Contract Law: Text Cases and Materials (11th edn)
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p. 289

8. The Terms of the Contract

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https://doi.org/10.1093/he/9780198898047.003.0008
Published in print: 17 May 2024
Published online: August 2024

Abstract

A contract is composed of terms, the number of which depends upon the importance of the transaction. The terms of the contract are of great significance to the parties because they define their rights and liabilities. This chapter examines two preliminary issues, the first of which relates to the identification of the terms of the contract. How do the courts decide what is and what is not a term of the contract? The second issue concerns the entitlement of the parties to lead evidence of terms not to be found in their written contract. Where the parties take the time, trouble, and expense of reducing their agreement to writing, are they still entitled to adduce evidence of terms other than those found in the written document, or is the written document the sole source of the terms of their contract?

Keywords: English contract law, contract terms, representation, parol evidence, distinction between terms and representations, exceptions to parol evidence rule

Central Issues

1. The answer to the question whether a statement made by one contracting party to another, prior to the conclusion of the contract, has been incorporated into the contract as a term or is merely a representation that has induced that party to enter into the contract depends upon the intention of the parties, objectively ascertained. In seeking to discern the intention of the parties the courts have regard to a variety of factors that are considered in this chapter.

2. While the distinction between a term and a representation remains one of some importance today it is not as important as it was prior to changes to the law of misrepresentation made by the judiciary in 1963 and by Parliament in 1967. Before these changes were made damages could be recovered for a fraudulent misrepresentation but not for an innocent or for a negligent misrepresentation. Thus a plaintiff who wished to recover damages in respect of an innocent or a negligent misstatement had to prove that the statement had been incorporated into the contract as a term in order to recover damages. Now that damages for misrepresentation are more widely available the distinction between a term and a representation tends to be of importance not to the *existence* of the jurisdiction to award damages but to the *measure* of damages recoverable.
3. In the case where the parties have reduced their contract to writing an issue can arise as to whether or not one of the parties is entitled to lead evidence of the existence of a term not to be found in that written document. The 'parol evidence' rule was thought to exclude such evidence where its effect was to add to, vary, or contradict the written document. But the status of this rule is the subject of some controversy. On one view the rule is a 'circular statement' on the basis that it only applies where the written document is intended by the parties to contain all the terms of the contract. The other view is that the rule is not circular because it applies where the document *looks* like a complete contract (even if it was not so intended by both parties) and, in such a case, the court will presume that the written document contains the whole contract in the absence of evidence to the contrary.

p. 290

8.1 Introduction

A contract is composed of a number of terms. The number of terms will obviously depend upon the importance of the transaction. Large-scale transactions often produce contracts of considerable length and complexity and some of the standard form clauses, such as exclusion and limitation clauses, are likely to have been the subject of protracted negotiation between the parties (or at least between their lawyers). The terms of the contract are obviously of great significance to the parties because they define their rights and liabilities. English law gives the parties considerable freedom to define for themselves the terms of their contract: freedom of contract remains a fundamental part of English law. Many commercial parties have their own standard terms of business which they seek to incorporate into the contracts they conclude (hence the so-called battle of the forms discussed at 3.3.1.1). However, the freedom of the parties is not unlimited. Parliament has in recent years intervened to regulate the use of certain types of contract terms. Initially the intervention was confined principally to exclusion and limitation clauses but it has since been extended, at least in the context of contracts between a trader and a consumer, to a much wider range of terms (see further 14.2). Not all terms are, however, agreed expressly by the parties. Some are implied into the contract either by the courts or by Parliament. Implied terms form an important part of many contracts, particularly contracts for the sale of goods.

This Part of the book is divided up in the following way. This chapter is devoted to two issues. The first relates to the identification of the express terms of the contract and the second concerns written contracts and the extent to which it is permissible to lead evidence of the existence of terms not found in the written contract. Chapter 9 deals with the subject of the incorporation of terms into a contract. This is an important issue in practice. Many companies spend substantial sums of money on legal advice in relation to the drafting of their standard terms of business but then fail to take adequate steps to ensure that these terms are incorporated into the contracts which they conclude. The subject matter of Chapter 10 is implied terms. Here the principal difficulty relates to the legal basis upon which courts imply terms into contracts. Chapter 11 deals with the principles applied by the courts when interpreting contracts. Many cases that come before the courts raise issues of interpretation or construction and both the House of Lords and the Supreme Court have been required on a number of occasions in recent years to re-state the principles by which contract documents are to be interpreted. Chapter 12 moves on to consider some standard clauses that are to be found in commercial contracts today (often known as 'boilerplate clauses'). The subject matter of Chapter 13 is one particular type of boilerplate clause, namely the exclusion or limitation clause. These clauses have been the subject of a considerable amount of judicial analysis and the Unfair Contract Terms Act 1977 was passed in order to regulate their use. Much of Chapter 13 is concerned with the statutory control of contract terms and this theme is developed in Chapter 14 which is devoted to Part 2 of the Consumer Rights Act 2015. The latter Act gives to the courts much broader powers to regulate unfair terms in contracts between a trader and a consumer. Chapter 15 draws this Part of the book to a close with a discussion of the role of good faith in contract law. The location of any discussion of good faith is a matter of real difficulty in English law. The traditional view taken by the courts is that English contract law does not recognize the existence of a general principle of good faith and fair dealing (see *Walford* v. *Miles* [1992] 2 AC 128). While this remains the case in the context of the negotiation of a contract, the position is now less certain in relation to the performance of
p. 291 contracts where there have been suggestions that the traditional hostility displayed ↵ by English contract law to good faith may be 'misplaced' (*Yam Seng Pte Ltd* v. *International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [153]) and the balance of authority now supports the enforceability of an express term requiring the parties to act in good faith, at least in the performance of a contract. English law appears to be isolated in its reluctance to embrace a principle of good faith and fair dealing. Such a principle is a fundamental part of the law of contract in most civilian legal systems and it is declared to be a mandatory principle by both the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law. Given the stance currently adopted by English law, it may seem odd to give it its own chapter. But the reality is that it is an issue that does require analysis and, a notion of good faith having been introduced into English law initially via the Unfair Terms in Consumer Contracts Regulations 1994 (and now to be found in Part 2 of the Consumer Rights Act 2015), this provides helpful context for the discussion. The question which English law has to answer can be shortly stated, even if it cannot be answered easily. It is: is the role of good faith in English law confined to those cases that fall within the scope of Part 2 of the Consumer Rights Act 2015 or will its influence extend beyond these cases and into transactions, particularly commercial transactions, that do not fall within the scope of the legislation?

8.2 Two Preliminary Issues

The purpose of this chapter is not to consider the substantive content of the express terms of a contract. The content of the most important standard clauses found in commercial contracts is considered later, in Chapter 12. Here we are concerned with two preliminary issues. The first relates to the identification of the terms of the contract. How do the courts decide what is and what is not a term of the contract? In the case where the parties reduce their agreement to the form of a written contract, the answer is fairly obvious, namely that the content is to be found in the terms set out in the document. But what about oral statements made prior to the conclusion of the contract? Are they also terms or are they merely representations which, while they may have induced one party to enter into the contract, are not part of the contract itself? The second issue concerns the entitlement of the parties to lead evidence of terms not to be found in their written contract. Where the parties take the time, trouble, and expense of reducing their agreement to writing, are they still entitled to adduce evidence of terms other than those found in the written document or is the written document the sole source of the terms of their contract? We shall explore each issue in turn.

8.3 Terms and Representations

The question whether or not a statement made by one party to the other prior to the conclusion of the contract has been incorporated into the contract as a term is one of some importance. If the statement has been incorporated into the contract as a term, then a failure to comply with it without lawful justification will amount to a breach of contract. On the other hand, if the statement has not been so incorporated then any liability cannot be for breach of contract but must be for misrepresentation. The distinction between a term and a representation is an important one but it is not as significant as it used to be. The primary

p. 292

↵ significance of the distinction lies in the different remedial responses to a breach of contract and a misrepresentation. We shall deal with the different remedial responses in more detail in the chapter on misrepresentation (see Chapter 17). Here it suffices to use one remedial difference for illustrative purposes. Every breach of contract gives rise to a claim for damages (in the case where the claimant suffers no loss as a result of the breach, she will still be entitled to recover damages but they will be nominal). But not every misrepresentation gives rise to a claim for damages. Indeed, prior to the decision of the House of Lords in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465 and the subsequent enactment of the Misrepresentation Act 1967, damages could only be recovered for fraudulent misrepresentations.[1] Fraud is not, however, an easy matter to prove (*Derry* v. *Peek* (1889) 14 App Cas 337). The fact that damages could not be recovered in respect of negligent or innocent misrepresentations prior to *Hedley Byrne* and the enactment of the 1967 Act had a significant impact on cases decided prior to these developments. In these cases a plaintiff who wished to recover damages had either to prove fraud (in order to recover damages for fraudulent misrepresentation) or prove that the statement had been incorporated into the contract as a term (in order to recover damages for breach of contract). In cases where the defendant had clearly not been fraudulent the only hope for a plaintiff who wished to recover damages was therefore to prove that the statement had been incorporated into the contract as a term. Cases can be found in which the courts adopted what appears to be a rather benevolent approach to the identification of a term in order to give a deserving plaintiff a remedy in damages (see, for example, *De Lassalle* v. *Guildford* [1901] 2 KB 215). But cases can also be found in which the

courts took a stricter view. Thus in *Heilbut, Symons & Co* v. *Buckleton* [1913] AC 30, 51 Lord Moulton stated that 'it is … of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made'.

How then do the courts decide whether or not a statement has been incorporated into a contract as a term? The answer is that the distinction turns upon the intention of the parties, objectively ascertained. As Professor John Cartwright has pointed out (*Misrepresentation, Mistake and Non-Disclosure* (6th edn, Sweet & Maxwell, 2022), para 8.06):

> The question, in general terms, is whether the parties intended the statement to be incorporated into the contract as one of its terms; whether, therefore, the defendant intended to make a contractually binding promise about the accuracy of his statement.

When seeking to ascertain whether the defendant intended to make a contractually binding promise about the accuracy of his statement, no one factor predominates. As Lord Moulton stated in *Heilbut, Symons* (at p. 51), 'the intention of the parties can only be deduced from the totality of the evidence, and no secondary principles … can be universally true'. It is therefore necessary to examine the cases in order to identify the range of issues to which the courts have regard when seeking to ascertain the intention of the parties. The approach that will be adopted here is to examine three illustrative cases and then seek to draw the threads together by setting out the range of factors taken into account by the courts in their decision-making.

p. 293

8.3.1 Three Illustrative Cases

Oscar Chess Ltd v. Williams
[1957] 1 WLR 370, Court of Appeal

> The plaintiff car dealers bought a car from the defendant in a part-exchange deal under which the defendant bought a new car from the plaintiffs' garage (the defendant in fact purchased the car from a finance company to which the plaintiffs had sold the car, but nothing turns on this for present purposes). The events that led up to the purchase of the car by the plaintiffs were as follows. The defendant had told one of the plaintiffs' salesmen that he wished to buy a new car. The salesman was a neighbour of the defendant and he had been given a lift in the car on a number of occasions. He thought that the car was a 1948 Morris and indeed the defendant described the car to him as a 1948 10 h.p. Morris and produced the registration book for it. The salesman checked the registration book and it showed that 1948 was the date of first registration. He then consulted a book (known as 'Glass's Guide'), which gave him the current prices for second-hand cars according to the year of their manufacture. On this basis he offered the defendant an allowance of £290 against the purchase of a new car. The defendant agreed and the transactions were completed. Eight months later the plaintiffs discovered that the car was not in fact a 1948 Morris but a 1939 model. If the plaintiffs had known that it was a 1939 model they would have offered the defendant only £175 for the car. The defendant honestly believed that the car was a 1948 model. The car had previously been bought by his mother and she had bought it on the basis that it was a 1948 model. The car's registration book showed that it had been first registered in 1948 and that it had changed hands five times between 1948 and 1954.
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> The plaintiffs sought to recover from the defendant damages of £115, based on the difference in value between £290 and £175. The trial judge held that the defendant was liable in damages but the Court of Appeal allowed the defendant's appeal by a majority (Morris LJ dissenting) on the basis that the statement by the defendant as to the age of the car was not a term of the contract but an innocent misrepresentation that had induced the plaintiffs to enter into the contract.

Denning LJ

> I entirely agree with the judge that both parties assumed that the Morris car was a 1948 model and that this assumption was fundamental to the contract. This does not prove, however, that the representation was a term of the contract. The assumption was based by both of them on the date given in the registration book as the date of first registration. They both believed that the car was a 1948 model, whereas it was only a 1939 one. They were both mistaken and their mistake was of fundamental importance.
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> The effect of such a mistake is this: It does not make the contract a nullity from the beginning, but it does in some circumstances enable the contract to be set aside in equity. If the buyer had come promptly, he might have succeeded in getting the whole transaction set aside in equity on the

ground of this mistake: see *Solle* v. *Butcher* [1950] 1 KB 671; but he did not do so and it is now too late for him to do it: see *Leaf* v. *International Galleries* [1950] 2 KB 86. His only remedy is in damages, and to recover these he must prove a warranty.

In saying that he must prove a warranty, I use the word 'warranty' in its ordinary English meaning to denote a binding promise. Everyone knows what a man means when he says, 'I guarantee it', or 'I warrant it', or 'I give you my word on it'. He means that he binds himself ↵ to it. That is the meaning which it has borne in English law for 300 years from the leading case of *Chandelor* v. *Lopus* (1603), Cro Jac 4 onwards. During the last hundred years, however, the lawyers have come to use the word 'warranty' in another sense. They use it to denote a subsidiary term in a contract as distinct from a vital term which they call a 'condition'. In so doing they depart from the ordinary meaning, not only of the word 'warranty', but also of the word 'condition'. There is no harm in their doing this, so long as they confine this technical use to its proper sphere, namely, to distinguish between a vital term, the breach of which gives the right to treat the contract as at an end, and a subsidiary term which does not. The trouble comes, however, when one person uses the word 'warranty' in its ordinary meaning and another uses it in its technical meaning. ... These different uses of the word seem to have been the source of confusion in the present case. The judge did not ask himself, 'Was the representation (that the car was a 1948 Morris car) intended to be a warranty?' He asked himself, 'Was it fundamental to the contract?' He answered it by saying that it was fundamental, and, therefore, it was a condition and not a warranty. By concentrating on whether it was fundamental, he seems to me to have missed the crucial point in the case which is whether it was a term of the contract at all. The crucial question is: Was it a binding promise or only an innocent misrepresentation? The technical distinction between a 'condition' and a 'warranty' is quite immaterial in this case, because it is far too late for the buyer to reject the car. He can, at best, only claim damages. The material distinction here is between a statement which is a term of the contract and a statement which is only an innocent misrepresentation. This distinction is best expressed by the ruling of Lord Holt: Was it intended as a warranty or not?, using the word warranty there in its ordinary English meaning: because it gives the exact shade of meaning that is required. It is something to which a man must be taken to bind himself.

p. 294

In applying Lord Holt's test, however, some misunderstanding has arisen by the use of the word 'intended'. It is sometimes supposed that the tribunal must look into the minds of the parties to see what they themselves intended. That is a mistake. Lord Moulton made it quite clear, in *Heilbut, Symons & Co* v. *Buckleton* [1913] AC at p. 51, that 'The intention of the parties can only be deduced from the totality of the evidence'. The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. And this, when the facts are not in dispute, is a question of law. That is shown by *Heilbut, Symons & Co* v. *Buckleton* itself, where the House of Lords upset the jury's finding of a warranty.

It is instructive to take some recent instances to show how the courts have approached this question. When the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant, intending that the buyer should act on it, and he does so, it is easy to infer a warranty; see *Couchman* v. *Hill* [1947] KB 554, where the farmer stated that the heifer was unserved, and *Harling* v.

> *Eddy* [1951] 2 KB 739, where he stated that there was nothing wrong with her. So also if the seller makes a promise about something which is or should be within his own control … But if the seller, when he states a fact, makes it clear that he has no knowledge of his own but has got his information elsewhere, and is merely passing it on, it is not so easy to imply a warranty. Such a case was *Routledge* v. *McKay* [1954] 1 All ER 855, where the seller 'stated that it was a 1942 model, and pointed to the corroboration found in the book', and it was held that there was no warranty.
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> Turning now to the present case, much depends on the precise words that were used. If the seller says: 'I believe the car is a 1948 Morris. Here is the registration book to prove it', there is clearly no warranty. It is a statement of belief, not a contractual promise. If, however, the seller says: 'I
> p. 295 guarantee that it is a 1948 Morris. This is borne out by the registration book, but you need ↵ not rely solely on that. I give you my own guarantee that it is', there is clearly a warranty. The seller is making himself contractually responsible, even though the registration book is wrong.
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> In this case much reliance was placed by the judge on the fact that the buyer looked up 'Glass's Guide' and paid £290 on the footing that the car was a 1948 model: but that fact seems to me to be neutral. Both sides believed the car to have been made in 1948 and in that belief the buyer paid £290. That belief can be just as firmly based on the buyer's own inspection of the log-book as on a contractual warranty by the seller.
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> Once that fact is put on one side, I ask myself: What is the proper inference from the known facts? It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes. He must have been relying on the registration book. It is unlikely that such a person would warrant the year of manufacture. The most that he would do would be to state his belief, and then produce the registration book in verification of it. In these circumstances the intelligent bystander would, I suggest, say that the seller did not intend to bind himself so as to warrant that the car was a 1948 model. If the seller was asked to pledge himself to it, he would at once have said 'I cannot do that. I have only the log-book to go by, the same as you'.
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> The judge seems to have thought that there was a difference between written contracts and oral contracts. He thought that the reason why the buyer failed in *Heilbut, Symons & Co* v. *Buckleton* and *Routledge* v. *McKay* was because the sales were afterwards recorded in writing, and the written contracts contained no reference to the representation. I agree that that was an important factor in those cases. If an oral representation is afterwards recorded in writing, it is good evidence that it was intended as a warranty. If it is not put into writing, it is evidence against a warranty being intended; but it is by no means decisive. There have been many cases where the courts have found an oral warranty collateral to a written contract. … But when the purchase is not recorded in writing at all it must not be supposed that every representation made in the course of the dealing is to be treated as a warranty. The question then is still: Was it intended as a warranty? …
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> One final word: It seems to me clear that the motor dealers who bought the car relied on the year stated in the log-book. If they had wished to make sure of it, they could have checked it then and there, by taking the engine number and chassis number and writing to the makers. They did not do so at the time, but only eight months later. They are experts, and, as they did not make that check at

the time, I do not think that they should now be allowed to recover against the innocent seller who produced to them all the evidence which he had, namely, the registration book. I agree that it is hard on the plaintiffs to have paid more than the car is worth, but it would be equally hard on the seller to make him pay the difference. He would never have bought the Hillman car unless he had received the allowance of £290 for the Morris. The best course in all these cases would be to 'shunt' the difference down the train of innocent sellers until one reached the rogue who perpetrated the fraud; but he can rarely be traced, or if he can, he rarely has the money to pay the damages. Therefore, one is left to decide between a number of innocent people who is to bear the loss. That can only be done by applying the law about representations and warranties as we know it: and that is what I have tried to do. If the rogue can be traced, he can be sued by whosoever has suffered the loss: but, if he cannot be traced, the loss must lie where it falls. It should not be inflicted on innocent sellers, who sold the car many months, perhaps many years before, and have forgotten all about it and have conducted their affairs on the basis that the transaction was concluded. Such a seller would not be able to recollect after all this length of time the exact words which he used, such as whether he said 'I believe it is a 1948 model', or 'I warrant it is a 1948 model'. The right course is to let the buyer set aside the transaction if he finds out the mistake quickly and comes promptly before other interests have
p. 296 irretrievably intervened, ↵ otherwise the loss must lie where it falls: and that is, I think, the course prescribed by law. I would allow this appeal accordingly.

Hodson LJ

I am of opinion that there was no evidence to support the conclusion that the statement that the Morris car was a 1948 car was a term of the contract. …

There is, in my opinion, nothing … to indicate that the statement as to the date of the car amounted to a promise or guarantee that the information given was accurate.

Morris LJ

[dissenting]

In the present case, on a consideration of the evidence that he heard, the judge came to the conclusion that the statement which he held to have been made by the defendant at the time of the making of the contract was a statement made contractually. It seems to me that the totality of the evidence points to that view. The statement related to a vitally important matter: it described the subject matter of the contract then being made and the statement directed the parties to, and was the basis of, their agreement as to the price to be paid or credited to the defendant. In the language of Scott LJ [in *Couchman* v. *Hill* [1947] KB 554, 559], it seems to me that the statement made by the defendant was 'an item in the description' of what was being sold and that it constituted a substantial ingredient in the identity of the thing sold.

> It is with diffidence that I arrive at a conclusion differing from that of my Lords, but I cannot see that the learned judge in any way misdirected himself or misapplied any principle of law, and I see no reason for disturbing his conclusion.

Commentary

In order to be able to recover damages the plaintiffs had to show that the defendant's statement that the car was a 1948 model was a term of the contract. The word that is used in the judgments is generally not 'term' but 'warranty'. The difficulty with the latter word is, as Denning LJ points out, that it also has a technical meaning in that it can refer to a lesser, subsidiary term of the contract, the breach of which gives to the innocent party the right to claim damages but does not give him the right to terminate further performance of the contract (the technical meaning of 'warranty' is discussed in more detail at 22.3.2). In this chapter the word 'term' will be used in preference to 'warranty' for the reason that it describes more clearly the issue that is at stake in the cases. We are not here concerned with the status of a term of the contract (that is, whether it is important or not) but with the prior question of whether the statement made has been incorporated into the contract as a term or not. The central question may be formulated as follows: has the statement been incorporated into the contract as a term or is it simply a statement that has induced the other party to enter into the contract but does not form part of the contract itself?

p. 297 ↵ The Court of Appeal concluded, by a majority, that the defendant's statement was not a term but only an innocent misrepresentation. This conclusion was fatal to the plaintiffs' claim for damages. But it is important to note that the plaintiffs' claim for damages would not necessarily fail today. As has been noted, the law has moved on since *Oscar Chess* was decided in November 1956. In 1963 the House of Lords in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465 held that there is a tort of negligent misrepresentation which gives rise to a liability in damages (see further 17.5.2). Section 2 of the Misrepresentation Act 1967 takes matters further. Section 2(1) imposes a liability in damages on a misrepresentor whose misrepresentation induces the claimant to enter into a contract with him unless the misrepresentor can show that he had reasonable grounds to believe and did believe in the truth of his statement up to the time that the contract was made (see further 17.5.1). Section 2(2) goes still further and gives to the court a discretionary power to award damages in lieu of rescission in cases of entirely innocent misrepresentations (see further 17.5.4). In the light of these developments it cannot be assumed that *Oscar Chess* would be decided the same way today. But, equally, it does not follow that all differences between terms and representations have been eliminated. In the days of *Oscar Chess* the difference between a term and a representation was relevant to the *existence* of the jurisdiction to award damages, whereas today it is relevant to the *measure* of damages recoverable. As we shall see, the amount recoverable in a misrepresentation claim is generally less than the sum recoverable in a breach of contract claim. The amount recoverable in a misrepresentation claim is the claimant's reliance loss, that is to say the aim of the award of damages is to compensate the claimant for the loss that he has suffered as a result of relying to his detriment upon the truth of the statement made. In a breach of contract claim, on the other hand, the aim of the award of damages is to protect the claimant's expectation interest, that is to say the aim is to put the claimant in the position which he would have been in had the contract been carried out according to its terms (the difference between the reliance measure and the expectation measure is discussed in more detail at 23.2).

Denning LJ applied an objective test (on which see further Chapter 2) in order to distinguish between a term and a representation. The distinction therefore depends on the words used by the parties and their behaviour; it does not depend upon their innermost thoughts. What factors persuaded the majority in the present case to conclude that the statement was a representation and not a term? The crucial factor would appear to have been the knowledge, or rather the lack of it, of the defendant. Both Denning and Hodson LJJ concluded that it was unlikely that the defendant, given the state of his knowledge, would have guaranteed that the car was in fact a 1948 model. Denning LJ also placed emphasis on the fact that the plaintiffs were experts and that they failed to take appropriate steps to check the vintage of the car. Morris LJ, in his dissenting judgment, emphasized the importance to the parties of the age of the car (in the sense that it had a considerable impact on the value of the car) and he also expressed his unwillingness to interfere with the finding of the trial judge. Denning LJ acknowledged the significance of the age of the car when he stated that both parties had made a mistake of 'fundamental importance' in relation to the age of the car, but he held that this was not enough of itself to turn the defendant's statement into a term of the contract. In his view, the significance of the importance of the statement was outweighed by the fact that the defendant lacked specialist knowledge and
p. 298 the fact that the plaintiffs were experts. The combination of these factors ↵ persuaded him to conclude that the statement was a representation and not a term. The significance of the knowledge of the parties becomes even more apparent when *Oscar Chess* is contrasted with the following case:

Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd
[1965] 1 WLR 623, Court of Appeal

The plaintiff, Dick Bentley, told the defendant, Harold Smith, that he was on the look-out for a 'well vetted Bentley car'. Mr Smith found one and bought it for £1,500. He then informed Mr Bentley of his acquisition. Mr Bentley then went to see the car. Mr Smith told him that the car had been fitted with a replacement engine and gearbox and that it had done only 20,000 miles since the work had been carried out. The speedometer on the car showed only 20,000 miles. Mr Bentley agreed to buy the car for £1,850 but the car proved to be a 'considerable disappointment to him'. He brought an action for damages for breach of warranty. Mr Smith admitted that he had made a statement that, to the best of his belief, the car had done only 20,000 miles since the replacement of the engine and the gear box but he denied that these statements amounted to warranties or representations and averred that the statements were made honestly in the belief that they were true. The trial judge found that certain representations, including the statement as to mileage, were untrue and amounted to warranties. He accordingly awarded Mr Bentley damages of £400. Mr Smith appealed to the Court of Appeal who dismissed his appeal.

Lord Denning MR

The first point is whether this representation, namely, that [the car] had done 20,000 miles only since it had been fitted with a replacement engine and gearbox, was an innocent misrepresentation (which does not give rise to damages), or whether it was a warranty. It was said by Holt CJ and repeated in *Heilbut, Symons & Co* v. *Buckleton* [1913] AC 30 at p. 49, that: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended'. But that word 'intended' has given rise to difficulties. I endeavoured to explain in *Oscar Chess, Ltd* v. *Williams* [1957] 1 WLR 370 that the question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. What conduct, then? What words and behaviour, lead to the inference of a warranty?

Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it. In the *Oscar Chess* case the inference was rebutted. ... Whereas in the present case it is very different. The inference is not rebutted. Here we have a dealer, Smith, who was in a position to know, or at least to find out, the history of the car. He
p. 299 could get it by writing to the makers. ↵ He did not do so. Indeed it was done later. When the history of this car was examined, his statement turned out to be quite wrong. He ought to have known better. There was no reasonable foundation for it.

> [He summarized the history of the car, and continued]
>
> The judge found that the representations were not dishonest. Smith was not guilty of fraud. But he made the statement as to 20,000 miles without any foundation. And the judge was well justified in finding that there was a warranty. He said: 'I have no hesitation [in saying] that as a matter of law the statement was a warranty. Smith stated a fact that should be within his own knowledge. He had jumped to a conclusion and stated it as a fact. A fact that a buyer would act on'. That is ample foundation for the inference of a warranty. So much for the first point. …
>
> [He then dealt with an issue on the counterclaim and on the county court judge's award of damages and concluded]
>
> I hold that the appeal fails and should be dismissed.
>
> ***Danckwerts LJ*** and ***Salmon LJ*** agreed with Lord Denning MR.

Commentary

Lord Denning expressly distinguished *Oscar Chess* on the ground that the defendant in that case had no knowledge of the age of the car and had made his statement in all innocence. On the present facts Lord Denning had no hesitation in concluding that Mr Smith was a dealer who was in a position to know, or at least to find out, the history of the car. Given his knowledge, he was not entitled to turn round and assert that his statement in relation to the mileage done by the car since the repairs had been carried out was a mere representation on his part. It was a warranty, for the breach of which he was liable in damages. It would seem to follow from this case that a statement made by a dealer in relation to the goods sold will generally be held to be a term of the contract. Indeed, it may be possible to go further. It has been stated that *Dick Bentley* illustrates the point that 'the courts tend to place the responsibility on the person who they think reasonably ought to bear the responsibility, rather than on the person who has agreed to bear it, for the simple reason that it is often not apparent whether anybody has agreed to bear it' (Atiyah's *An Introduction to the Law of Contract* (6th edn, Oxford University Press, 2005), p. 146).

Lord Denning, in both *Oscar Chess* and *Dick Bentley*, used the language of fault, in that he concluded that Mr Smith in *Dick Bentley* 'ought to have known better' while the plaintiffs in *Oscar Chess* could have checked the vintage of the car by 'taking the engine number and chassis number and writing to the makers'. But, while fault may be a relevant consideration when deciding whether a statement is a term or representation, liability for breach of contract does not generally depend upon fault so that, even if Mr Smith had taken all reasonable care to discover whether the car had done more than 20,000 miles since the repair work had been carried out, he would still have been liable to Mr Bentley in damages when it transpired that the car had, in fact, done more than 20,000 miles.

p. 300 ***Esso Petroleum Co Ltd v. Mardon***
[1976] QB 801, Court of Appeal

In 1961 Esso found a site for a filling station on a busy main road. One of Esso's employees, Mr Leith, who had 40 years' experience in the petrol trade, estimated that the throughput of petrol at the station would be 200,000 gallons per year by the third year of operation. After Esso had bought the site and started to build the station the local planning authority refused permission for the pumps to front onto the road, so that the station had to be built back to front. Nonetheless when in 1963 Esso interviewed Mr Mardon, a prospective tenant of the station, Mr Leith stated that the estimated throughput of the station was 200,000 gallons per year. On that basis Mr Mardon entered into a tenancy agreement with Esso for three years at a rent of £2,500 for the first two years and £3,000 for the third year. Despite Mr Mardon's best efforts, which included raising an overdraft with his bank and putting all his available capital into the business, in the first 15 months the throughput of petrol was only 78,000 gallons. The trial judge found that the lack of throughput was due to the inability of passing traffic to see the pumps. In June 1964 Mr Mardon terminated the tenancy agreement by notice. However Esso offered him a new tenancy agreement for one year at a rent of £1,000 plus a surcharge on petrol sold. Mr Mardon entered into the agreement on these terms in September 1964. But the losses continued. When Mr Mardon failed to pay for petrol supplied, Esso cut off his supplies and brought an action for moneys owed. Mr Mardon counterclaimed for damages for breach of warranty as to the throughput of petrol and for negligent misrepresentation. The trial judge held that Mr Leith's statement as to the throughput was not a warranty such as to give Mr Mardon a cause of action for breach of warranty but that Esso was liable for negligent misrepresentation. The Court of Appeal held that Mr Leith's statement was a warranty which Esso had breached. In addition the statement was a negligent misrepresentation, for which they were also liable.

Lord Denning MR

Collateral warranty

Ever since *Heilbut, Symons & Co* v. *Buckleton* [1913] AC 30, we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege—I often did it myself—that the misrepresentation was fraudulent, or alternatively a collateral warranty. At the trial we nearly always succeeded on collateral warranty. We had to reckon, of course, with the dictum of Lord Moulton, at p. 47, that 'such collateral contracts must from their very nature be rare'. But more often than not the court elevated the innocent misrepresentation into a collateral warranty: and thereby did justice—in advance of the Misrepresentation Act 1967. I remember scores of cases of that kind, especially on the sale of a business. A representation as to the profits that had been made in the past was invariably held to be a warranty. Besides that experience, there have been many cases since I have sat in this court where we have readily held a representation—which induces a person to enter into a contract—to be a warranty sounding in damages. I summarised them in *Dick Bentley Productions Ltd* v. *Harold Smith (Motors) Ltd* [1965] 1 WLR 623, 627, when I said:

> 'Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering
> p. 301 into the ↵ contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on.'

Mr Ross-Munro [counsel for Esso], retaliated, however, by citing *Bisset* v. *Wilkinson* [1927] AC 177, where the Privy Council said that a statement by a New Zealand farmer that an area of land 'would carry 2,000 sheep' was only an expression of opinion. He submitted that the forecast here of 200,000 gallons was an expression of opinion and not a statement of fact: and that it could not be interpreted as a warranty or promise.

Now I would quite agree with Mr Ross-Munro that it was not a warranty—in this sense—that it did not guarantee that the throughput would be 200,000 gallons. But, nevertheless, it was a forecast made by a party—Esso—who had special knowledge and skill. It was the yardstick (the estimated annual consumption) by which they measured the worth of a filling station. They knew the facts. They knew the traffic in the town. They knew the throughput of comparable stations. They had much experience and expertise at their disposal. They were in a much better position than Mr Mardon to make a forecast. It seems to me that if such a person makes a forecast, intending that the other should act upon it—and he does act upon it, it can well be interpreted as a warranty that the forecast is sound and reliable in the sense that they made it with reasonable care and skill. It is just as if Esso said to Mr Mardon: 'Our forecast of throughput is 200,000 gallons. You can rely upon it as being a sound forecast of what the service station should do. The rent is calculated on that footing'. If the forecast turned out to be an unsound forecast such as no person of skill or experience should have made, there is a breach of warranty. Just as there is a breach of warranty when a forecast is made—'expected to load' by a certain date—if the maker has no reasonable grounds for it: see *Samuel Sanday and Co* v. *Keighley, Maxted and Co* (1922) 27 Com Cas 296; or bunkers 'expected 600/700 tons': see *Efploia Shipping Corporation Ltd* v. *Canadian Transport Co Ltd (The Pantanassa)* [1958] 2 Lloyd's Rep 449, 455–457 by Diplock J. It is very different from the New Zealand case where the land had never been used as a sheep farm and both parties were equally able to form an opinion as to its carrying capacity: see particularly *Bisset* v. *Wilkinson* [1927] AC 177, 183–184.

In the present case it seems to me that there was a warranty that the forecast was sound, that is, Esso made it with reasonable care and skill. That warranty was broken. Most negligently Esso made a 'fatal error' in the forecast they stated to Mr Mardon, and on which he took the tenancy. For this they are liable in damages. The judge, however, declined to find a warranty. So I must go further.

Negligent misrepresentation

Assuming that there was no warranty, the question arises whether Esso are liable for negligent misstatement under the doctrine of *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465. ...

It seems to me that *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another—be it advice, information or opinion—with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages. …

p. 302 ↵ Applying this principle, it is plain that Esso professed to have—and did in fact have—special knowledge or skill in estimating the throughput of a filling station. They made the representation—they forecast a throughput of 200,000 gallons—intending to induce Mr Mardon to enter into a tenancy on the faith of it. They made it negligently. It was a 'fatal error'. And thereby induced Mr Mardon to enter into a contract of tenancy that was disastrous to him. For this misrepresentation they are liable in damages.

The measure of damages

Mr Mardon is not to be compensated here for 'loss of a bargain'. He was given no bargain that the throughput *would* amount to 200,000 gallons a year. He is only to be compensated for having been induced to enter into a contract which turned out to be disastrous for him. Whether it be called breach of warranty or negligent misrepresentation, its effect was *not* to warrant the throughput, but only to induce him to enter the contract. So the damages in either case are to be measured by the loss he suffered. Just as in *Doyle* v. *Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167 he can say: 'I would not have entered into this contract at all but for your representation. Owing to it, I have lost all the capital I put into it. I also incurred a large overdraft. I have spent four years of my life in wasted endeavour without reward: and it will take me some time to re-establish myself'.

For all such loss he is entitled to recover damages. It is to be measured in a similar way as the loss due to a personal injury. You should look into the future so as to forecast what would have been likely to happen if he had never entered into this contract: and contrast it with his position as it is now as a result of entering into it. The future is necessarily problematical and can only be a rough-and-ready estimate. But it must be done in assessing the loss.

Shaw LJ

Mr Mardon complained that 'he had been sold a pup'. I think he had; but it was a warranted pup, so that Esso are in breach of warranty and liable in damages accordingly. … Mr Mardon is entitled in my view to damages for breach of warranty or for negligent misrepresentation.

Ormrod LJ delivered a concurring judgment.

Commentary

Esso were found liable to Mr Mardon on two grounds, namely breach of warranty and negligent misrepresentation. We can see that the law of misrepresentation has moved on since *Oscar Chess* was decided because Lord Denning in his judgment here draws upon the decision of the House of Lords in *Hedley Byrne*. Thus the distinction between a term and a misrepresentation was not, as it was in *Oscar Chess*, significant in terms of the *existence* of the right to recover damages. Nor does it appear to have been significant for the *measure* of recovery. The same sum was recoverable by Mr Mardon whether his claim was one for breach of a term of the contract or for negligent misrepresentation. The reason for this was that the warranty found on the facts by the Court of Appeal was a promise that Esso had used reasonable care and skill in making their forecast as to the likely throughput of petrol. It was not a case in which Esso had actually guaranteed that the throughput would reach a given level. Therefore, the appropriate measure of recovery for breach of the term
p. 303 was not the profit Mr Mardon would have made had the projected throughput been reached, but the losses he ↵ had suffered as a result of relying to his detriment on the exercise by Esso of reasonable care and skill in making the projection. This formulation of the warranty given by Esso has been criticized. Thus Professor Taylor argues ('Expectation, Reliance and Misrepresentation' (1982) 45 *MLR* 139, 142) that:

> *Esso* v. *Mardon* provides a good illustration of the court limiting the plaintiff to reliance damages precisely because the gist of his claim is that he has relied on a representation rather than that his expectations have been disappointed. Of course Mr Mardon's expectations were *in fact* disappointed but the Court of Appeal clearly did not think that his was a case where his expectations ought to be legally protected in damages but rather felt that compensation for reliance incurred because of expectations aroused by the forecast was more appropriate. It would have been better to express this by denying that the forecast made by Esso was a warranty, rather than by finding a warranty and then denying that expectation damages were available for it.

8.3.2 Drawing the Threads Together

We can see from the decisions in *Oscar Chess*, *Dick Bentley*, and *Esso* v. *Mardon* that the knowledge of the parties is an important factor when seeking to decide whether or not a statement has been incorporated into a contract as a term. We can also see from the dissenting judgment of Morris LJ in *Oscar Chess* that the importance of the statement is also a relevant factor (in the sense that the more important the statement, the more likely it is that it will be incorporated into the contract as a term). Morris LJ cited as authority for this proposition the decision of the Court of Appeal in *Couchman* v. *Hill* [1947] KB 554. There the plaintiff purchased at an auction a heifer which was described in the sale catalogue as 'unserved'. At the auction the plaintiff asked the defendant vendor and the auctioneer whether the heifer was in fact unserved and was informed by both that she was. The plaintiff then bought the heifer. He later discovered that the heifer was in calf and she died as a result of the strain of carrying a calf at too young an age. The plaintiff brought an action against the defendant claiming damages for breach of warranty. One of the issues in the case was whether the defendant's oral representation at the auction was a warranty or not. The Court of Appeal concluded that it was and, in doing so, had regard to the importance to the plaintiff of the assurance given to him by the defendant that the heifer was unserved.

The range of factors taken into account by the courts extends beyond those we have already identified. The authorities have been helpfully summarized in the following terms in *Anson's Law of Contract* (31st edn, Oxford University Press, 2020, (edited by J Beatson, A Burrows, and J Cartwright), p. 141):

> In endeavouring to reach a conclusion as to the parties' intentions, the Courts can be said to take into account a number of factors, although none is in itself decisive. First, they may have regard to the time which elapsed between the time of making the statement and the final manifestation of agreement; if the interval is a long one, this points to a representation. Secondly, they may consider the importance of the statement in the minds of the parties; a statement which is important is likely to be classed as a term of the contract. Thirdly, if the statement was followed by the execution of a formal contract in writing, it is more likely to be regarded as a representation where it is not
> p. 304 incorporated in the written document. Finally, ↵ where the maker of the statement is, *vis-à-vis* the other party, in a better position to ascertain the accuracy of the statement or has the primary responsibility for doing this, the Courts will tend to regard it as a contractual term.

But even this list is not complete. A further factor taken into account by the courts is whether or not the maker of the statement asks the other party to verify the truth of his statement. Where he does ask the other party to verify its truth it is unlikely that the statement will amount to a term (*Ecay* v. *Godfrey* (1947) 80 Ll LR 286). Conversely, where he states expressly that there is no need to verify its truth, it is more likely that the statement will amount to a term (*Schawel* v. *Reade* [1913] IR 64). It is not possible to define exhaustively the list of factors to which the courts will have regard. But we have been able to identify the principal factors taken into account by the courts. Whether or not a statement is incorporated into a contract as a term depends ultimately upon the facts of the individual case and, as *Oscar Chess* demonstrates, judges can and do differ in the conclusions which they reach in individual cases.

8.4 The Parol Evidence Rule

The second issue that arises for consideration concerns the situation where the parties have reduced their contract to writing. In such a case is it possible for them to lead evidence of terms other than those contained in their written contract or does the written contract constitute the sole repository of the terms of their contract? This is not an easy question to answer. The answer depends upon the scope of what is generally referred to as the 'parol evidence rule'. The scope of this rule is a matter of some controversy. One view is that the rule amounts to no more than this: that in the case where the parties intend that the written document shall contain all the terms of their contract it is not possible to lead evidence for the purpose of adding to, varying, subtracting from, or contradicting the terms contained in that document. An alternative view is that the rule does not rest on the intention of both parties but consists of a presumption made by the court that a document that looks like the whole contract is in fact the whole contract so that it is not possible to lead evidence for the purpose of adding to, varying, subtracting from, or contradicting the terms contained in the written document. Two contrasting views of the rule are set out in the following passages:

Law Commission No 154, *Law Of Contract: The Parol Evidence Rule* (1986)

Nature of the parol evidence rule

2.6. So far as we are aware, no English or Commonwealth court has ever found it necessary to analyse the parol evidence rule in detail as to its applicability, width and effect. In the cases in which the rule has been mentioned, it has generally been in terms which seem to indicate that the judge thought it was both obvious and well known. For the purpose of deciding whether the parol evidence rule should be abolished or amended by statute, it has been necessary to analyse the rule in detail. We had to be clear as to what the rule was which might be abolished, amended or declared.

p. 305

2.7. We have now concluded that although a proposition of law can be stated which can be described as the 'parol evidence rule' it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract. We have considerable doubts whether such a proposition should properly be characterised as a 'rule' at all, but several leading textbook writers and judges have referred to it as a 'rule' and we are content to adopt their terminology for the purposes of this report.

2.8. Our conclusion as to the nature of the parol evidence rule is no new theory. The opinions of some leading textbook writers, who reached a similar conclusion long before we approached the subject, confirm us in our view that the parol evidence rule is no more than as we have stated above. ...

2.9. The two principal reasons which have led us to our conclusion on the nature of the parol evidence rule are, in substance, two aspects of the same process of reasoning.

2.10. The first relates to the circumstances in which the rule is to be applied. In our view, some statements of the rule may have given rise to misunderstandings because they have concentrated on the effect of the rule rather than when it is to be applied. The effect of the rule is to exclude evidence or to cause the judge to ignore the evidence if given. As to the application of the rule, Lord Morris' statement in Bank of *Australasia* v. *Palmer* refers to the inadmissibility of parol evidence to 'contradict, vary, add to or subtract from the terms of a written contract'. Thus, the rule can only be applied where the parties have entered into a written contract when 'the writing is intended by the parties as a contractual document which is to contain all the terms of their agreement'. When the parties have set down all the terms of their contract in writing, extrinsic evidence of other terms must be ignored. If the contract is not entirely in writing, it is not a written contract. ... If it is proved or admitted that all the terms of the contract have been set out in a particular document or documents, then evidence of other terms must be irrelevant and therefore inadmissible, because inconsistent with the finding that the parties have entered into a written contract.

2.11. The second reason for our conclusion as to the nature of the parol evidence rule is exemplified by the concept of the contract which is made partly orally and partly in writing. ...

2.12. Because a contract can be made partly orally and partly in writing, the mere production of a contractual document, however complete it may look, cannot as a matter of law exclude evidence of oral terms if the other party asserts that such terms were agreed. If that assertion is proved, evidence of the oral terms cannot be excluded because the court will, by definition, have found that the contractual terms are partly to be found in what was agreed orally as well as in the document in question. No parol evidence rule could apply. On the other hand, if that assertion is not proved, there can be no place for a parol evidence rule because the court will have found that all the terms of the contract were set out in the document in question and, by implication, will thereby have excluded evidence of terms being found elsewhere. ...

2.13. Of course, the more the parties have done to create what appears to be a written contract, the greater are the probabilities that the court will conclude that they did indeed make such a contract. In this connection, in considering the parol evidence rule in 1959, Professor Lord Wedderburn concluded that,

p. 306

> 'What the parol evidence rule has bequeathed to the modern law is a presumption —namely that a document which *looks* like a contract is to be treated as the *whole* contract.'

While we have no doubt that this statement accurately reflects the practical effect of the parol evidence rule as we now believe it to be, the presumption (which can be displaced by evidence) is not a rule of law laying down whether a particular type of evidence should be admitted or, if it is admitted, whether the court should give effect to it. Moreover, we do not think that in this context it is strictly correct to refer to a 'presumption'. In reaching a conclusion as to whether a document which looks like a complete contract was the whole contract, the court does not apply any presumption of law. Rather, it will reach its conclusion on the evidence tendered, applying to its judgment the prima facie probability derived from its experience of how people normally behave in a given situation. For example, if the plaintiff proves that the parties signed a document, such as a complicated lease of a commercial chattel, which document appears to be a complete contract and which is in a form generally adopted for setting out all the contractual terms, it may be difficult in practice for the defendant to prove, on the balance of probabilities, that terms were orally agreed in addition to those set out in the document.

2.14. The issue whether parties intended that the whole of their agreement should be as recorded in a particular document or documents is to be judged objectively. The court is not concerned with whether both parties, in their minds, intended the writing to contain the whole of the agreement between them but whether, having regard to what was said or done, and to what documents were signed and exchanged, and when, a reasonable person

> would have understood the writing to contain the whole of the agreement. A party is not permitted to give evidence of his private but uncommunicated intention as to what was to be agreed, or as to what the written agreement was to mean.
>
> 2.15. Sometimes parties may include in their contracts a clause to the effect that the whole contract is contained in the document and that nothing was agreed outside it (sometimes called a 'merger' or 'integration' clause). In particular, it may be provided that nothing said during negotiations is intended to be of any contractual effect unless recorded in the document. Without legislative provision such a clause cannot, we think, have conclusive effect. It may have a very strong persuasive effect but if it were proved that, notwithstanding the clause, the parties actually intended some additional term to be of contractual effect, the court would give effect to that term because such was the intention of the parties. If the parties intended that the additional term should have been recorded in the document, the contract could be rectified. If it had been their intention that the term should be of contractual effect but not be included in the document, the analysis likely to be adopted by the court is that the parties agreed a collateral contract alongside the written one. But if it were proved that the intention of the parties was to make one contract partly in writing and partly orally, the court would give effect to that contract. The parties might have been aware of the integration clause when they agreed the additional terms but have agreed to ignore it, or they might have forgotten about the clause or never read it. Whatever the reason for there being an integration clause and additional terms, the court will give effect to the intention of the parties as it is proved or admitted to have been. …
>
> 2.17. The conclusion which emerges from the discussion above is that there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law.

p. 307 ↵ Treitel states by way of reply:

GH Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 6-022

> It has been argued [by the Law Commission] that the right of a party to rely on extrinsic evidence … turns the parol evidence rule (as applied to contracts) into 'no more than a circular statement'. For if the rule applies only where the written document is intended to contain *all* the terms of the contract, evidence of other terms would be useless even if admitted (since they would not form part of the contract); while the rule never prevents a party from relying on evidence of terms which *were* intended to be part of the contract. Accordingly, on this view, no injustice is caused by the operation of the rule. There is much force in this view in cases in which, at the time of contracting, both parties actually shared a common intention with regard to the term in question. But in most cases in which the rule is invoked this is not the position: the dispute arises precisely because the parties had different intentions, and one alleges, while the other denies, that terms not set out in the document were intended to form part of the contract. In such cases, the court will attach importance to the appearance of the document: if it *looks* like a complete contract to one of the parties taking a reasonable view of it, then the rule will prevent the other party from relying on extrinsic evidence to show that the contract also contained other terms.
>
> This result has been described as being simply an application of the objective test of agreement; but, even if it can be so regarded, it is such a common and frequently recurring application of this test as to amount to an independent rule. In cases of the present kind, moreover, the law goes beyond the normal objective test. That test normally requires the party relying on it to prove that he reasonably believed that the other party was contracting on the terms alleged. Where a document *looks* like a complete contract, the party relying on it does not have to prove that he had such a belief: he can rely on a presumption to that effect which it is up to the other party to rebut. As laymen are known to attach greater importance than the law does to writing in a contractual context, it will be hard for the party relying on extrinsic evidence to rebut the presumption that the written document was an exclusive record of the terms agreed. Moreover, the objective test normally prevents a party from relying on his 'private but uncommunicated intention as to what was to be agreed'. The presumption which applies in the case of an apparently complete contractual document goes beyond this: it prevents a party from relying on evidence of intention that was not 'private and uncommunicated' at all, but simply not recorded in the document.
>
> For these reasons, it is submitted that the admissibility of extrinsic evidence, where it is proved that the document was not in fact intended to contain all the terms of the contract, does not turn the rule into a merely 'circular statement'. Whether it also supports the conclusion that the rule is not one that 'could lead to evidence being unjustly excluded' is perhaps more doubtful. The primary purpose of the rule, like that of the objective test of agreement, is to promote certainty, sometimes even at the expense of justice. Where the parties have brought into being an apparently complete contractual document, the rejection of evidence of extrinsic terms that were actually agreed may cause injustice to the party relying on those terms, while the reception of such evidence may cause injustice to the other party, if he reasonably believed that the document formed an exclusive record of the contract. The question is which, on balance, is the greater injustice. Where the evidence is rejected because the party relying on it cannot overcome the presumption arising from the fact that the document *looks*

> like a complete contract, the greater injustice would appear to lie in the exclusion of the evidence; for the presumption seems to be based on the nature and form of the document, rather than on any actual belief of the party relying on it, that it formed an exclusive record of the contract.

p. 308

Commentary

The difference between these two views is not as stark as might at first sight appear. The reason for this is that any presumption that a document that looks like the whole contract is the whole contract does not appear to be a particularly strong one. This brings Treitel's view much closer to that of the Law Commission in the sense that it seems unlikely that the presumption will preclude a party from leading evidence of terms which it is argued were intended to be part of the contract. The modern court is more likely to admit the evidence and evaluate its significance than declare it to be inadmissible.

In any event, it is clear that the parol evidence rule, whatever its true scope, is the subject of a number of exceptions. For example, evidence is admissible to prove a custom (*Hutton* v. *Warren* (1836) 1 M & W 466, see 10.3), to show that the contract is invalid on a ground such as misrepresentation, to show that the document should be rectified, and to prove the existence of a collateral agreement (*City and Westminster Properties (1934) Ltd* v. *Mudd* [1959] Ch 129).

The final point to be made relates to the wisdom of this drift towards the admissibility of such evidence and the desirability of leaving it to the court to evaluate its significance. There has been a commercial reaction against this trend, largely because it is said to promote uncertainty. The Law Commission at paragraph 2.15 of their report (extracted earlier) refer to 'merger' or 'integration' clauses. These clauses are often referred to today as 'entire agreement clauses'. We shall encounter them in more detail later (see 12.3.10). Here it suffices to note that the purpose of these clauses is generally to shut out evidence that the parol evidence rule would probably have excluded in the past. So evidence that is now admissible as a matter of law is sought to be excluded from judicial consideration by contractual stipulation. The Law Commission state that such provisions cannot have 'conclusive effect'. The scope of an entire agreement clause is a question of interpretation of the particular clause which has been agreed between the parties. Where the effect of the clause is to identify the terms of the contract and to prevent a party from asserting that there are other terms to the contract not to be found in the written agreement, the courts are more likely to give effect to the clause and to exclude the term sought to be added to the written document. But in the case where the effect of the clause is claimed to be to defeat a claim in misrepresentation that otherwise would exist, the courts have been much more hesitant and any such clause is likely to be subject to challenge under section 3 of the Misrepresentation Act 1967 if it is unreasonable (see *First Tower Trustees Ltd v. CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, see 17.6). But the drafting of entire agreement clauses is a matter of great difficulty and the time and expense that is devoted by commercial parties and their lawyers to the drafting of such clauses tends to suggest that the relaxation of the parol evidence rule that has taken place over the last 100 years or more might not necessarily have been a desirable development.

Further Reading

CARTWRIGHT, J, *Misrepresentation, Mistake and Non-Disclosure* (6th edn, Sweet & Maxwell, 2022), ch. 8.

LAW COMMISSION, Report No 154, *Law of Contract: The Parol Evidence Rule* (1986).

STEVENS, R, 'Objectivity, Mistake and the Parol Evidence Rule' in A BURROWS AND E PEEL (eds), *Contract Terms* (Oxford University Press, 2007), pp. 101, 107–110.

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Notes

[1] Here leaving to one side the decision of the House of Lords in *Nocton* v. *Lord Ashburton* [1914] AC 932.