements between parties which do not result in contracts within ↵ the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves—agreements such as are in dispute in this action—agreements for allowances, by which the husband agrees that he will pay to his wife a certain sum of money, per week, or per month, or per year, to cover either her own expenses or the necessary expenses of the household and of the children of the marriage, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given. To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. The consideration, as we know, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. That is a well-known definition, and it constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30s. or £2 a

> week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for nonperformance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted. The only question in this case is whether or not this promise was of such a class or not. For the reasons given by my brethren it appears to me to be plainly established that the promise here was not intended by either party to be attended by legal consequences. I think the onus was upon the plaintiff, and the plaintiff has not established any contract. The parties were living together, the wife intending to return. The suggestion is that the husband bound himself to pay £30 a month under all circumstances, and she bound herself to be satisfied with that sum under all circumstances, and, although she was in ill-health and alone in this country, that out of that sum she undertook to defray the whole of the medical expenses that might
> p. 271 fall upon her, whatever might be the development of her illness, ↵ and in whatever expenses it might involve her. To my mind neither party contemplated such a result. I think that the parol evidence upon which the case turns does not establish a contract. I think that the letters do not evidence such a contract, or amplify the oral evidence which was given by the wife, which is not in dispute. For these reasons I think the judgment of the Court below was wrong and that this appeal should be allowed.

Commentary

The judgment of Atkin LJ is the one that is most commonly quoted in the textbooks and in subsequent cases. His judgment clearly recognizes the existence of the doctrine of intention to create legal relations and he applies it to the facts of the case. The judgments of Warrington and Duke LJJ are more equivocal. The central question for Warrington LJ was whether or not it was possible to imply a contract on the facts of the case and, while he made reference to the question of whether or not the parties intended to make a bargain which could be enforced in law, he did not expressly articulate an independent requirement that the parties must intend to create legal relations. The judgment of Duke LJ seems to be based rather more on the doctrine of consideration. As the law then stood, a wife had authority, under certain circumstances, to pledge her husband's credit for suitable necessaries. In essence this was the common law remedy available to a wife who was not supported financially by her husband. Thus it was argued on behalf of Mrs Balfour that she had supplied consideration for the promise to pay her £30 a month by refraining from pledging her husband's

credit for necessaries. However, Duke LJ held that she had not supplied consideration for her husband's promise. His reason for so concluding appears to have been simply that the parties were still husband and wife at the time the promise was made and this brings us back to the point that the reason for the failure of the claim is to be found in the fact that the parties were husband and wife, and had not separated, at the time the promise was made.

This diversity in the reasoning of the court in *Balfour* makes it difficult to discern the precise *ratio* of the case. That said, courts in subsequent cases have not been unduly concerned by this point and have turned to the judgment of Atkin LJ for support for the proposition that English law recognizes the existence of a doctrine of intention to create legal relations. The existence of this doctrine is now clearly established by authority, whatever doubts we may harbour about the *ratio* of the case that is usually cited as the origin of the doctrine in English law. We must now turn to consider the scope of the presumption that parties to domestic agreements do not intend to create legal relations, the factors that have been used by the courts in order to rebut the presumption, the rationale of the presumption, and, finally, the relationship, in the domestic context, between the doctrine of intention to create legal relations and the doctrine of consideration.

7.2.1 The Scope of the Presumption

As *Balfour* demonstrates, the presumption that parties to domestic agreements do not intend to create legal relations is applicable as between husbands and wives, at least where they have not separated and are living together 'in amity'. The position is otherwise where they have separated at the time at which the agreement is made. Thus in *Merritt* v. *Merritt* [1970] 1 WLR 1211 the Court of Appeal held that an agreement between a husband and wife who had separated was enforceable as a contract. Lord Denning MR stated (at p. 1213):

p. 272 ↵

> I do not think that [*Balfour* v. *Balfour* has] any application here. The parties there were living together in amity. In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.

In this respect *Balfour* may be thought to be close to the margins because the parties agreed to separate shortly after Mr Balfour promised to pay £30 per month to Mrs Balfour. But Duke LJ records in his judgment that Mrs Balfour conceded that there was no separation at the time at which the agreement was made and that 'the period of absence was a period of absence as between husband and wife living in amity'. Had she not made that concession and had there been evidence to prove that a separation was imminent, *Balfour* might have been decided differently (indeed in *Pettitt* v. *Pettitt* [1970] AC 777, 816 Lord Upjohn stated that the facts of *Balfour* stretched the doctrine of intention to create legal relations to 'its limits'). It is unlikely that *Balfour* only applies as between married couples who are living together 'in amity'. It must also apply by analogy to parties who cohabit, whether or not they are married.

The presumption that parties to a domestic agreement do not intend to create legal relations has also been applied to an agreement between a mother and her daughter. In *Jones* v. *Padavatton* [1969] 1 WLR 328 a mother promised to maintain her daughter if she gave up her job in Washington and went to London to read for the Bar with a view to practising as a lawyer in Trinidad. The mother lived in Trinidad and her promise was made in 1962. Initially, the promise took the form of a promise of a monthly allowance but subsequently that arrangement was varied and the mother bought a house for her daughter in 1964, on the understanding that the daughter could live there rent free, rent out rooms in the house to lodgers, and use the rent to provide for her maintenance. The daughter entered on her studies for the Bar in November 1962 but by November 1968, the date of the hearing before the Court of Appeal, she had not completed the course successfully (she had passed all but one of her Part I papers but had not yet embarked upon Part II). In 1967 the mother issued a summons in which she claimed possession of the house. The daughter resisted her attempt to do so on the ground that she had a contractual entitlement to live in the house. The Court of Appeal held that the mother was entitled to possession of the house. The reasons given for the rejection of the daughter's claim differed. Danckwerts LJ stated (at p. 332):

> There is no doubt that this case is a most difficult one, but I have reached a conclusion that the present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements. *Balfour* v. *Balfour* was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother. This, indeed, seems to me a compelling case. Mrs Jones and her daughter seem to have been on very good terms before 1967. The mother was arranging for a career for her daughter which she hoped would lead to success. This involved a visit to England in conditions which could not be wholly foreseen. What was required was an arrangement which was to be financed by the mother, and was such as would be adaptable to circumstances, as it in fact was. The operation about the house was, in my view, not a completely fresh arrangement, but an adaptation of the mother's financial assistance to the daughter due to the situation which was found to exist in England. It was not a stiff contractual operation any more than the original arrangement.

p. 273 ↵ Fenton-Atkinson LJ adopted a similar approach. In his view neither party intended to enter into a contract at any stage in this saga: rather, they placed trust in one another to honour their promises. Salmon LJ took a rather different view. He concluded that there was, initially, a binding agreement between the mother and the daughter. Thus he stated (at p. 333) that he could not think that 'either intended that if, after the daughter had been in London, say, for six months, the mother dishonoured her promise and left her daughter destitute, the daughter would have no legal redress'. On the 'very special circumstances of this case' he concluded that 'the true inference must be that neither the mother nor the daughter could have intended that the daughter should have no legal right to receive, and the mother no legal obligation to pay, the allowance of $200 a month'. But the problem which he identified was one relating to the certainty of the agreement itself, particularly in relation to its duration. Thus he concluded (at p. 334) that:

> the promise was to pay the allowance until the daughter's studies were completed, and to my mind there was a clear implication that they were to be completed within a reasonable time. … It may not be easy to decide, especially when there is such a paucity of evidence, what is a reasonable time. The daughter, however, was a well educated intelligent woman capable of earning the equivalent of over £2,000 a year in Washington. It is true that she had a young son to look after, and may well … have been hampered to some extent by the worry of this litigation. But, making all allowances for these factors and any other distraction, I cannot think that a reasonable time could possibly exceed five years from November 1962, the date when she began her studies.

Jones v. *Padavatton* is, in many ways, a difficult case. The daughter initially gave up a great deal on the strength of her mother's promise and that factor pointed in the direction of the promise being legally enforceable. But, in the end, the Court of Appeal concluded that that factor was outweighed by the presumption that the parties did not intend to create legal relations combined with the vague terms in which the agreement was expressed.

7.2.2 Rebutting the Presumption

The presumption that the parties to domestic agreements do not intend to create legal relations can be rebutted in a number of different ways. There is no finite list of methods by which the presumption can be rebutted.

While the question whether or not the presumption has been rebutted ultimately depends upon the facts of the case, the cases in which the presumption has been rebutted exhibit some common features. In the first place the context in which the agreement was concluded has often been a factor in persuading the court to rebut the presumption. For example, the presumption may be rebutted where a husband and wife enter into an 'agreement to share the ownership or tenancy of the matrimonial home, bank accounts, savings or other assets' (*Granatino* v. *Radmacher* [2010] UKSC 42, [2011] 1 AC 534, [142]). The presumption is, also, more likely to be rebutted in the case where the relationship between the parties is approaching the point of break-down (see *Merritt* v. *Merritt*, 7.2.1). Similarly, where the context in which the agreement is reached is a commercial one, as in the example of an agreement made in connection with the running of a family business, a court is more likely to conclude that the presumption has been rebutted (see, for example, *Snelling* v. *John G Snelling Ltd* [1973] 1 QB 87).

p. 274 ↵ Secondly, the presumption may be rebutted where the parties have acted to their detriment in reliance upon the agreement that has been concluded between the parties. This factor does not always suffice to rebut the presumption, as can be seen from *Jones* v. *Padavatton* (see 7.2.1). But cases can be found in which it has operated to rebut the presumption. An example is *Parker* v. *Clark* [1960] 1 WLR 286. The plaintiffs, a married couple, agreed to give up their own home in order to move in and share the home of the defendants, an elderly couple. The parties reached an agreement under which they agreed to share the household expenses and the defendants promised to leave the house in their will for the benefit of the plaintiffs and their relatives. In reliance upon the agreement, the plaintiffs sold their home and lent part of the proceeds to their daughter in order to enable her to buy a flat. The plaintiffs moved into the defendants' home in March 1956 and they did most of the work around the house. However, the relationship between the parties soon began to deteriorate and in December 1957 the plaintiffs, in order to avoid being evicted, left the house. They brought an action for

damages against the defendants. One of the grounds on which the defendants denied that they were liable to the plaintiffs was that the parties had not concluded a contract because they had no intention to create legal relations. Devlin J concluded that there was a contract between the parties and that the defendants were liable in damages to the plaintiffs. He stated:

> I cannot believe … that the defendant really thought that the law would leave him at liberty, if he so chose, to tell the plaintiffs when they arrived that he had changed his mind, that they could take their furniture away and that he was indifferent whether they found anywhere else to live or not. Yet this is what the defence means. … I am satisfied that an arrangement binding in law was intended by both parties.

However, the position may well have been different had the parties fallen out before the plaintiffs acted to their detriment by selling the house and moving in with the defendants. On such facts a court may well have concluded that the parties did not intend to enter into a binding contract. This suggests that there may be a difference between executed and executory agreements. In this context, consider the following claim made by Professor Hedley (see S Hedley, 'Keeping Contract in its Place: *Balfour* v. *Balfour* and the Enforceability of Informal Agreements' (1985) 5 *OJLS* 391, 408):

> The fallacy to be avoided … consists of asking the question 'Is there a contract?', but forgetting that a court is almost invariably faced with a particular claim based on an alleged contract. The perspective given by the claim made alters everything. Take a variation of the classic academic conundrum in this area: Jack and Jill agree to go out to dinner and to split the bill. By asking the academic question 'Is there a contract?' we are immediately in the realm of the abstract. If, however, we approach the matter from a practical standpoint, we must know what claim is being made. If Jill is suing Jack because Jack has refused to go to dinner at all, the arguments against liability are compelling. Surely, Jack cannot be taken as giving an outright commitment to go to dinner—what if he is ill, or they cannot agree on a suitable restaurant? But imagine that the two already had their dinner, for convenience Jill pays the bill in full, but Jack subsequently refuses to pay his half. The perspective changes. It is no longer so obvious that the contract cannot be enforced. *If it is the 'reasonable man' we are consulting, then the 'reasonable man's' opinion may change in the course of the transaction*. Jack's
> p. 275 contention that there was no intention to form a binding contract is likely to receive little sympathy.
> ↵ Blanket statements in cases that there is no 'intention to contract' on the facts before the court should therefore be treated with suspicion; it is vital to note whether this was being said in relation to an executed or an executory contract. [Emphasis in the original.]

7.2.3 The Rationale Behind the Presumption

What is the basis of the presumption that the parties to domestic agreements do not intend to create legal relations? Is it to be found in the actual, albeit unexpressed, intention of the parties or is its basis to be found in a rule of law or of public policy? The judgment of Atkin LJ in *Balfour* suggests that the initial presumption is derived from the law (or, if one prefers, public policy) rather than the intention of the parties. The reasons he gave in support of the conclusion that the parties did not intend to create legal relations did not relate

specifically to the position of Mr and Mrs Balfour but were of general application. Thus he advanced the floodgates argument ('the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations') and also reasons of policy about the role of the law in the regulation of family relationships ('the common law does not regulate the form of agreements between spouses. … The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.'). This is not to say that the intention of the parties is irrelevant. Their intention is relevant but it is only relevant to the rebuttal of the presumption.

Are the reasons given in support of this presumptive exclusion of contract law from the regulation of family life valid? Professor Michael Freeman, a leading family lawyer, has concluded that they are not (see 'Contracting in the Haven: *Balfour* v. *Balfour* Revisited' in R Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth, 1996), p. 68). Professor Freeman argues (at pp. 75–77):

> The Balfours was a Victorian marriage. The ideals of Victorian marriages and values concerning the family lasted until perhaps a generation ago. But where the emphasis was on status, it is now on autonomy. For role identification we have now substituted role distance. The 'self' and individual choice have replaced role and obligation as central organising concepts. … Modern family law, responding to this trend, has embraced contract as its governing principle. Despite the ruling orthodoxy of *Balfour* v. *Balfour*, private ordering, rather than public regulation, has become the preferred means of organising and governing relationships within the family. … Thus, entry into marriage is less regulated than it was and is more dependent upon individual choice. … The law is also more willing to let those who are married define the terms of their relationship. Husbands and wives can sue each other, in contract and in tort. … In addition to greater control over entry into marriage and its terms, husbands and wives have been given greater powers to determine for themselves when to leave the marital relationship. … The conceptualisation of marriage as a private matter is emphasised also by the trend to define marital fault very narrowly in property and money determinations and in disputes about children. …
>
> Marriage has become 'a personal rather than a social institution', fit for private ordering rather than state regulation. And yet the official version of the truth is that husbands and wives do not subject their arrangements to the law of contract. If *Balfour* v. *Balfour* was a 'wise' decision based on the 'realities' of life, then wisdom dictates that we rethink the doctrine it embodies. It no longer reflects realities nor is it in line with developments taking place in family law. Once the fiction is rejected we will be in a position to assess the role of contract in intimate relationships and to examine the relevance of the modern law of contract on the family.

p. 276 ↵ Professor Freeman's thesis has its attractions in that it recognizes the changes that have taken place in family life since Victorian times. But it has not commended itself to all family lawyers (see, for example, G Douglas, *An Introduction to Family Law* (2nd edn, Oxford University Press, 2004), pp. 75–76). It also gives rise to the floodgates problem identified by Atkin LJ in *Balfour*. Once the law of contract is admitted into family life, how far do we allow it to go? That there is a real problem here can be demonstrated by reference to the

following radical proposal made by Professor Anthony Giddens in his book *The Third Way* (Polity Press, 1998). When discussing the problem of how to ensure that children are protected and cared for in a society where marriage and parenthood are becoming increasingly disentangled, he writes (at p. 95):

> Contractual commitment to a child could … be separated from marriage, and made by each parent as a binding matter of law, with unmarried and married fathers having the same rights and the same obligations. Both sexes would have to recognize that sexual encounters carry the chance of life-time responsibilities, including protection from physical abuse.

In what may be thought to be something of an under-statement he notes (at p. 96) that 'enforcing parenthood contracts wouldn't be without its problems'. It is clear that there is a vital interest at stake in ensuring that children are properly cared for, but is the creation of binding contracts between parents and children really the best way to do this? The presence at the birth of a child of the family lawyer, ready and willing to draw up a contract between each parent and the child, is not a prospect to be viewed with enthusiasm. The policy values underpinning *Balfour* seem preferable to those advocated by both Professor Freeman and Professor Giddens. As Professor Kahn-Freund stated back in 1952, '*Balfour* v. *Balfour* is one of those wise decisions in which the courts allow the realities of life to determine the legal norm which they formulate' ('Inconsistencies and Injustices in the Law of Husband and Wife' (1952) 15 *MLR* 133, 138).

7.2.4 The Relationship with Consideration

Balfour v. *Balfour*, in particular the judgment of Duke LJ, demonstrates that there is a link between the doctrine of intention to create legal relations and the doctrine of consideration. But they are nevertheless doctrinally distinct. Intention to create legal relations is an additional hurdle which a claimant must overcome. That is to say, even if Mrs Balfour had been successful in proving that she had provided consideration for her husband's promise to pay her £30 per month, her claim would still have failed (at least on the reasoning of Atkin LJ, on the ground that she could not prove that she and her husband had intended to create legal relations, see 7.2).

While consideration and intention to create legal relations are doctrinally distinct they can overlap, in the sense that it is not always entirely clear whether the basis of the court's decision is the absence of consideration or the absence of an intention to create legal relations. A helpful illustration of this point is provided by the case of *White* v. *Bluett* (1853) 23 LJ Ex 36. A father lent money to his son and the son in return gave his father a promissory note by which he promised to repay the money. After the father's death his executor sought to recover from the son the money that had not been repaid. The son defended the claim on
p. 277 the basis that his father had promised to discharge him from his liability to repay provided ↵ that he stopped his practice of complaining about his father's distribution of his estate. His defence failed. Pollock CB said this (at p. 37):

> The plea [of the son] is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusion may be arrived at. It is said, the son had a right to an equal distribution of his father's property, and did not complain of his father because he had not an equal share, and said to him, I will cease to complain if you will not sue upon this note. Whereupon the father said, if you will promise me not to complain I will give up the note. If such a plea as this could be supported, the following would be a binding promise: A might complain that another person used the public highway more than he ought to do, and that other might say, do not complain, and I will give you five pounds. It is ridiculous to suppose that such promises could be binding. … In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration.

The language of the court is the language of the doctrine of consideration but it may be that it is the doctrine of intention to create legal relations that best captures the spirit of the decision to reject the son's defence. The difficulty with the argument based on consideration is that the son did have a right to complain, in the sense that he was entitled to complain, even if he was not entitled to an equal distribution of his father's estate. Thus, in giving up his right to complain, he did give up something that he was entitled to do (although whether that something was something of value in the eyes of the law is another matter, on which see 5.2.1). The better view may be that the basis of the decision was that there was no intention to create legal relations. But this proposition is not entirely straightforward either. In the first place the court did not use the language of intention to create legal relations. But that is not a conclusive objection given that the doctrine had not been recognized in 1853. A modern court might well invoke the doctrine of intention to create legal relations on the facts of *White*. A second difficulty is that the parties did intend to create legal relations in the sense that it was accepted that the son was in principle liable to repay the debt. And, if the son was subject to a liability to repay the debt, why should the father not be liable on his promise to waive the debt? This is a difficult question to which there are at least two possible answers. The first is that the father was not liable because the son's promise was too vague to be enforceable (and the vagueness may be relevant either to the doctrine of consideration or to the doctrine of intention to create legal relations). The second is that, as Parke B commented (at p. 37), it was 'not immaterial … to observe, that the [father] did not give the [promissory] note up'. Thus it may well be that he did not intend to discharge his son from his liability to repay the debt and so he retained the promissory note in order to evidence the fact that he did not intend to waive the debt and release his son from his liability to pay.

7.3 Social Agreements

A similar presumption operates in the context of social agreements, where the courts presume that the parties did not intend to create legal relations. In his judgment in *Balfour* v. *Balfour* (see 7.2) Atkin LJ provided two
p. 278 examples of social agreements that are not generally ↵ intended to give rise to legal relations, namely an agreement between two people to take a walk together and an offer and acceptance of hospitality. A further example is provided by the case of *Lens* v. *Devonshire Club*, The Times, 4 December 1914, where it was held that

the winner of a golf competition was not entitled to sue in order to recover the prize (although many competitions, for example those in national newspapers, do now give rise to legal relations between the competitors and the organizers of the competition: see *O'Brien* v. *MGN Ltd* [2002] CLC 33, discussed in more detail at 9.3).

The presumption is a rebuttable one and the factors relevant to the rebuttal of the presumption in a domestic context are also applicable to social agreements. An example of a case in which the presumption was held to have been rebutted is provided by the case of *Simpkins* v. *Pays* [1955] 1 WLR 975. The plaintiff lived with the defendant as her lodger. Each week the plaintiff, the defendant, and the defendant's granddaughter entered a competition in a Sunday newspaper. The plaintiff filled out the coupon in the defendant's name. They shared the entry fee and the postage between themselves. One week they won the prize and the sum of £750 was paid to the defendant. The defendant refused to pay to the plaintiff a one-third share of the prize. One of the grounds on which the defendant refused to pay was that she alleged that the agreement made between them was not intended to be legally binding. Sellers J held that the plaintiff was entitled to payment of a one-third share of the prize. He concluded (at p. 979):

> It may well be there are many family associations where some sort of rough and ready thing is said which would not, on a proper estimate of the circumstances, establish a contract which was contemplated to have legal consequences, but I do not so find here. I think that there was here a mutuality in the arrangement between the parties. It was not very formal, but certainly in effect it was agreed that every week the forecast should go in in the name of the defendant, and that if there was success, no matter who won, all should share equally. That seems to be the implication from or the interpretation of what was said, that this was in the nature of a very informal syndicate so that they should all get the benefit of success.

The reference to 'mutuality' is a puzzling one and it has been argued (Unger (1956) 19 *MLR* 96, 98) that it refers to the presence of consideration rather than the presence of an intention to create legal relations. This point is made as part of a wider argument to the effect that 'absence of consideration … provides a simpler and more realistic explanation of the special quality of domestic agreements' than does the doctrine of intention to create legal relations. While it is true that Sellers J does not nail his colours to the doctrinal mast, counsel for the defendant submitted that the agreement was not binding because there was no intention to create legal relations and the judgment of Sellers J appears to be directed principally towards the rebuttal of that submission. The case is therefore probably best regarded as a case in which the court held that there was an intention to create legal relations notwithstanding the fact that the agreement was reached in a social or a domestic context (no formal distinction is drawn between these two categories and they can overlap). The reasons for the rebuttal of the presumption are probably to be found in the fact that the parties had acted in reliance upon the agreement in relation to the sharing of the expenses of entering into the competition and the agreement was not one made in connection with the running of the household (had the dispute been about whose turn it was to do the ironing, the court may well have concluded that there was no intention to create legal relations).

p. 279 ↵ The courts have also experienced some difficulty in deciding whether or not an agreement between workmates to share the cost of travelling to work by car is intended to be legally binding. The issue arose in a line of cases concerned with the meaning of the words 'hire or reward' in the Road Traffic Act 1930. The relevant provisions have since been repealed so that the particular point at issue in these cases is no longer a live one. One of the issues discussed by the courts when deciding whether or not a passenger had been carried for 'reward' was whether a contract had been concluded for the carriage of the passenger. For example, in *Coward* v. *Motor Insurers' Bureau* [1963] 1 QB 259 Mr Cole regularly gave a lift to his work colleague Mr Coward on the pillion seat of his motorcycle. Mr Coward made a contribution to Mr Cole's expenses. One of the issues before the court was whether or not Mr Cole had carried Mr Coward 'for reward'. The Court of Appeal concluded that he had not. Sellers LJ stated (at p. 271):

> The practice whereby workmen go to their place of business in the motor-car or on the motor cycle of a fellow-workman upon the terms of making a contribution to the costs of transport is well known and widespread. In the absence of evidence that the parties intended to be bound contractually, we should be reluctant to conclude that the daily carriage by one of another to work upon payment of some weekly (or it may be daily) sum involved them in a legal contractual relationship. The hazards of everyday life, such as temporary indisposition, the incidence of holidays, the possibility of a change of shift or different hours of overtime, or incompatibility arising, make it most unlikely that either contemplated that the one was legally bound to carry and the other to be carried to work. It is made all the more improbable in this case by reason of the fact that alternative means of transport seem to have been available to Coward.

In the later case of *Albert* v. *Motor Insurers' Bureau* [1972] AC 301 Lord Cross adopted a different approach. In his view, there may be a contract, at least in relation to completed journeys. Thus he stated (at p. 340):

> It is not necessary in order that a legally binding contract should arise that the parties should direct their minds to the question and decide in favour of the creation of a legally binding relationship. If I get into a taxi and ask the driver to drive me to Victoria Station it is extremely unlikely that either of us directs his mind to the question whether or not we are entering into a contract. We enter into a contract not because we form any intention to enter into one but because if our minds were directed to the point we should as reasonable people both agree that we were in fact entering into one. When one passes from the field of transactions of an obviously business character between strangers to arrangements between friends or acquaintances for the payment by the passenger of a contribution towards expenses the fact that the arrangement is not made purely as a matter of business and that if the anticipated payment is not made it would probably never enter into the head of the driver to sue for it disposes one to say that there is no contract; but in fact the answer to the question 'contract' or 'no contract' does not depend on the likelihood of an action being brought to enforce it in case of default.
>
> Suppose that when one of Mr Quirk's fellow workers [Mr Quirk being the driver of the car] got in touch with him and asked him whether he could travel in his car to Tilbury and back next day, an 'officious bystander' had asked 'Will you be paying anything for your transport?' the prospective passenger would have answered at once 'Of course I will pay'. If the officious bystander had gone on
> p. 280 to ask Mr Quirk whether, if he was not paid, he would sue the ↵ man in the county court, Mr Quirk might well have answered … 'Not bloody likely'. But the fact that if default was made Mr Quirk would not have started legal proceedings but would have resorted to extrajudicial remedies does not mean that an action could not in theory have been brought to recover payment for the carriage. If one imagines such proceedings being brought, a plea on the part of the passenger that he never meant to enter into a contract would have received short shrift. …

7.4 Commercial Agreements

Commercial agreements differ from domestic and social agreements in that the presumption operates the other way. In the case of commercial transactions the courts presume that the parties did intend to create legal relations and that presumption is not an easy one to displace. This is particularly so where a term is introduced into a pre-existing contractual relationship (such as a contract of employment), where there is a very strong presumption that the term is intended to be legally binding (*Attrill* v. *Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] 3 All ER 607, [80]). The strength of the presumption is such that the issue does not arise frequently in commercial litigation.

One case in which it did arise, and which produced a division of judicial opinion, is the decision of the House of Lords in *Esso Petroleum Ltd* v. *Commissioners of Customs and Excise* [1976] 1 WLR 1. Esso devised a sales promotion scheme for its petrol under which it offered to give away a World Cup coin to every motorist who purchased four gallons of Esso petrol (each coin bore the likeness of one member of the England football squad for the 1970 World Cup competition in Mexico). The Customs and Excise Commissioners claimed that the coins were chargeable to a purchase tax on the ground that they had been 'produced in quantity for general sale'. The House of Lords held that the coins were not subject to the purchase tax on the ground that

they had not been 'sold'. A contract of sale is one under which goods are transferred to a buyer in return for a money consideration called the price. The consideration supplied by the motorists for the coins was not a money payment but entry into a collateral contract to purchase the appropriate quantity of petrol. Given that the supply of the coins did not fall within the scope of the taxation legislation, it was not strictly necessary for their Lordships to consider whether or not the coins were supplied by Esso as a matter of legal obligation or by way of gift. Nevertheless, the issue was considered by their Lordships.

By a bare majority they concluded that there was an intention to create legal relations. Lord Wilberforce, Lord Simon of Glaisdale, and Lord Fraser of Tullybelton were of the view that the coins were supplied as a matter of contractual obligation (albeit that Lord Fraser dissented on the ground that he was of the view that the coins had been sold and thus were chargeable to the purchase tax), whereas Viscount Dilhorne and Lord Russell of Killowen concluded that the coins were not supplied as a matter of contractual obligation. In considering whether or not there was an intention to create legal relations much reliance was placed on Esso's advertising campaign in which they stated 'Collect the full set of thirty coins. One coin given when you buy four gallons of petrol.' Lord Simon of Glaisdale concluded that the parties did intend to create legal relations. He stated (at pp. 5–6):

> p. 281 I am … not prepared to accept that the promotion material put out by Esso was not envisaged by them as creating legal relations between the garage proprietors who adopted ↵ it and the motorists who yielded to its blandishments. In the first place, Esso and the garage proprietors put the material out for their commercial advantage, and designed it to attract the custom of motorists. The whole transaction took place in a setting of business relations. In the second place, it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations (cf. *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256). The coins may have been themselves of little intrinsic value; but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage to themselves from the scheme, an advantage to which the garage proprietors also would share. Thirdly, I think that authority supports the view that legal relations were envisaged. …
>
> [He considered *Rose and Frank Co* v. *JR Crompton and Brothers Ltd* (7.4.1) and *Edwards* v. *Skyways Ltd* (7.4.1) and continued]
>
> And I venture to add that it begs the question to assert that no motorist who bought petrol in consequence of seeing the promotion material prominently displayed in the garage forecourt would be likely to bring an action in the county court if he were refused a coin. He might be a suburban Hampden who was not prepared to forgo what he conceived to be his rights or to allow a tradesman to go back on his word.

Viscount Dilhorne, on the other hand, concluded that the parties did not have an intention to create legal relations. He said (at pp. 3–4):

> True it is that the respondents are engaged in business. True it is that they hope to promote the sale of their petrol, but it does not seem to me necessarily to follow or to be inferred that there was any intention on their part that their dealers should enter into legally binding contracts with regard to the coins; or any intention on the part of the dealers to enter into any such contract or any intention on the part of the purchaser of four gallons of petrol to do so.
>
> If in this case on the facts of this case the conclusion is reached that there was any such intention on the part of the customer, of the dealer and of the respondents, it would seem to exclude the possibility of any dealer ever making a free gift to any of his customers however negligible its value to promote his sales.
>
> If what was described as being a gift, which would be given if something was purchased, was something of value to the purchaser, then it could readily be inferred that there was a common intention to enter into legal relations. But here, whatever the cost of production, it is clear that the coins were of little intrinsic value.
>
> I do not consider that the offer of a gift of a free coin is properly to be regarded as a business matter … I see no reason to imply any intention to enter into contractual relations from the statements on the posters that a coin would be given if four gallons of petrol were bought.
>
> Nor do I see any reason to impute to every motorist who went to a garage where the posters were displayed to buy four gallons of petrol any intention to enter into a legally binding contract for the supply to him of a coin. On the acceptance of his offer to purchase four gallons there was no doubt a legally binding contract for the supply to him of that quantity of petrol, but I see no reason to conclude that because such an offer was made by him, it must be held that, as the posters were displayed, his offer included an offer to take a coin. The gift of a coin might lead a motorist returning to the garage to obtain another one, but I think the facts in this case negative any contractual intention on his part and on the part of the dealer as to the coin and suffice to rebut any presumption there may be to the contrary.

p. 282 ↵ It is important to note that *Esso* is a tax case. It is not a case in which a motorist was bringing a claim against a garage that had refused to give him a coin. The issue was whether or not the supply of the coins was chargeable to a purchase tax. This required their Lordships to focus on the obligations of the garage in relation to the supply of the coin and not their obligations in relation to the supply of petrol. The fact that the coins had little intrinsic value is often used by commentators to demonstrate the strength of the presumption in favour of legal relations in a commercial context.

Two principal issues remain to be discussed in terms of the application of the doctrine of intention to create legal relations to commercial transactions. The first relates to the circumstances in which the presumption may be rebutted and the second concerns the relationship between the doctrine of intention to create legal relations and the question of whether or not the parties intended to contract. We shall consider each issue in turn.

7.4.1 Rebuttal of the Presumption

The presumption in favour of legal relations in commercial transactions can be rebutted but the cases in which it has been rebutted are few. It can be rebutted by the express stipulation of the parties. In *Rose and Frank Co* v. *JR Crompton and Bros Ltd* [1925] AC 445 the agreement between the parties contained the following clause:

> This arrangement is not entered into, nor is this memorandum written as a formal and legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.

The plaintiffs had been appointed as sole agents of the defendants. The agreement was entered into in 1913 for a three-year period with an option to extend it for a further period of time. The agreement was extended to March 1920 but in 1919 the defendants terminated it without giving notice. The plaintiffs sued for breach of contract but the House of Lords held that the effect of the 'honour' clause was to prevent a contract coming into existence between the parties. Is such a clause contrary to public policy? Scrutton LJ addressed this particular issue in the Court of Appeal in *Rose and Frank* [1923] 2 KB 261 and concluded it was not. He stated (at p. 288):

> I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such an intention I can see no reason in public policy why effect should not be given to their intention.

An important distinction must be drawn here. On the one hand, it is contrary to public policy for parties to a legally binding contract to attempt to oust the jurisdiction of the court. On the other hand, it is not contrary to public policy for parties to an agreement to insert into their agreement a clause the effect of which is to prevent their agreement from amounting to a contract in law.

p. 283 ↵ In every case the court must consider, as a matter of construction, whether or not the effect of the words used is to rebut the presumption that the parties intended to create legal relations. In *Edwards* v. *Skyways Ltd* [1964] 1 WLR 349 the defendant employers promised to make an 'ex gratia payment' to employees who were made redundant. The defendants subsequently sought to go back on their promise, alleging that it was not legally binding. Megaw J rejected their submission. He stated (at p. 356):

> [T]he words 'ex gratia' do not, in my judgment, carry a necessary, or even a probable, implication that the agreement is to be without legal effect. … The words … are used simply to indicate … that the party agreeing to pay does not admit any pre-existing liability on his part; but he is certainly not seeking to preclude the legal enforceability of the settlement itself by describing the contemplated payment as 'ex gratia'. So here, there are obvious reasons why the phrase might have been used by the defendant company in just such a way. It might have desired to avoid conceding that any such payment was due under the employers' contract of service. It might have wished—perhaps ironically in the event—to show, by using the phrase, its generosity in making a payment beyond what was required by the contract of service. I see nothing in the mere use of the words 'ex gratia', unless in the circumstances some very special meaning has to be given to them, to warrant the conclusion that this promise, duly made and accepted, for valid consideration, was not intended by the parties to be enforceable in law.

Exceptionally, the presumption may be rebutted notwithstanding the absence of an express stipulation to this effect by the parties. So, for example, the presumption may be rebutted where the context in which commercial parties reach agreement is entirely social. A recent example of this phenomenon is provided by *Blue* v. *Ashley* [2017] EWHC 1928 (Comm) where Leggatt J held that the presumption had been rebutted in a case where the meeting between the parties had taken place in a pub and where the claimant alleged that the defendant had promised to pay him £15 million if shares in the company owned by the defendant reached a certain market price. The factors which persuaded Leggatt J to conclude that the parties did not intend to create legal relations included the fact that the discussion between the parties was a jocular one and those in attendance had not at the time believed the promise to take the form of a contractual commitment. Thus the informality of the occasion may in an appropriate case have the effect of rebutting the presumption that the parties intended to create legal relations (see to similar effect *MacInnes* v. *Gross* [2017] EWHC 46 (QB) where the context was a very informal dinner conversation between two businessmen).

A further example where the presumption that the parties intended to create legal relations is rebutted is a collective agreement between a trade union and an employer (or an employer's association) which is presumed not to be legally enforceable as between the parties to the agreement. This was held to be the case at common law in *Ford Motor Co Ltd* v. *Amalgamated Union of Engineering and Foundry Workers* [1969] 2 QB 303. Statute has now intervened in order to strengthen the common law position. Thus section 179(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 states that:

> A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—
>
> (a) is in writing, and
>
> (b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

p. 284 ↵ Section 179(2) of the Act further provides that a 'collective agreement which does satisfy those conditions shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract'.

7.4.2 Did the Parties Intend to Contract?

Rather than seek to rebut the presumption that the parties intended to create legal relations, a defendant may take the point that the parties did not intend to contract or otherwise lacked contractual intent. What is the difference, if any, between the submission that the parties lacked contractual intent and the submission that the parties did not intend to create legal relations? The answer would appear to be that the former submission is much wider in scope, in that it can encompass issues such as whether the parties have in fact reached agreement. The latter submission, by contrast, accepts that the parties *have* reached agreement and is restricted to the issue of whether the agreement was intended to create legal obligations.

While it is possible to separate out these two issues in theory, it may not be so easy to do this in practice. The issues may overlap. This is particularly so in the case where the agreement between the parties is expressed in vague or uncertain terms. In such a case a defendant may argue that there is no contract on two grounds: (i) the agreement is too vague or uncertain to amount to a contract; and (ii) the parties did not intend to create legal relations. The two grounds are inter-related in that the vagueness or uncertainty of the agreement may suggest both that the parties did not reach sufficient agreement on essential matters, and that they lacked an intention to create legal relations.

It may, however, be important to distinguish between the two issues in relation to the location of the burden of proof. First, it is for the claimant to prove that a contract has been concluded. But, secondly, once the existence of an otherwise enforceable contract has been established and the defendant wishes to take the point that the agreement apparently concluded by the parties was not intended to give rise to legal obligations, the onus of proof switches to the defendant to prove that the parties did not intend to create legal relations, at least in the case where the agreement is made in a commercial context. The relationship between these two issues was considered in more detail by Mance LJ in *Baird Textile Holdings Ltd* v. *Marks and Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 when he stated (at [59]–[61]) that:

> for a contract to come into existence, there must be both (a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations.
>
> Both requirements are normally judged objectively. Absence of the former may involve or be explained by the latter. But this is not always so. A sufficiently certain agreement may be reached, but there may be either expressly (i.e. by express agreement) or impliedly (e.g. in some family situations) no intention to create legal relations.
>
> An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement. … It is otherwise, when the case is that an implied contract falls to be inferred from parties' conduct. … It is then for the party asserting such a contract to show the necessity for implying it … [I]f the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any contract will then be inferred.

p. 285 ↵ The order of the two requirements identified by Mance LJ should be noted. He expressly rejected a submission that the order should be reversed. In his view it was 'more appropriate to take the requirements in the order in which I have set them out, and to recognize their potential inter-relationship'. This ordering is

significant because it puts the initial onus of proof on to the party alleging the existence of an enforceable contract. At the same time Mance LJ recognizes that the two issues are inter-related in that an absence of sufficient agreement on essential matters may well also reflect an absence of an intention to create legal relations.

7.5 The Future of the Doctrine of Intention to Create Legal Relations

The doctrine of intention to create legal relations has not lacked its critics. Some, such as Professor Freeman (see 7.2.3), are critical of the way in which it has been used to deny legal effect to agreements made in a family context. Others point out that the doctrine rests on a fiction in that the parties to the alleged agreements frequently have no discernible intention one way or the other.

In the light of these and other arguments it has been argued that the doctrine of intention to create legal relations is, in fact, unnecessary. The case for the elimination of the doctrine of intention to create legal relations has been put in the following terms (R Halson (ed), *The Law of Contract*, Butterworths Common Law Series (7th edn, LexisNexis, 2022), para 2.172):

> The existence of a separate requirement of intention to create legal relations has ... been criticised by a number of commentators. It is submitted that there is much force in these criticisms and that it is unnecessary to impose a separate requirement of 'intention to create legal relations' over and above those of offer, acceptance and consideration. A proposal cannot properly be regarded as an offer unless it indicates an intention to undertake a legal obligation if its terms are accepted and the requested consideration is furnished by the offeree. Thus a proposal in which the maker indicates, expressly or impliedly, that he does not intend to undertake a legal obligation cannot properly be regarded as an offer. Similarly, if an offer is made and the offeree responds agreeing to the terms of the offer but indicating that he does not intend to create a legal relationship, the offeree's response cannot properly be regarded as an acceptance of the offer. Where the offer is of a bilateral contract the offeror requests a promise from the offeree as the consideration for his offer. That counter-promise must necessarily be legally binding if it is to be regarded as consideration for the offeror's promise, so that if the offeree makes the requested promise but expressly or impliedly indicates that he does not intend to be legally bound by his promise (i) his response does not meet the conditions of the offer and therefore cannot be regarded as an acceptance of it and (ii) his counter-promise cannot be regarded as consideration for the offeror's promise. Thus if either offeror or offeree does not intend a legal relationship there is in fact no offer or acceptance, as the case may be. If the parties agree but neither intends a legal relationship there is neither offer nor acceptance. If this view is accepted, 'intention to create legal relations' is not a separate, additional requirement, but an aspect of the rules relating to offer, acceptance and consideration. There is some support for this approach
p. 286 in ↵ *Carlill* v. *Carbolic Smoke Ball Co* where the defendants argued that their advertisement was not intended to be legally binding and therefore could not be regarded as an offer, and indeed the cases concerning the classification of proposals as 'offers' or 'invitations to treat' are effectively concerned with the question whether the proposal in question is intended to be legally binding.

The difficulty with this argument is that it does not in fact eliminate the doctrine of intention to create legal relations; rather it imports it as an element into the rules relating to offer, acceptance, and consideration. Such a step is likely to make the law more complex and, for this reason, it is unlikely that the courts will go down this road. They are more likely to increase the role of the doctrine of intention to create legal relations. The reduction of the practical significance of the doctrine of consideration (in the sense that the requirements of the doctrine appear to be easier to satisfy as a result of the decision of the Court of Appeal in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, on which see 5.2.2.3) is likely to bring the doctrine of intention to create legal relations into play to a greater extent than before. Thus in *Williams*, Russell LJ stated that 'the courts nowadays should be more ready to find [the existence of consideration] so as to reflect the intention of the parties'. In this way it may fall to the doctrine of intention to create legal relations to distinguish those promises intended to be binding from those that are not intended to be binding (see to similar effect the judgment of Rajah JC in *Chwee Kin Keong* v. *Digilandmall.com Pte Ltd* [2004] 2 SLR 594, 634: 'the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship'.)

Further Reading

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HEDLEY, S, 'Keeping Contract in Its Place: *Balfour* v. *Balfour* and the Enforceability of Informal Agreements' (1985) 5 *OJLS* 391.

HEPPLE, B, 'Intention to Create Legal Relations' [1970] *CLJ* 122.

SIMPSON, AWB, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *LQR* 247, 263–265.

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Subscriber: University of Durham; date: 29 May 2025