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6. Formalities

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Abstract

Requirements of form (such as writing) are not as important today as they were in the past. As a general rule, contracts can be made in any form and can be proved by any means, although there remain exceptional cases where the law does insist upon requirements of form. This chapter, which considers the reasons for continued reliance upon requirements of form, along with the criticisms levelled against such requirements, begins by explaining why legal systems impose formal requirements upon contracting parties. It then outlines the formal requirements in English contract law, followed by a discussion of the future of formal requirements, including deeds, noting the distinction between cases where the contract must be made in writing and cases in which contracts must be evidenced in writing.

Keywords: English contract law, formal requirements, writing, deeds, contracts made in writing, contracts which must be evidenced in writing

Central Issues

1. Requirements of form (such as writing) are not as important today as they were in the past. As a general rule, contracts can be made in any form and can be proved by any means. Commercial parties generally reduce their contract to written form but this is for reasons of practical convenience, not legal compulsion.

2. However, there remain exceptional cases where the law does insist upon requirements of form. The reasons for continued reliance upon requirements of form are considered in this chapter, together with the criticisms that are advanced against such requirements.
3. The only example in English contract law of a formal requirement which is sufficient in itself to render a promise binding is a promise that is made in a deed. The deed is a useful device in commercial practice. Where there is no consideration for a promise or there is a doubt about the presence of consideration, the promise can be rendered enforceable by the simple device of making use of a deed.
4. There are other cases where the formal requirement is an *additional*, *necessary* pre-requisite that must be satisfied if the contract is to be binding (in other words the agreement must also be supported by consideration, etc). The formal requirement may take different forms. The principal forms are (i) the contract must be made in writing, (ii) it must be evidenced in writing, or (iii) it must be made by deed.

6.1 Introduction

It is an old joke that an oral contract is not worth the paper it is written on. This reflects a general perception, common among laypersons, that they are not bound by a contract until they 'sign on the dotted line'. However, this perception is misconceived since an oral contract is generally just as binding as a written one. It may prove advantageous to the parties to record the terms of their agreement in writing in order to minimize the risk of dispute at a later stage. Indeed, because of the desire for certainty, particularly valuable contracts
p. 253 will invariably take written form. But a contract is in general legally binding notwithstanding ↵ the lack of written evidence. To this general principle certain exceptions have been made. In some circumstances a contract will be unenforceable unless it is evidenced in writing. In other circumstances a contract will be void unless it is actually made in writing. Finally, there are certain types of transaction which must be made in the form of a deed that is signed before witnesses. These requirements are referred to in this chapter as 'formalities', 'formal requirements', or 'requirements of form' (all three terms being interchangeable).

As Professor Kötz has pointed out (*European Contract Law* (2nd edn, Oxford University Press, 2017), p. 73):

> All legal systems in Europe have rules which invalidate certain contracts if specified formalities are ignored. Such rules are commonly regarded as exceptional, the general principle being that no formalities are required.

This statement is generally true of English contract law. It does have rules that have the effect of invalidating a limited class of contracts in the event of a failure to comply with certain prescribed formal requirements. But these rules are very much the exception. The general rule is that the parties are free to decide for themselves the form that their contract is to assume. If they wish to impose upon themselves a formal requirement they

are free to do so. Further, parties can make a requirement of form a condition precedent to the existence of any contractual obligation provided that they use sufficiently clear words to this effect. Thus in *Winn* v. *Bull* (1877) 7 Ch D 29, 32 Jessel MR stated that:

> where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared.

Equally, contracting parties can impose on themselves formal requirements in relation to the variation of their contracts. Thus it is not uncommon for parties to include in their contracts a 'no oral modification clause' which provides that variations to the contract will only be given effect if made in a prescribed form, such as in writing and signed by both parties. The Supreme Court has held, in a decision that has both its supporters and its critics, that such clauses are valid and binding with the consequence that a variation which does not comply with the prescribed formality will not, at least in the absence of an estoppel, be given effect by the courts (*MWB Business Exchange Centres Ltd* v. *Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119). But in the absence of such stipulations the law does not generally impose formal requirements: the parties can make their contract quite informally if they wish to do so.

However, it was not always so. Formal requirements were a prominent feature of English contract law until the second half of the twentieth century. The principal source of these formal requirements was the Statute of Frauds 1677. Professor Simpson (*A History of the Common Law of Contract* (Oxford University Press, 1975), pp. 599–600) has stated that the 'broad policy' behind the Statute of Frauds was:

> to require written evidence of important legal transactions as a prerequisite to their enforcement, to insist, that is, on a measure of formality in areas in which wholly informal transactions had come to be legally effective. Thereby the bringing of groundless suits would become more difficult, though inevitably at the cost of some injustice to plaintiffs unable to produce written evidence.

p. 254 ↵ But over time it became apparent that the 'cost' of the legislation was greater than the benefits which it brought in terms of preventing parties from bringing groundless or fraudulent claims. The Statute gradually fell into disrepute as it came to be used by those who wished to get out of their agreements on the 'technical' ground that the agreement did not comply with the prescribed formalities and so was not enforceable. It was largely (but not entirely) repealed in 1954 by the Law Reform (Enforcement of Contracts) Act 1954. This repeal is consistent with the modern trend which, with the notable exception of a deed (on which see 6.3.1), is to place less emphasis on formal requirements in the law of contract. The reduced significance of formal requirements can be seen in both the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts. Article 2:101(2) of the Principles of European Contract Law provides that:

> [a] contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

While Article 1.2 of the Unidroit Principles provides that:

> [n]othing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

The similarity between these two provisions is striking and it demonstrates the measure of consensus that currently exists in relation to the declining significance of formal requirements. However, before we consign formal requirements to the dustbin of history, it is important to notice that this consensus is largely confined to the sphere of commercial contracts. When we turn to consumer contracts a very different picture emerges. The point has been well put by Professor Kötz (p. 74) in the following terms:

> [I]t would be a mistake to suppose that formalities are no longer important in modern systems—quite the contrary. New formal requirements are constantly being imposed everywhere, in the name of consumer protection, to such an extent that in France there has been much discussion of the *renaissance de formalisme*.

A number of examples of formal requirements imposed in the name of consumer protection can be found in English law (see, for example, the Consumer Credit Act 1974, sections 60 and 61 and the Timeshare, Holiday Products, Resale and Exchange Regulations 2010 (SI 2010/2960), regulation 15). Before examining the circumstances in which English law imposes formal requirements on contracting parties it is worth considering the reasons that lead legal systems to make use of requirements of form.

6.2 The Reasons for Formal Requirements

Why do legal systems impose formal requirements upon contracting parties? The question has to be asked given the obvious disadvantages that attend such requirements. They are open to criticism on a number of
p. 255 grounds. In the first place, they tend to be time-consuming, ↵ cumbersome, and bureaucratic. Secondly, it is not easy to decide which out of the millions of contracts that are entered into on a daily basis should be subject to formal requirements. Thirdly, the content of the formal requirement can be difficult to prescribe. In the past the formal requirement was often one of writing but, given the increasing use of electronic means of communication, is it sensible to continue to insist upon writing? Further, should the contract be made in writing or should it suffice that it is evidenced in writing? Finally, difficulties arise where the parties do not comply with the formal requirements, especially in the case where the parties were unaware of their existence. Should the courts always refuse to give effect to a contract that does not comply with a requirement of form?

Powerful though these objections are, they are not conclusive. There does remain a role for requirements of form in the modern law. While recognizing the difficulties that they can bring, the case for a limited role for formal requirements has been made by Professor Kötz (*European Contract Law* (2nd edn, Oxford University Press, 2017), pp. 75–76), in the context of an analysis of the development of contract law in Europe, in the following terms:

It takes time and trouble to meet formal requirements—the text has to be drafted, properly recorded, and signed by the parties. The law therefore imposes such requirements only if there is some good reason for doing so.

One such reason has to do with *proof* and *evidence*. Parties whose agreement is purely verbal may easily find themselves in disagreement over what was agreed and when. If they put their undertakings and agreements in writing, such disputes are still possible, but they are much less likely.

Other formal requirements have the alternative or additional purpose of putting the parties on *notice*. Requiring a person who is about to embark on an important undertaking to go through a formality affords him a final chance to reflect on what he is doing. This is desirable not only when the transaction is an important one, but also when it is one-sided: a party giving something for nothing may need to be protected from impulsive generosity or exposure to unconsidered risks. This is why donative promises and guarantees are always subjected to formal requirements. The written-form requirement does not necessarily afford much time for reflection since it does not take long to draw up and sign a guarantee agreement, yet people—especially laymen—have the impression that when a pen is put in their hand they are entering the sphere of obligation, and this concentrates the mind on the question whether they really want to engage in a legally enforceable transaction.

Sometimes formalities are required in order to mark the *transition* from negotiation to contract. In circumstances where pre-contractual negotiations tend to be prolonged, the parties can easily disagree on whether the negotiations have reached the stage of agreement and legal obligation. But if the contract has to be in writing or notarized, the answer is clear. Parties know that nothing they say or write during the negotiations is binding in law and that they may break off the negotiations without liability; they also know that they should not rely on what the other party has said until it is put into the correct legal form.

Modern legislation increasingly requires that a contract be put into writing when one of the parties to it needs special protection. Since these contracts are put into writing anyway, it may seem superfluous for the law to make it mandatory. In fact, the law is not so much concerned with the written form as such: it seeks to ensure that the party needing protection is provided with certain information before or at the time the contract is concluded. The purpose of this written-form requirement is to *provide information*. … Such regulation is doubtless well-intentioned, but it is doubtful whether it is effective. A consumer in urgent need of money will hardly be deterred from accepting credit by the mass of information he has to be given, though it will prevent him saying
p. 256 afterwards that he did not know what he was letting ↵ himself in for. Good deeds overdone can be a bane. Man's ability to process information thrust on him is limited. The costs of such paternalistic legislation are sometimes underestimated. They comprise not only the cost of paper and printing, but also the legal uncertainty which results from the courts forever having to deal with the question of the sanctions to be applied—in particular whether the protected party can withdraw from the contract on the basis of a contravention of the duty to provide information, when he may have quite different reasons for wanting to get out of the obligation. [Emphasis in the original.]

6.3 Formal Requirements in English Contract Law

When considering the role of formal requirements in English contract law it is important to distinguish two different types of case. The first is the case where the formal requirement is both necessary and sufficient to render the promise binding. This is the case of a gratuitous promise made in a deed: such a promise is binding notwithstanding the fact that it is not supported by consideration. The second is the case where the formal requirement is necessary but not sufficient to render a promise binding. In other words, the formal requirement is an additional hurdle to the usual requirements of a binding contract that must be satisfied by the parties.

6.3.1 Formal Requirements Which Are Sufficient to Render the Promise Binding

The only example in English contract law of a formal requirement which is sufficient in itself to render a promise binding is a promise that is made in a deed. Until relatively recently, the deed had to be made under seal but the requirement of sealing was abolished by the Law of Property (Miscellaneous Provisions) Act 1989. The rules applicable to deeds are to be found in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989, the principal provisions of which provide:

Deeds and their execution

1. —(1) Any rule of law which—

(a) restricts the substances on which a deed may be written;

(b) requires a seal for the valid execution of an instrument as a deed by an individual; or

(c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed,

is abolished.

(2) An instrument shall not be a deed unless—

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

(b) it is validly executed as a deed—

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(i) by that person or a person authorised to execute it in the name or on behalf of that person, or

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

(2A) For the purposes of subsection 2(a) above, an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal.

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

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

at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed.

(4) In subsections (2) and (3) above 'sign', in relation to an instrument, includes—

(a) an individual signing the name of the person or party on whose behalf he executes the instrument; and

(b) making one's mark on the instrument, and 'signature' is to be construed accordingly.

(4A) Subsection (3) above applies in the case of an instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual.

The principal requirements that must be complied with if a deed is to be validly executed are set out in subsections (2) and (3). Most of them, such as signature and attestation, are relatively straightforward. The only requirement that requires some elaboration is the concept of 'delivery' as found in section 1(3)(b). In *Vincent* v. *Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, 619 Lord Denning stated that:

> '[d]elivery' in this connection does not mean 'handed over' to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying: 'I deliver this my act and deed'.

Deeds have an important role to play in legal practice. They provide a relatively simple means by which a unilateral gratuitous promise can be rendered binding. Take the example of a company that wishes to provide financial support to a university in order to fund a university lectureship. The company may be unwilling to pay all the money up front: it would rather pay an annual sum to the university over a fixed period of time. But the university will want to know that the money will be paid as a matter of legal obligation before it commits itself to employing a new member of staff in reliance upon the promise of payment. The simplest way to make the promise binding is to use a deed in which the company will undertake to pay a stipulated sum of money to the university for a defined period of time. The other circumstance in which deeds play an important role is where there is doubt about whether or not consideration has been provided for a particular promise. Rather than invite litigation over whether or not consideration has been provided, the parties may choose to eliminate the doubt by including the promise in a deed, thus rendering it binding.

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6.3.2 Formal Requirements Which Are Necessary in Order to Render a Contract Binding

The second group of cases differs from the first in that the formal requirement does not suffice to render the promise binding. In these cases the formal requirement is an *additional*, *necessary* pre-requisite that must be satisfied if the contract is to be binding. Thus the parties must show that there has been an offer, acceptance, consideration, and intention to create legal relations in the usual way and, in addition, they must demonstrate that the formal requirement has been satisfied. The formal requirement may take different forms: it may be that the contract must be (i) made in writing, (ii) evidenced in writing, or (iii) made by deed. Brief consideration will be given to these three different formal requirements, to the consequences that may flow from a failure to comply with them, and to the problems to which these requirements have given rise.

6.3.2.1 Contracts Which Must Be Made in Writing

An example of a contract that must be made in writing is a contract for the sale or disposition of an interest in land. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides:

> (1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
>
> (2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.
>
> (3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.
>
> (4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.
>
> (5) This section does not apply in relation to—
>
> (a) a contract to grant such a lease as is mentioned in section 54(2) of the Law of Property Act 1925 (short leases);
>
> (b) a contract made in the course of a public auction; or
>
> (c) a contract regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract, a regulated home reversion plan, a regulated home purchase plan or a regulated sale and rent back agreement;
>
> and nothing in this section affects the creation or operation of resulting, implied or constructive trusts.
>
> (6) In this section—
>
> 'disposition' has the same meaning as in the Law of Property Act 1925;
>
> 'interest in land' means any estate, interest or charge in or over land.
>
> (7) Nothing in this section shall apply in relation to contracts made before this section comes into force.
>
> (8) Section 40 of the Law of Property Act 1925 (which is superseded by this section) shall cease to have effect.

p. 259 ↵ Section 2 applies only to executory contracts for the future sale or other disposition of an interest in land and does not apply to an agreement which itself effects such a disposition (*Rollerteam Ltd* v. *Riley* [2016] EWCA Civ 1291, [2017] Ch 109). The section has generated a considerable amount of litigation in its relatively short lifetime as parties who have failed, for one reason or another, to comply with its requirements have sought to escape from the consequences of non-compliance. In general, the courts have not been sympathetic to their plight. The reason for this is that the courts have discerned in section 2 an intention by Parliament to 'introduce new and strict requirements as to the formalities to be observed for the creation of a valid disposition of an interest in land' (per Neill LJ in *McCausland* v. *Duncan Lawrie Ltd* [1997] 1 WLR 38, 44).

This strict approach has been most apparent in the case where there has been a failure to comply with the requirements of section 2. It has been less apparent where the issue before the court is whether or not the requirements of section 2 have been satisfied. In the latter context Briggs J stated in *North Eastern Properties* v. *Coleman* [2010] EWCA Civ 277, [2010] 1 WLR 2715, [42] that it was 'no part of Parliament's intention by enacting s 2 of the 1989 Act to make it easier for people who have genuinely contracted to escape their contractual obligations'. Thus a court may be willing to adopt a construction of section 2 which enables it to conclude that its requirements have been satisfied and thereby 'prevent or mitigate the injustice of enabling genuine contracting parties to escape from their obligations' (*North Eastern Properties*, [45]).

Section 2 is stricter than its statutory predecessor, section 40 of the Law of Property Act 1925, in a number of respects. First, section 40 only required that the contract be evidenced in writing, whereas section 2 requires that the contract be 'made' in writing (section 2(1)). Secondly, non-compliance with section 40 did not render the contract void[1] but only unenforceable,[2] whereas an agreement which does not comply with section 2 is a nullity (this is not expressly stated in section 2(1) but, given that the subsection states that the contract must be made in writing, it follows that a contract that does not comply with this requirement is ineffective as a matter of law). Thirdly, under section 40 the written evidence could be contained in more than one document, whereas under section 2(1) only one document is allowed. Fourthly, section 40 did not require the memorandum or note to contain every term of the contract, whereas section 2(1) requires that all the terms must be contained in the document in question (unless the parties enter into a genuine composite transaction which includes a land contract where the land contract is genuinely separated from the rest of the transaction in the sense that its performance is not made conditional upon the performance of some other expressly agreed part of the bargain: *North Eastern Properties* v. *Coleman* [2010] EWCA Civ 277, [2010] 1 WLR 2715). Finally, section 40(2) of the Law of Property Act 1925 preserved a role for the doctrine of part performance which was used by the courts in order to mitigate the hardships that would otherwise flow from the conclusion that the contract was unenforceable. The essence of the doctrine of part performance was that in the case where, in the expectation that the defendant would perform its part of the bargain, a claimant partly performed an oral contract required by statute to be in writing, the court would not permit the defendant to invoke the statute in order to prevent the claimant from enforcing the contract.

The doctrine of part performance has not survived the enactment of section 2 (section 2(8)). In *Keay* v. *Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 WLR 2855, [47] the Court of Appeal affirmed that a void contract cannot, by acts in the nature of part performance, mature into a valid contract. This further
p. 260 evidences the fact that the ↵ pendulum has swung away from the prevention of hardship in favour of the promotion of certainty. But do the courts have at their disposal any techniques that they can employ in order to prevent section 2 giving rise to undue hardship?

The answer to this question is to be found in large part in section 2(5) which expressly preserves a role for resulting, implied, and constructive trusts.[3] While this subsection expressly preserves a role for the constructive trust (on which see *Matchmove Ltd* v. *Dowding and Church* [2016] EWCA Civ 1233, [2017] 1 WLR 749), there is greater doubt whether proprietary estoppel (on which see 5.3.4) has any role to play in this context. In *Yeoman's Row Management Ltd* v. *Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 Lord Scott answered this question in the negative when he stated (at [29]):

> Subsection (5) expressly makes an exception for resulting, implied or constructive trusts. These may validly come into existence without compliance with the prescribed formalities. Proprietary estoppel does not have the benefit of this exception. The question arises, therefore, whether a complete agreement for the acquisition of an interest in land that does not comply with the section 2 prescribed formalities, but would be specifically enforceable if it did, can become enforceable via the route of proprietary estoppel. It is not necessary in the present case to answer this question … My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute.

However, his statement (which was *obiter*) cannot be regarded as the last word on the issue. Lord Walker (at [93]) in *Cobbe* expressly reserved his view on the scope of section 2 and Lord Neuberger returned to the issue in his speech in *Thorner* v. *Major* [2009] UKHL 18, [2009] 1 WLR 776 when he stated (at [99]) that:

> section 2 may have presented Mr Cobbe with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature … and section 2 lays down formalities which are required for a valid 'agreement' relating to land. However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection.

It would be premature to conclude that proprietary estoppel can have no role to play in these cases (see *Kinnear* v. *Whittaker* [2011] EWHC 1479 (QB), [2011] All ER (D) 78 (Jun), [30]) but it seems unlikely that it will have a role to play where the parties have not implemented their intention to make a formal document setting out the terms on which one party is to acquire an interest in property, they have failed to reach agreement with sufficient clarity on the property to be acquired, or they did not expect their agreement to be
p. 261 immediately binding (*Herbert* v. *Doyle* [2010] EWCA Civ 1095, (2010) 13 ITELR 561, [57]). This relative ↵ lack of clarity is regrettable and runs counter to one of the principal purposes of section 2 which is to promote certainty in conveyancing transactions. However, the fact that section 2(5) expressly reserves a role for the constructive trust demonstrates that the statutory commitment to the cause of certainty is not unlimited. It is limited by the desire to prevent section 2 being used as a cloak for unconscionable conduct or fraud. So, in an extreme case, where one party has encouraged another to act to her (considerable) detriment in the belief that she has a beneficial interest in the land, the court may be able to recognize the existence of a beneficial interest notwithstanding the fact that the requirements of section 2(1) have not been satisfied (see, for example, *Yaxley* v. *Gotts* [2000] Ch 162). But such cases are very much the exception, not the rule. As Robert Walker LJ observed in *Yaxley*, the courts have discerned in section 2:

> Parliament's conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must *in general* outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict. [Emphasis added.]

However, it should not be thought that such a strict approach is an inevitable consequence of a statutory requirement that a contract be made in writing. The strict approach to the interpretation of section 2 is a product of the policy that underpins the section. But the aim of a statute may not be to promote certainty; it may be to protect one party to the transaction. An example in the latter category is provided by the Consumer Credit Act 1974, section 61(1) of which states that a 'regulated agreement' is not 'properly executed' unless it complies with the requirements of sections 60 and 61. In this instance the consequence of non-compliance is not inevitable nullity because such a conclusion would frustrate the policy behind the legislation. The aim of the Act is to protect the consumer and this is reflected in section 65(1) which states that 'an improperly-executed regulated agreement is enforceable *against the debtor or hirer* on an order of the court only' (emphasis added). The court is thus interposed as the protector of the consumer. The jurisdiction of the court to make an enforcement order notwithstanding the fact that the agreement has been improperly executed is regulated by section 127 of the Act, which gives to the court a discretion to make an enforcement order notwithstanding the infringement.

6.3.2.2 Contracts Which Must Be Evidenced in Writing

Secondly, the law may state that the contract must be *evidenced* in writing (rather than made in writing). An example in this category is provided by section 4 of the Statute of Frauds 1677 which states:

> Noe action shall be brought … whereby to charge the defendant upon any speciall promise to answere for the debt default or miscarriages of another person … unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.

p. 262 ↵ Section 4 is another provision that has given rise to a substantial amount of litigation. In many ways it is the classic illustration of the problems that can arise in terms of identifying the type of contract that should be the subject of the formal requirement. The critical phrase when determining the scope of the section is 'debt, default or miscarriages of another person'. Thus the section applies only where a primary liability has been assumed by 'another person' and the defendant has assumed a secondary liability to answer for that debt (a secondary liability is a liability that arises upon default by the debtor of a primary obligation). If the defendant's liability proves to be primary rather than secondary in character, section 4 will not be applicable. The problem is that it can, in some cases, be difficult to tell whether the liability that has been assumed by the defendant is primary or secondary in nature. The courts have in fact experienced considerable difficulty in deciding whether the liability of the defendant is secondary (a guarantee) or primary (an indemnity). Indeed

the difficulty in drawing this distinction once led Harman LJ to state that this 'barren controversy' has 'raised many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public' (*Yeoman Credit Ltd* v. *Latter* [1961] 1 WLR 828, 835).

The effect of non-compliance with section 4 is to render the contract unenforceable. In *Actionstrength Ltd* v. *International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 AC 541 sub-contractors on a construction project threatened to withdraw their labour because they were not being paid for their work by the main contractor (notwithstanding the fact that the main contractor had been paid by the employer). The sub-contractors withdrew this threat after reaching an oral agreement with the employer under which the employer agreed to ensure that the sub-contractors received the sums due to them by the main contractor and that, if necessary, the employer would do this by making payments directly to the sub-contractors rather than to the main contractor. The sub-contractors returned to work but the main contractor's indebtedness to them continued to increase until it reached £1.3 million. It being clear that the main contractor was unable to pay this amount, the sub-contractors brought a claim against the employer. The employer argued that its promise to pay was unenforceable on the ground that it did not satisfy the requirements of section 4. The sub-contractors argued that the agreement did not fall within the scope of section 4 but this submission was rejected. It was held that the employer's liability was secondary in nature rather than primary so that it fell within the scope of section 4 and, being an oral promise that was not evidenced in writing, it was not enforceable. Further, it was held that the employers were not estopped from invoking section 4 in order to deny the efficacy of the promise made. On the facts the only assurance given by the employers to the sub-contractors was the oral promise itself (which was unenforceable) and this was held to be insufficient to give rise to an estoppel. The House of Lords did not conclude that estoppel can never be invoked in order to prevent reliance upon the Statute of Frauds. But they stated that 'something more' was required than reliance upon the unenforceable promise itself. The precise nature of that 'something more' was not established but it is likely to take the form of an express assurance that reliance will not be placed upon the Statute of Frauds.

Actionstrength therefore illustrates the serious consequences that can flow from a failure to comply with formal requirements. The decision must have caused significant hardship to the sub-contractors in that they were left with no enforceable claim against the employer and a worthless claim for £1.3 million against the main contractor who was in liquidation. This point was noted by their Lordships. Thus Lord Woolf stated that he reached the decision to dismiss the appeal with 'regret'. Lord Bingham was more forthright. He stated:

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6. While section 4 of the Statute of Frauds has been repealed or replaced in its application to the other four classes of contract originally specified, it has been retained in relation to guarantees. In 1937 the Law Revision Committee (in its Sixth Interim Report, *Statute of Frauds and the Doctrine of Consideration*, Cmd 5449, paragraph 16) recommended the repeal of so much as remained of section 4. But a minority headed by Goddard J dissented in relation to guarantees, on the grounds

   (1) that there was a real danger of inexperienced people being led into undertaking obligations which they did not fully understand, and that opportunities would be given to the unscrupulous to assert that credit was given on the faith of a guarantee which the alleged surety had had no intention of giving;

   (2) that a guarantee was a special class of contract, being generally one-sided and disinterested as far as the surety was concerned, and the necessity of writing would give the proposed surety an opportunity for thought;

   (3) that the requirement of writing would ensure that the terms of the guarantee were settled and recorded;

   (4) that Parliament had imposed a requirement of writing in other contractual contexts;

   (5) that judges and juries were not infallible on questions of fact, and in the vast majority of cases the surety was getting nothing out of the bargain;

   (6) that it was desirable to protect the small man; and

   (7) that the necessity for guarantees to be in writing was generally understood.

   No action was taken on the 1937 report. In 1953 the Law Reform Committee (First Report, *Statute of Frauds and Section 4 of the Sale of Goods Act 1893*, Cmd 8809) endorsed the recommendation of its predecessor that section 4 of the Statute of Frauds should be largely repealed but, agreeing with those who had earlier dissented, unanimously recommended that the section should continue to apply to guarantees. Effect was given to this report by enactment of the 1954 Act. Whatever the strength of the reasons given … for retaining the old rule in relation to conventional consumer guarantees, it will be apparent that those reasons have little bearing on cases where the facts are such as those to be assumed here. It was not a bargain struck between inexperienced people, liable to misunderstand what they were doing. St-Gobain [the employers], as surety, had a very clear incentive to keep the Actionstrength workforce on site and, on the assumed facts, had an opportunity to think again. There is assumed to be no issue about the terms of the guarantee. English contract law does not ordinarily require writing as a condition of enforceability. It is not obvious why judges are more fallible when ruling on guarantees than other forms of oral contract. These were not small men in need of paternalist protection. While the familiar form of bank guarantee is well understood, it must be at least doubtful whether those who made the assumed agreement in this case appreciated that it was in law a guarantee. The judge at first instance was doubtful whether it was or not. The Court of Appeal reached the view that it was, but regarded the point as interesting and not entirely easy … Two members of the court discussed the question at a little length, with detailed reference to authority.

> 7. It may be questionable whether, in relation to contracts of guarantee, the mischief at which section 4 was originally aimed, is not now outweighed, at least in some classes of case, by the mischief to which it can give rise in a case such as the present, however unusual such cases may be. But that is not a question for the House in its judicial capacity. Sitting judicially, the House must of course give effect to the law of the land of which (in England and Wales) section 4 is part.

Reform of the law is therefore a matter for Parliament, not the judges.

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6.3.2.3 Contracts Which Must Be Made by Deed

Thirdly, the law may state that the contract must be made by deed. This is an exceptional requirement and it is now confined to conveyancing transactions. Thus section 52(1) of the Law of Property Act 1925 provides:

> All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

Section 52(2) provides for a number of exceptions to the requirement laid down in section 52(1). One of these exceptions is a lease for a term not exceeding three years (see section 52(2)(d) and section 54(2)).

6.4 The Future of Formal Requirements

Requirements of form are likely to continue to play a prominent role in transactions involving consumers. In the commercial sphere it is unlikely that there will be a further significant role for requirements of form. The nature of formal requirements will also have to be given further thought. This is true both for consumer and for commercial contracts given the increasing use of electronic means of communication. European law has played an important role in encouraging legal systems to adapt to the changing nature of formal requirements. For example, Article 9(1) of the EC Directive on Electronic Commerce (2000/31/EC) states that:

> Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their being made by electronic means.

Section 8 of the Electronic Communications Act 2000 gives to Ministers the authority to review statutes and related legislation that require documents to be in writing and to amend them by way of secondary legislation 'in such manner as [the Minister] may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage'. Further, section 91(4) of the Land Registration Act 2002 provides that a document properly made in electronic form is to be treated as if it were in writing and properly executed, while section 91(5) further provides that a document properly made in electronic form is to be

regarded 'for the purposes of any enactment as a deed'. The section thus paves the way for the introduction of electronic conveyancing. Gradually, we can expect to see further modifications to existing legislation to reflect the fact that, in the modern world, requirements of form can be satisfied by electronic means in addition to more traditional formal requirements, such as writing.

p. 265 ↵ However, it may not be necessary to pass legislation in order to reflect the changing nature of modern communications. Judges may be able to do this through the normal process of interpreting existing legislation. Thus in *J Pereira Fernandes SA* v. *Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543, Judge Pelling QC held that an offer sent by email satisfied the requirements of 'writing' in section 4 of the Statute of Frauds and that, when deciding whether or not an email has been 'signed', the same approach should be taken as would be adopted when deciding whether a hard copy of the same document had been signed (see also *Neocleous* v. *Rees* [2019] EWHC 2462 (Ch), [2020] 2 P & CR 4).

Further Reading

KÖTZ, HA, *European Contract Law* (2nd edn, Oxford University Press, 2017), ch. 5.

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Notes

[1] A contract which is void has, in general, no legal effect.

[2] A contract which is unenforceable is valid in all respects except that it cannot be enforced by one or other party (possibly, both).

[3] A constructive trust is generally regarded as a trust that is imposed by law, whereas a resulting trust is a trust where the beneficial interest jumps back, or returns, to the settlor. See further A Burrows (ed), *English Private Law* (3rd edn, Oxford University Press, 2013), paras 4.159–4.161.

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