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4. Uncertain and Incomplete Agreements

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Abstract

The parties to agreements sometimes express themselves in terms that are vague, incomplete, or uncertain. The courts have experienced considerable difficulty in deciding whether or not an agreement has been expressed in a form that is sufficiently certain for them to enforce. On the one hand, judges generally do not wish to be seen to be making the contract for the parties, and on the other hand, are reluctant to deny legal effect to an agreement that the parties have apparently accepted as valid and binding. The result has been a degree of tension in the case-law. This chapter examines two groups of cases. The first group consists of cases in which it was held that the agreement was too uncertain or too vague to be enforced, while the second comprises a number of cases in which the courts have concluded that the agreement was valid and binding.

Keywords: English contract law, vagueness, uncertainty, incompleteness, agreement to agree

Central Issues

1. The courts will not generally make the contract for the parties. It is for the parties to make their contract and they must express their agreement in a form that is sufficiently certain for the courts to be able to enforce it.
2. The courts have experienced considerable difficulty in the cases in deciding whether or not an agreement has been expressed in a form that is sufficiently certain for them to enforce. On the one hand, the judges generally do not wish to be seen to be making the contract for the parties.

On the other hand, they are reluctant to deny legal effect to an agreement that the parties have apparently accepted as valid and binding. The result has been a degree of tension in the case-law. This is particularly so in relation to 'agreements to agree'. The view taken by the House of Lords in a case decided more than eighty years ago is that an agreement to agree is not enforceable. However, courts in other jurisdictions have recognized the validity of such agreements and many commentators and commercial practitioners have argued that English law should now do so as well. The competing views in this debate are considered in this chapter.

3. An agreement is less likely to be held to be too vague or too uncertain where it contains within it criteria or machinery that the court can use in order to resolve the uncertainty or to clarify the word or phrase that is expressed in vague terms. For example, the agreement can provide that the uncertainty or doubt is to be resolved by one of the contracting parties or by a third party (provided that the third party is not a judge sitting in a court of law). The court may also be able to imply a term into the agreement in order to fill the gap that was left by the parties or it may be able to cut out (or 'sever') the term that is alleged to be too uncertain or too vague and enforce the rest of the agreement.

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4.1 Introduction

It sometimes happens that parties to agreements express themselves in terms that are vague, incomplete, or uncertain. Does an agreement expressed in such terms amount to an enforceable contract? This question does not admit of an easy answer, largely because it cannot be answered in black and white terms. A great deal depends on the facts of the individual case. Further, the question which the courts ask themselves is whether or not the agreement is 'sufficiently certain' to be enforced and sufficiency involves questions of degree. The result has been a degree of inconsistency in the case-law, with some judges appearing to be more willing than others to find the existence of a contract notwithstanding the fact that the agreement between the parties was expressed in terms that were in some way vague, incomplete, or uncertain.

The tension in the case-law can be easily stated, if not easily resolved. On the one hand, the courts insist that it is not their function to make the contract for the parties. It is for the parties to make the contract, and the task of the courts is simply to interpret the contract and, where necessary, enforce it or grant remedies for its breach. On the other hand, the courts do not wish to incur the reproach of the commercial community by denying legal effect to an agreement that has been reached by commercial parties, was regarded by them as a binding agreement, and, possibly, had been acted upon over a period of time. This tension is particularly acute where the parties expressly recognize that they have not reached agreement on a particular issue but have reached agreement on a number of other points. In such a case should a court conclude that the agreement is not enforceable on the ground that the parties have failed to reach agreement or on the ground that it is not the function of the court to make the agreement for the parties? Or should the court nevertheless give legal effect to the agreement concluded between the parties even though it was expressed in the form of an agreement to reach an agreement? An example will illustrate the point. Clause 1 of the contract between the parties in *Foley* v. *Classique Coaches Ltd* [1934] 2 KB 1 provided as follows:

> The vendor shall sell to the company and the company shall purchase from the vendor all petrol which shall be required by the company for the running of their said business at a price to be agreed by the parties in writing and from time to time.

A dispute broke out between the parties and one of the issues between them was whether or not the agreement to supply petrol to the purchasers was valid and binding despite their failure to reach agreement on the price at which the petrol was to be sold. The purchasers argued that it was not binding. They submitted that the parties had failed to reach agreement on the price and it was not the function of the courts to make the contract for the parties. The vendors, on the other hand, relied on the fact that the parties had acted on the basis of this agreement for three years and the fact that the agreement contained an arbitration clause which covered a failure to agree the price at which the petrol was to be sold. The Court of Appeal came down on the side of the vendors and held that the agreement was valid and binding. Greer LJ stated (at p. 11) that, 'in order to give effect to what both parties intended the Court is justified in implying that in the absence of agreement as to price a reasonable price must be paid, and if the parties cannot agree as to what is a reasonable price then arbitration must take place'.

The task of the Court of Appeal in *Foley* was made more difficult by the fact that, in the words of Scrutton LJ
p. 127 (at p. 9), 'a good deal of the case turns upon the effect of two ↵ decisions of the House of Lords which are not easy to fit in with each other'. The first of these decisions is *May and Butcher Ltd* v. *The King* [1934] 2 KB 17n, a case decided in 1929 but not reported until 1934, while the second is *Hillas & Co Ltd* v. *Arcos Ltd* (1932) 147 LT 503. These two cases remain leading cases and their relationship is an uneasy one. It is therefore important to commence our analysis by considering these two cases and their relationship with each other.

May and Butcher Ltd v. The King
[1934] 2 KB 17n, House of Lords

May and Butcher Ltd, the suppliants[1] (also referred to in the judgments as the appellants), alleged that they had concluded an agreement with the Controller of the Disposals Board under which they agreed to buy the whole of the tentage which might become available in the United Kingdom for disposal up to 31 March 1923. On 29 June 1921, the Controller wrote to the suppliants stating that:

> 'in consideration of your agreeing to deposit with the [Disposals & Liquidation] Commission the sum of 1000l. as security for the carrying out of this extended contract, the Commission hereby confirm the sale to you of the whole of the old tentage which may become available … up to and including December 31, 1921, upon the following terms:
>
> (1) The Commission agrees to sell and [the suppliants] agree to purchase the total stock of old tentage. …
>
> (2) The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission.
>
> (3) Delivery … shall be taken by the purchasers in such period or periods as may be agreed upon between the Commission and the purchasers when such quantities of old tentage are offered to the purchasers by the Commission. …
>
> (4) It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889.'

In a second letter, dated 7 January 1922, the Disposals Controller confirmed the sale to the suppliants of the tentage that might become available for disposal up to 31 March 1923. This letter, which varied in certain respects the earlier terms, stated that 'the prices to be agreed upon between the Commission and the purchasers in accordance with the terms of clause 3 of the said earlier contract shall include delivery free on rail … nearest to the depots at which the said tentage may be lying'.

In August 1922, after the suppliants had made proposals to purchase tentage that were not acceptable to the Controller, the Disposals Board wrote to the suppliants and stated that they considered themselves no longer bound by the agreement. The suppliants then filed their petition of right in which they claimed (i) an injunction restraining the Commission from disposing of the remainder of the tentage to anyone other than the suppliants, and (ii) an account of the tentage that had become available and compensation for the damage done to them. Their petition was dismissed by the House of Lords.

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Lord Buckmaster

The points that arise for determination are these: Whether or not the terms of the contract were sufficiently defined to constitute a legal binding contract between the parties. The Crown says that the price was never agreed. The suppliants say first, that if it was not agreed, it would be a reasonable price. Secondly, they say that even if the price was not agreed, the arbitration clause in the contract was intended to cover this very question of price, and that consequently the reasonableness of the price was referred to arbitration under the contract. ...

My Lords, those being the contentions, it is obvious that the whole matter depends upon the construction of the actual words of the bargain itself.

[He set out various terms of the correspondence that had passed between the parties and continued]

What resulted was this: it was impossible to agree the prices, and unless the appellants are in a position to establish either that this failure to agree resulted out of a definite agreement to buy at a reasonable price, or that the price had become subject to arbitration, it is plain on the first two points which have been mentioned that this appeal must fail.

In my opinion there never was a concluded contract between the parties. It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined. It has been argued that as the fixing of the price has broken down, a reasonable price must be assumed. That depends in part upon the terms of the Sale of Goods Act, which no doubt reproduces, and is known to have reproduced, the old law upon the matter. That provides in s. 8 that 'the price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price'; while, if the agreement is to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, s. 9 says that the agreement is avoided. I find myself quite unable to understand the distinction between an agreement to permit the price to be fixed by a third party and an agreement to permit the price to be fixed in the future by the two parties to the contract themselves. In principle it appears to me that they are one and the same thing. ...

The next question is about the arbitration clause, and there I entirely agree with the majority of the Court of Appeal and also with Rowlatt J. The clause refers 'disputes with reference to or arising out of this agreement' to arbitration, but until the price has been fixed, the agreement is not there. The arbitration clause relates to the settlement of whatever may happen when the agreement has been completed and the parties are regularly bound. There is nothing in the arbitration clause to enable a contract to be made which in fact the original bargain has left quite open.

Viscount Dunedin

I am of the same opinion. This case arises upon a question of sale, but in my view the principles which we are applying are not confined to sale, but are the general principles of the law of contract.
p. 129 To be a good contract there must be a concluded bargain, and a concluded ↵ contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. In the system of law in which I was brought up,[2] that was expressed by one of those brocards of which perhaps we have been too fond, but which often express very neatly what is wanted: 'Certum est quod certum reddi potest'.[3] Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else. As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract. It may be left to the determination of a certain person, and if it was so left and that person either would not or could not act, there would be no contract because the price was to be settled in a certain way and it has become impossible to settle it in that way, and therefore there is no settlement. No doubt as to goods, the Sale of Goods Act, 1893, says that if the price is not mentioned and settled in the contract it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point and here there is no silence, because there is a provision that the two parties are to agree. As long as you have something certain it does not matter. For instance, with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer. I have not had time, or perhaps I have not been industrious enough, to look through all the books in England to see if there is such a case; but there was such a case in Scotland in 1760, where it was decided that a sale of a landed estate was perfectly good, the price being left to be settled by the buyer himself. I have only expressed in other words what has already been said by my noble friend on the Woolsack. Here there was clearly no contract. There would have been a perfectly good settlement of price if the contract had said that it was to be settled by arbitration by a certain man, or it might have been quite good if it was said that it was to be settled by arbitration under the Arbitration Act so as to bring in a material plan by which a certain person could be put in action. The question then arises, has anything of that sort been done? I think clearly not. The general arbitration clause is one in very common form as to disputes arising out of the arrangements. In no proper meaning of the word can this be described as a dispute arising between the parties; it is a failure to agree, which is a very different thing from a dispute.

Lord Warrington of Clyffe delivered a concurring judgment.

Hillas & Co Ltd v. Arcos Ltd
(1932) 147 LT 503, House of Lords

By an agreement dated 21 May 1930 the appellants agreed to buy from the respondents '22,000 standards of softwood goods of fair specification over the season 1930' subject to a number of conditions, one of which, clause 9, was in the following terms:

> 'Buyers shall also have the option of entering into a contract with sellers for the purchase of
> p. 130 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the
> ↵ conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5%. on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before the 1st Jan. 1931.'

The appellants purported to exercise the option on 22 December 1930 but the respondents had already agreed to sell the whole of the output of the 1931 season to a third party. The appellants sued for damages for breach of contract but were met by the defence that the document of 21 May 1930 did not constitute an enforceable agreement because it did not contain a sufficient description of the goods to be sold to enable them to be identified and it contemplated in the future some further agreement upon essential terms. The House of Lords rejected the defence and held that, the option having been exercised, the agreement was complete and binding in itself and was not dependent on any future agreement for its validity.

Lord Tomlin

In the present case one or two preliminary observations fall to be made.

First, the parties were both intimately acquainted with the course of business in the Russian softwood timber trade, and had without difficulty carried out the sale and purchase of 22,000 standards under the first part of the document of the 21st May 1930;

Secondly, although the question here is whether Clause 9 of the document of the 21st May 1930, with the letter of 22nd Dec. 1930, constitutes a contract, the validity of the whole of the document of the 21st May 1930 is really in question so far as the matter depends upon the meaning of the phrase 'of fair specification'; and,

Thirdly, it is indisputable, having regard to clause 11, which provides that 'this agreement cancels all previous agreements', that the parties intended by the document of 21st May 1930 to make, and believed that they had made, some concluded bargain.

The case against the appellants is put on two grounds.

First, it is said that there is in Clause 9 no sufficient description of the goods to be sold; and

Secondly, it is said that clause 9 contemplates a future bargain the terms of which remain to be settled.

As to the first point it is plain that something must necessarily be implied in clause 9. The words '100,000 standards' without more do not even indicate that timber is the subject matter of the clause. The implication at the least of the words 'of softwood goods' is in my opinion inevitable, and if this is so I see no reason to separate the words 'of fair specification' from the words 'of softwood goods'. In my opinion, there is a necessary implication of the words 'of softwood goods of fair specification' after the words '100,000 standards' in clause 9.

What, then, is the meaning of '100,000 standards of softwood goods of fair specification for delivery during 1931'?

If the words 'of fair specification' have no meaning which is certain or capable of being made certain, then not only can there be no contract under clause 9 but there cannot have been a contract with regard to the 22,000 standards mentioned at the beginning of the document of the 21st May 1930. This may be the proper conclusion, but before it is reached it is, I think, necessary to exclude as impossible all reasonable meanings which would give certainty to the words. In my opinion, this cannot be done.

The parties undoubtedly attributed to the words in connection with the 22,000 standards, some meaning which was precise or capable of being made precise. ...

Reading the document of 21st May 1930 as a whole, and having regard to the admissible evidence as to the course of the trade, I think that upon their true construction the words 'of fair specification
p. 131 over the season 1930,' used in connection with the 22,000 standards, mean ↵ that the 22,000 standards are to be satisfied in goods distributed over kinds, qualities and sizes in the fair proportions, having regard to the output of the season 1930 and the classifications of that output in respect of kinds, qualities and sizes. That is something which if the parties fail to agree can be ascertained just as much as the fair value of a property.

I have already expressed the view that clause 9 must be read as '100,000 standards of fair specification for delivery during 1931,' and these words, I think, have the same meaning, *mutatis mutandis*,[4] as the words relating to the 22,000 standards. Thus, there is a description of the goods which if not immediately yet ultimately is capable of being rendered certain.

The second point upon clause 9, that it contemplates a future agreement, remains to be considered.

The form of the phrases 'the option of entering into a contract' and 'such contract to stipulate that' upon which stress has been laid by the respondents seems to me unimportant. These phrases are but an inartificial way of indicating that there is no contract till the option is exercised. The sentence that such contract is to stipulate that whatever the conditions are the buyers are to obtain the goods at a certain reduction is more difficult. The words 'whatever the conditions are' being governed by the word 'that' which follows the words 'to stipulate' must be intended to be part of the contract. If so the word 'conditions' cannot mean terms of the contract, but must connote some extrinsic condition of affairs, and the condition of affairs referred to is, I think, the conditions as to supply and demand which may prevail during 1931.

> Upon this view of the matter it cannot, I think, be said that there is nothing more than an agreement to make an agreement.
>
> It is also urged as a minor point that there was no provision as to shipment, and that this was an essential of such a contract. I am not prepared without further consideration to accept the view that in the absence of a provision in relation to shipment there can be no contract in law in such a case as the present.
>
> In my opinion, however, the point does not arise here. Clause 9 is one of the clauses containing the conditions upon which the sale of the 22,000 standards is made. This fact, together with the presence of the word 'also' in clause 9, satisfies me that upon the true construction of the document the sale conditions in relation to the 22,000 standards are so far as applicable imported into the option for the sale of this 100,000 standards, and in particular that clause 6, relating to shipping dates and loading instructions, is so imported.
>
> Reference was made in the course of the arguments before your Lordships and in the judgments in the Court of Appeal to the unreported[5] case before your Lordships' House of *May & Butcher, Ltd* v. *Rex*.
>
> In the agreement there under consideration there was an express provision that the price of the goods to be sold should be subsequently fixed between the parties. Your Lordships' House reached the conclusion that there was no contract, rejecting the appellants' contention that the agreement should be construed as an agreement to sell at the fair or reasonable price or alternatively at a price to be fixed under the arbitration clause contained in the agreement.
>
> That case does not, in my opinion, afford any assistance in determining the present case, the result of which must depend upon the meaning placed upon the language employed ...

Lord Wright

The document of the 21st May 1930 cannot be regarded as other than inartistic, and may appear repellent to the trained sense of an equity draftsman. But it is clear that the parties both intended to
p. 132 make a contract and thought they had done so. Business men often record ↵ the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the court should seek to apply the old maxim of English law *verba ita sunt intelligenda ut res magis valeat quam pereat*.[6] That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus, in contracts for future performance over a period the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that

> implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced, if the fair meaning of the parties can be extracted.
>
> [Lord Wright proceeded to consider the construction of the words used in some detail and concluded]
>
> In the result, I arrive at the same conclusion as MacKinnon, J, viz., that the contract is valid and enforceable and that the appellants are entitled to recover damages from the respondents for its repudiation.
>
> ***Lord Thankerton***, ***Lord Warrington***, and ***Lord Macmillan*** concurred in the judgment delivered by Lord Tomlin.

Commentary

The spirit of the judgments in *Hillas* appears to stand in marked contrast to the tenor of the judgments in *May and Butcher*. The modern perception tends to be that the House of Lords in *May and Butcher* adopted an unduly restrictive approach and that it should be kept within narrow confines, if not overruled. This sentiment was expressed by Blanchard J, giving the judgment of the Court of Appeal of New Zealand, in *Fletcher Challenge Energy Ltd* v. *Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433. He stated (at pp. 446–447):

> Something should be said about the place that the controversial decision of the House of Lords in *May and Butcher Ltd* v. *The King* [1934] 2 KB 17n has in the modern law of contract. We take the view that this case is no longer to be regarded as authority for any wider proposition than that an 'agreement' which omits an essential term (or, as Lord Buckmaster called it, 'a critical part'), or a means of determining such a term does not amount to a contract. No longer should it be said, on the basis of that case, that *prima facie*, if something essential is left to be agreed upon by the parties at a later time, there is no binding agreement. The intention of the parties, as discerned by the Court, to
> p. 133 be bound or not to be bound should be ↵ paramount. If the Court is satisfied that the parties intended to be bound, it will strive to find a means of giving effect to that intention by filling the gap. On the other hand, if the Court takes the view that the parties did not intend to be bound unless they themselves filled the gap (that they were not content to leave that task to the Court or a third party), then the agreement will not be binding.
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> On its own facts we respectfully doubt that *May and Butcher* would be decided by their Lordships in the same way today. We are now perhaps more accustomed to resort to arbitration in order to settle matters of considerable importance to the contracting parties. We find curious the notion that, in a commercial contract where price is left to be agreed, a reasonable price cannot be fixed and that, even where there is an arbitration clause, that clause cannot be used to determine the price because 'unless the price has been fixed, the agreement is not there'.
>
> We agree with Professor McLauchlan ('Rethinking Agreements to Agree' (1998) 18 *NZULR* 77, 85) that 'an agreement to agree will not be held void for uncertainty if the parties have provided a workable formula or objective standard or a machinery (such as arbitration) for determining the matter which has been left open'. We also agree with him that the court can step in and apply the formula or standard if the parties fail to agree or can substitute other machinery if the designated machinery breaks down.

One feature of this passage from the judgment of Blanchard J is the emphasis that it places upon the issue of whether or not the parties intended to be bound by the agreement they have concluded (on which see further 7.4.2). In other words, instead of asking the question whether or not the agreement reached by the parties was sufficiently certain to constitute an enforceable contract, the court should ask itself whether or not the parties intended to be bound by their agreement. In this way lack of certainty ceases to be a distinct issue in itself and instead is subsumed within a wider inquiry as to the intention of the parties. The difficulty with the latter approach is its lack of precision and this may itself give rise to uncertainty!

But it does at least point in the right direction, in the sense that where the parties did, objectively, intend to be bound and performance has taken place, the courts are much more likely to conclude that the parties have entered into a legally binding contract. An illustration is provided by the decision of the Supreme Court in *Wells* v. *Devani* [2019] UKSC 4, [2020] AC 129. The defendant developer, who was having some difficulty selling some properties, was put in contact with the claimant estate agent. During the course of a telephone conversation the claimant stated that his standard fees were 2 per cent plus VAT, but no express mention was made of the circumstance that would trigger the obligation to pay the fee. The claimant then contacted a housing association who agreed, subject to contract, to buy the properties and the sale of the properties was subsequently completed. The defendant denied that the parties had entered into a contract because of their

failure to agree the point in time at which the commission was to be paid. The Court of Appeal held that no contract had been concluded for this reason but their finding was overturned on appeal to the Supreme Court. The leading judgment was given by Lord Kitchin who stated:

> 18. It may be the case that the words and conduct relied upon are so vague and lacking in specificity that the court is unable to identify the terms on which the parties have reached agreement or to attribute to the parties any contractual intention. But the courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement. …
>
> p. 134 19. It is true that, as the judge found, there was no discussion of the precise event which would give rise to the payment of that commission but, absent a provision to the contrary, I have no doubt it would naturally be understood that payment would become due on completion and made from the proceeds of sale. Indeed, it seems to me that is the only sensible interpretation of what they said to each other in the course of their telephone conversation … and the circumstances in which that conversation took place. In short, Mr Devani [the claimant] and Mr Wells [the defendant] agreed that if Mr Devani found a purchaser for the flats he would be paid his commission. He found Newlon [the housing association] and it became the purchaser on completion of the transaction. At that point, Mr Devani became entitled to his commission and it was payable from the proceeds of sale.

In many ways *Wells* should have been a clear-cut case, given that the transaction had proceeded through to completion and the choice of the date of completion as the trigger date for payment when payment would be made out of the proceeds of the sale protected the legitimate interests of the defendant (which might not have happened had the earlier date of exchange been identified as the trigger date). However, it proved not to be a straightforward case because it was necessary to take the case all the way up to the Supreme Court in order to overturn the decision of the Court of Appeal that no contract had been concluded.

The reality appears to be that judges do find it difficult to know where to draw the line. As an illustration of the difficulties involved it is instructive to examine the judgment of Scrutton LJ in the Court of Appeal in *Hillas*. Scrutton LJ had also been one of the judges in the Court of Appeal in *May and Butcher* where, in a dissenting judgment, he had expressed the view that the agreement between the parties was enforceable. He returned to this issue in his judgment in *Hillas* (at p. 506) in the following terms:

> I am afraid I remain quite impenitent. I think it was right and that nine out of ten business men would agree with me. But of course I recognise that I am bound as a judge to follow the principles laid down by the House of Lords. But I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart, with the result that commercial business is leaving the courts and is being decided by commercial arbitrators with infrequent reference to the courts. … The commercial man does not think there can be no contract to make a contract when every day he finds a policy ‘premium to be agreed’ treated by the law as a contract.

The force with which this view was expressed might lead us to believe that he would have upheld the validity of the agreement in *Hillas*. But this is not in fact the case. In his view, the agreement was not enforceable. He stated (at p. 506):

> In my view, *apart from authority*, considering the number of things left undetermined, kinds, sizes and quantities of goods, times and ports and manner of shipment, as will be seen from the detailed terms in contracts which were agreed, but which had in this case to be determined by agreement after negotiation, the option clause was not an agreement, but … 'an agreement to make an agreement' which is not an enforceable agreement. [Emphasis added.]

Thus Scrutton LJ thought that the agreement in *May and Butcher* was enforceable but that the agreement in *Hillas* was not, whereas the House of Lords adopted the opposite view in both cases. This difference of view
p. 135 serves to illustrate the problem of distilling clear and ↵ coherent principles from the case-law. Professor Macneil has described the attempt to find 'coherent principles' in the agreement to agree cases as 'a fool's errand' (Macneil in 'Biographical Statement' in D Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001)). In this respect he is probably right. Much will depend on the facts of the individual case (a point emphasized by Rix LJ in *Mamidoil-Jetoil Greek Petroleum Company SA* v. *Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 76, [69]). The parties are unlikely to have reached agreement on every single matter and so the court must decide in each case whether there is *sufficient* evidence of agreement to enable it to reach the conclusion that the agreement is valid and binding. If they have failed to reach agreement on what the court deems to be an essential term of the contract, the court may conclude that the parties have not in fact entered into a legally binding contract (as demonstrated by cases such as *Teekay Tankers Ltd* v. *STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm), [2017] 1 Lloyd's Rep 387), or that the particular term sought to be enforced is no more than an agreement to agree and so is unenforceable (*Morris* v. *Swanton Care & Community Ltd* [2018] EWCA Civ 2763). On the other hand, while this inquiry is in many respects fact-specific, it is nevertheless possible to identify some factors that are taken into account by the courts in deciding whether or not an agreement is valid and enforceable (see, for example, the judgment of Rix LJ in *Mamidoil-Jetoil Greek Petroleum Company SA* v. *Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 76, [69] and the judgment of Chadwick LJ in *BJ Aviation Ltd* v. *Pool Aviation Ltd* [2002] 2 P & CR 25, [19]–[24]).

The cases will now be divided into two groups. The first group consists of cases in which it was held that the agreement was too uncertain or too vague to be enforced, while the second group comprises a number of cases in which the courts have concluded that the agreement was valid and binding.

4.2 Cases in Which it Has Been Held that the Agreement is too Vague or Uncertain to Be Enforced

The leading case in this category is undoubtedly the decision of the House of Lords in *May and Butcher* v. *The King* (discussed earlier). But there are other examples. It suffices for our purposes to provide one further illustration.

Scammell and Nephew Ltd v. Ouston
[1941] AC 251, House of Lords

The defendants (appellants) wrote to the plaintiffs (respondents) and offered to sell them a Commer van for £268 and to take the plaintiffs' Bedford van in part exchange, allowing them the sum of £100 for the Bedford van. The parties agreed these terms at an interview. The following day the defendants wrote to the plaintiffs and asked them to place the official order for the van in order to enable them to complete their records. The plaintiffs accordingly wrote to the defendants and the letter included the following sentence: 'this order is given on the understanding that the balance of the purchase price can be had on hire-purchase terms over a period of 2 years.' This sentence reflected the plaintiffs' position throughout the negotiations, namely that they could only purchase
p. 136 the van on hire-purchase terms. The relationship ↵ between the parties then deteriorated, principally as a result of a disagreement about the condition of the Bedford van that led the defendants to refuse to take it in part-exchange. The plaintiffs claimed that this amounted to a breach of contract and brought a claim for damages. The defendants denied any liability on the ground that no contract had in fact been concluded between the parties. The defence failed at first instance and in the Court of Appeal but succeeded in the House of Lords where it was held that the words 'on hire-purchase terms' could not be given any definite meaning so that the parties had not, in fact, concluded a contract.

Viscount Maugham

My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Russell of Killowen. I entirely agree with it and with his statement of the relevant facts. No less, however, than four judges have come to a different conclusion, and they think that the respondents have succeeded in establishing a contract in this case. I should always be slow to differ from views of those for whom I entertain a very genuine respect, if I could entertain any real doubt about the matter. I am constrained therefore to add some remarks of my own to explain why I am led to an opinion which coincides with that of my noble friend.

It is a regrettable fact that there are few, if any, topics on which there seems to be a greater difference of judicial opinion than those which relate to the question whether as the result of informal letters or like documents a binding contract has been arrived at. Many well-known instances are to be found in the books, the last being that of *Hillas & Co* v. *Arcos, Ltd* (1932) 147 LT 503. The reason for these different conclusions is that laymen unassisted by persons with a legal training are not always accustomed to use words or phrases with a precise or definite meaning. In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the consensus ad idem would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a

> binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract: see *Hillas & Co* v. *Arcos, Ltd*. …
>
> We come then to the question as to the effect of the (so-called) purchase being on 'hire-purchase terms', and here we are confronted with a strange and confusing circumstance. The term 'hire-purchase' for a good many years past has been understood to mean a contract of hire by the owner of a chattel conferring on the hirer an option to purchase on the performance of certain conditions: *Helby* v. *Matthews* [1895] AC 471. There is in these contracts—and this is from a business standpoint a most important matter—no agreement to buy within the Factors Act, 1889, or the Sale of Goods Act, 1893; there is only an option and the hirer can confer on a purchaser from him no better title than he himself has, except in the case of sale in market overt. It is inaccurate and misleading to add to an order for goods, as if given by a purchaser, a clause that hire-purchase terms are to apply, without something to explain the apparent contradiction. Moreover a hire-purchase agreement may assume many forms and some of the variations in those forms are of the most important character, e.g., those which relate to termination of the agreement, warranty of fitness, duties as to repair, interest, and so forth.
>
> Bearing these facts in mind, what do the words as to 'hire-purchase terms' mean in the present case? They may indicate that the hire-purchase agreement was to be granted by the appellants or on the other hand by some finance company acting in collaboration with the appellants; they may contemplate that the appellants were to receive by instalments a sum of £168 spread over a period of
> p. 137 two years upon delivering the new van and receiving the ↵ old car, or, on the other hand, that the appellants were to receive from a third party a lump sum of £168 and that the third party, presumably a finance company, was to receive from the respondents a larger sum than £168 to include interest and profit spread over a period of two years. Moreover, nothing is said (except as to the two years period) as to the terms of the hire-purchase agreement, for instance, as to the interest payable, and as to the rights of the letter whoever he may be in the event of default by the respondents in payment of the instalments at the due dates. As regards the last matters there was no evidence to suggest that there are any well-known 'usual terms' in such a contract; and I think it is common knowledge that in fact many letters though by no means all of them insist on terms which the legislature regards as so unfair and unconscionable that it was recently found necessary to deal with the matter in the recent Act entitled the Hire-Purchase Act, 1938.
>
> These, my Lords, are very serious difficulties, and when we find as we do in this curious case that the trial judge and the three Lords Justices, and even the two counsel who addressed your Lordships for the respondents, were unable to agree upon the true construction of the alleged agreement, it seems to me that it is impossible to conclude that a binding agreement has been established by the respondents.
>
> The appeal must, I think, succeed, and the action for damages must be dismissed with costs here and below.
>
> ***Viscount Simon LC***, ***Lord Russell of Killowen***, and ***Lord Wright*** delivered concurring speeches.

Commentary

Scammell further evidences the difficulties that the courts experience when deciding whether or not an agreement is too vague or uncertain to be valid and binding. As Viscount Maugham points out at the beginning of his speech, the judges in the lower courts reached a different conclusion from that reached by the House of Lords. Viscount Maugham also makes the point that the courts are 'very willing' to imply a term 'in commercial documents connected with dealings in a trade with which the parties are perfectly familiar' if they are satisfied that the parties thought that they had made a binding contract. In such a case a court may have more to draw upon in order to give a meaning to the vague phrase (for example, the court may be able to have regard to the custom of the trade in which the parties were working: *Shamrock SS Co* v. *Storey and Co* (1899) 81 LT 413).

One of the problems that confronted the plaintiffs on the facts of *Scammell* lay in explaining the basis on which they alleged that the parties had concluded a contract. Lord Russell of Killowen pointed out that the decisions of the lower courts and the arguments of counsel for the plaintiffs had been put in five different ways. Before their Lordships, leading counsel for the plaintiffs argued that the contract was one of sale and purchase, subject to a condition precedent that the balance of the purchase price could be paid on reasonable hire-purchase terms, while junior counsel for the plaintiffs submitted that the contract was not one of sale and purchase at all. Lord Russell of Killowen concluded (at p. 260) that:

> the existence of this fivefold choice is embarrassing but eloquent. An alleged contract which appeals for its meaning to so many skilled minds in so many different ways is undoubtedly open to suspicion. For myself I feel no doubt that no contract between the parties existed at all; notwithstanding that they may have thought otherwise.

p. 138 ↵ *Scammell* is thus a case in which the court felt unable, on the basis of the evidence that had been led, to identify the meaning which the parties had agreed should be given to the words 'hire-purchase'. Although such cases tend to be relatively rare (*Scammell* v. *Dicker* [2005] EWCA Civ 405, [2005] 3 All ER 838, [31] and [41]), modern cases can be found in which the courts have concluded that the agreement was no more than an agreement to agree and, as such, unenforceable (see, for example, *Barbudev* v. *Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548, [2012] 2 All ER (Comm) 963).

Why is it that the House of Lords concluded in both *Scammell* and *May and Butcher* that the agreements were not valid and enforceable? The answer would appear to lie in the fact that their Lordships were of the view that there was no basis in the evidence for a finding that the parties had reached agreement on the point at issue nor were there, in their opinion, criteria or machinery agreed by the parties that the courts could employ in order to fill the gap or resolve the uncertainty.

4.3 Cases in Which the Courts Have Held the Agreement to be Valid and Binding

The courts have at their disposal a variety of techniques that they can employ in order to resolve the uncertainty or the lack of clarity that surrounds a particular agreement. In this respect *May and Butcher* and *Scammell* should be seen as the exception rather than the rule. The principal techniques are as follows:

4.3.1 Make Use of the Criteria or Machinery that Have Been Agreed by the Parties in Order to Resolve the Uncertainty or to Clarify the Word or Phrase that is Expressed in Vague Terms

The main stumbling-block that confronts the courts in these cases is the principle that it is not the function of the courts to make the contract for the parties. This being the case, the parties cannot simply leave it to the courts to resolve issues that the parties themselves have left unresolved. To do so would be to invite the court to make the contract for the parties and the courts will generally decline such an invitation. But the courts will generally make use of criteria or machinery that have been agreed by the parties in order to resolve the uncertainty or clarify the meaning of a particular word or phrase. There are in fact a number of options open to the parties to establish some criteria or machinery to resolve the issue. The two principal options are as follows:

4.3.1.1 Resolution by One or Other of the Parties

The parties can agree to entrust the resolution of the issue to one or other party to the contract. Thus in *May and Butcher* (discussed earlier) Viscount Dunedin stated that 'with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer'. The difficulty with such a clause is that it appears to place the seller at the mercy of the buyer. But the courts may be able to imply a term into the agreement in order to
p. 139 place a limit on the ↵ power of the buyer. In *Paragon Finance plc* v. *Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685 the clause at issue between the parties stated:

> The rate of interest applicable to the loan and the monthly payment will be as specified in the offer of loan as varied from time to time in accordance with the applicable mortgage condition indicated in the offer of loan.

One of the issues before the Court of Appeal was whether or not the claimant's power to set the interest rates from time to time was completely unfettered. The Court of Appeal held that it was not. A term was to be implied into the agreement to the effect that the rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily, or in a way in which no reasonable mortgagee,[7] acting reasonably, would do (the basis upon which the Court of Appeal decided to imply this term is discussed in more detail at 10.4.2). On the facts of *Paragon Finance* it was held that the borrowers had no real prospect of successfully establishing a breach of this implied term. The reason for the increase in interest rates was that the lenders were in financial difficulties and so had to increase their interest rates in order to protect their own financial position.

It could not be said that they had behaved dishonestly, improperly, capriciously, arbitrarily, or unreasonably in so acting. The protection afforded by such an implied term may be limited but it does at least ensure that one party is not left entirely at the mercy of the other.

4.3.1.2 Resolution by a Third Party

Alternatively, the parties can entrust the resolution of the particular issue to a third party, such as an arbitrator. In *May and Butcher* Viscount Dunedin stated that the parties could have agreed 'that a certain part of the contract of sale … may be settled by someone else'. That someone else is often, but not invariably, an arbitrator. In general, the courts have been slower to conclude that an agreement is too uncertain to be enforced where the agreement contains an arbitration clause (with the notable exception of *May and Butcher*). Thus in *Queensland Electricity Generating Board* v. *New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205, 210 Sir Robin Cooke, delivering the judgment of the Privy Council, stated:

> At the present day, *in cases where the parties have agreed on an arbitration or valuation clause in wide enough terms*, the Courts accord full weight to their manifest intention to create continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the Courts for making contractual rights effective, exert minimal attraction. [Emphasis added.]

But there is a need for caution here. Sir Robin Cooke attached considerable significance to the width of the arbitration clause, whereas the House of Lords in *May and Butcher* placed emphasis on the terms of the agreement as a whole. The latter case demonstrates that the presence of an arbitration clause will not inevitably lead to the conclusion that the agreement is valid and binding; for this reason it has been criticized
p. 140 by arbitration lawyers. Further, ↵ *May and Butcher* is not easy to reconcile with the later decisions of the Court of Appeal in *Foley* v. *Classique Coaches Ltd* [1934] 2 KB 1 (see 4.1) and *F & G Sykes (Wessex) Ltd* v. *Fine Fare Ltd* [1967] 1 Lloyd's Rep 53 (see 4.3.4) where the presence of an arbitration clause was an important factor in persuading the court to conclude that the agreement was valid and binding. But the proposition that an arbitration clause should operate as a passport to the validity of an agreement is not beyond question. Why should the parties be entitled to leave important matters for the decision of an arbitrator when they cannot leave the same matters to be resolved by a judge in the High Court?

4.3.1.3 What Happens When the Machinery Agreed by the Parties Breaks Down?

While the courts will generally make use of the criteria or machinery that have been agreed by the parties, what is to be done in the case where the machinery breaks down or for some other reason does not work? In *May and Butcher* Viscount Dunedin appeared to suggest that the failure of the agreed machinery (in his example it was the determination of a third party) would inevitably result in the conclusion that no agreement had been reached. The modern courts, however, adopt a more flexible approach. The leading modern case on this point is:

Sudbrook Trading Estate Ltd v. Eggleton
[1983] 1 AC 444, House of Lords

Lord Fraser of Tullybelton

My Lords, the appellants are the tenants in four leases, by each of which they were granted an option to purchase the freehold reversion of the leased premises at a valuation. The appellants have exercised the options, but the respondents, who are the landlords, contend that the options are unenforceable. The questions now to be determined, therefore, are whether the options are valid and enforceable, and, if so, how they should be enforced.

The leases relate to adjacent industrial premises in Gloucester. They were granted at different dates, but for terms which all expire on December 24, 1997, at yearly rents which are subject to periodical review. The leases are all in substantially the same form. ... The clause in the 1949 lease, clause 11, has been taken as typical of them all. It entitled the appellants to purchase the reversion in fee simple, upon certain conditions which were all satisfied,

> 'at such price not being less than £75,000 as may be agreed upon by two valuers one to be nominated by the lessor and the other by the lessee or in default of such agreement by an umpire appointed by the said valuers. ...'

The respondents contend that the options are void for uncertainty on the ground that they contain no formula by which the price can be fixed in the event of no agreement being reached, and that they are no more than agreements to agree. The respondents have therefore declined to appoint their valuer. The machinery provided in the leases has accordingly become inoperable.

In these proceedings the appellants seek a declaration that the options are valid, that they have been validly and effectively exercised, and that the contracts constituted by the exercise ought to be specifically performed. As regards the mode of performance, the main argument for the appellants is
p. 141 that the court should order such inquiries as are necessary to ↵ ascertain the value of each of the properties. Lawson J decided the question of principle in favour of the appellants, but his decision was reversed by the Court of Appeal which held that the options were unenforceable. Templeman LJ, who delivered the judgment of the Court of Appeal, made a full review of the English authorities and the conclusion which he drew from them was, in my opinion inevitably, adverse to the appellants' contentions. The fundamental proposition upon which he relied was, in his own words:

> 'that where the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties or by the decision of an arbitrator or valuer, the court is powerless, because there is no complete agreement to enforce:. ...'

I agree that that is the effect of the earlier decisions but, with the greatest respect, I am of opinion that it is wrong. It appears to me that, on the exercise of the option, the necessary preconditions having been satisfied, as they were in this case, a complete contract of sale and purchase of the

> freehold reversion was constituted. The price, which was of course an essential term of the contract, was for reasons which I shall explain, capable of being ascertained and was therefore certain. Certum est quod certum reddi potest: see *May and Butcher Ltd* v. *The King (Note)* [1934] 2 KB 17, 21, per Viscount Dunedin.
>
> The courts have applied clauses such as those in the present case in a strictly literal way and have treated them as making the completion of a contract of sale conditional upon agreement between the valuers either on the value of the property, or failing that, on the choice of an umpire. They have further laid down the principle that where parties have agreed on a particular method of ascertaining the price, and that method has for any reason proved ineffective, the court will neither grant an order for specific performance to compel parties to operate the agreed machinery, nor substitute its own machinery to ascertain the price, because either of these clauses would be to impose upon parties an agreement that they had not made. ...
>
> While that is the general principle it is equally well established that, where parties have agreed to sell 'at a fair valuation' or 'at a reasonable price' or according to some similar formula, without specifying any machinery for ascertaining the price, the position is different. ... The court will order such inquiries as may be necessary to ascertain the fair price: see *Talbot* v. *Talbot* [1968] Ch 1.
>
> I recognise the logic of the reasoning which has led to the courts' refusing to substitute their own machinery for the machinery which has been agreed upon by the parties. But the result to which it leads is so remote from that which parties normally intend and expect, and is so inconvenient in practice, that there must in my opinion be some defect in the reasoning. I think the defect lies in construing the provisions for the mode of ascertaining the value as an essential part of the agreement. That may have been perfectly true early in the 19th century, when the valuer's profession and the rules of valuation were less well established than they are now. But at the present day these provisions are only subsidiary to the main purpose of the agreement which is for sale and purchase of the property at a fair or reasonable value. In the ordinary case parties do not make any substantial distinction between an agreement to sell at a fair value, without specifying the mode of ascertaining the value, and an agreement to sell at a value to be ascertained by valuers appointed in the way provided in these leases. The true distinction is between those cases where the mode of ascertaining the price is an essential term of the contract, and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential. ... The present case falls, in my opinion, into the latter category. Accordingly when the option was exercised there was constituted a
> p. 142 complete contract for sale, and the clause should be construed as meaning that ↵ the price was to be a fair price. On the other hand where an agreement is made to sell at a price to be fixed by a valuer who is named, or who, by reason of holding some office such as auditor of a company whose shares are to be valued, will have special knowledge relevant to the question of value, the prescribed mode may well be regarded as essential. Where, as here, the machinery consists of valuers and an umpire, none of whom is named or identified, it is in my opinion unrealistic to regard it as an essential term. If it breaks down there is no reason why the court should not substitute other machinery to carry out the main purpose of ascertaining the price in order that the agreement may be carried out.

> In the present case the machinery provided for in the clause has broken down because the respondents have declined to appoint their valuer. In that sense the breakdown has been caused by their fault, in failing to implement an implied obligation to co-operate in making the machinery work. The case might be distinguishable in that respect from cases where the breakdown has occurred for some cause outside the control of either party, such as the death of an umpire, or his failure to complete the valuation by a stipulated date. But I do not rely on any such distinction. I prefer to rest my decision on the general principle that, where the machinery is not essential, if it breaks down for any reason the court will substitute its own machinery. …
>
> The appropriate means for the court to enforce the present agreements is in my opinion by ordering an inquiry into the fair value of the reversions. … The alternative of ordering the respondents to appoint a valuer would not be suitable because in the event of the order not being obeyed, the only sanction would be imprisonment for contempt of court which would clearly be inappropriate.

The important issue for the court is whether or not the machinery agreed by the parties is essential or not. In *Sudbrook* the majority held that it was not essential. A case on the other side of the line is *Gillatt* v. *Sky Television Ltd* [2000] 1 All ER (Comm) 461. A clause in a contract between the parties stated that, if the defendant sold or otherwise disposed of the entire issued share capital of a company, the claimant would be entitled to payment of '55% of the open market value of such shares … as determined by an independent chartered accountant'. Neither party took any steps to appoint an independent chartered accountant to determine the value of the shares, but the claimant nevertheless sought to recover from the defendant a 'sum equal to 55% of such sum as is found to be the value of the true open market value of the issued share capital' of the company. The Court of Appeal held that the expression 'as determined by an independent chartered accountant' was an integral and essential part of the definition of the payments to which the claimant was entitled; it was not merely a mechanism or permissive procedure for dispute resolution. Nor did the reference to 'open market value' of the shares provide the court with adequate objective criteria because there is more than one possible approach to the valuation of shares in a private company. Commercial indications also suggested that the parties intended that the determination of the open market value of the shares should be carried out by an independent accountant and not by the court. Finally, there was no question in this case, unlike *Sudbrook*, of the 'breakdown' of machinery for the determination of value. Neither party had attempted to invoke the procedure laid down in the clause, and the court refused to substitute something different (its own opinion of the market value of the shares) in place of what the parties had actually agreed. It therefore followed that no payment was due to the claimant under the clause in the contract.

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4.3.2 The Intervention of Statute

Occasionally statute may intervene to provide an answer to the issue that has not been resolved by the parties. The principal example in this category is section 8 of the Sale of Goods Act 1979 which provides:

> (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.
>
> (2) Where the price is not determined as mentioned in subsection (1) above the buyer must pay a reasonable price.
>
> (3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 8(2) was not applicable on the facts of *May and Butcher* because it only comes into play where the contract is silent as to the price of the goods and the contract in *May and Butcher* was not silent. It purported to make provision for the determination of the price and this was sufficient to exclude the operation of section 8. It may seem odd that section 8 only comes into play when the contract is silent and not where the contract purports to deal with the issue. However, it is not open to the courts to alter the clear meaning of a statutory provision.

4.3.3 Severance

The court may be able to sever the term that is alleged to be vague or uncertain and enforce the rest of the contract. An example of this process at work is provided by the case of *Nicolene Ltd* v. *Simmonds* [1953] 1 QB 543. The defendant sent to the plaintiffs an acceptance of the plaintiffs' order which contained the following sentence:

> As you have made the order direct to me, I am unable to confirm on my usual printed form which would have the usual force majeure and war clauses, but I assume that we are in agreement and that the usual conditions of acceptance apply.

The plaintiffs replied to this letter, confirming the order. The defendant failed to deliver the goods and so the plaintiffs brought an action for damages for breach of contract. The defendant denied that a contract had been concluded on the ground that there were no 'usual conditions' in operation between the parties. The defence failed. The Court of Appeal held that the reference to 'usual conditions' was meaningless and could be struck out without impairing the rest of the contract. Denning LJ stated (at p. 551):

> In my opinion a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, whilst still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms.
>
> p. 144 ↵ I take it to be clear law that if one of the parties to a contract inserts into it an exempting condition in his own favour, which the other side agrees, and it afterwards turns out that that condition is meaningless, or what comes to the same thing, that it is so ambiguous that no ascertainable meaning can be given to it, that does not mean that the whole contract is a nullity. It only means that the exempting condition is a nullity and must be rejected. It would be strange indeed if a party could escape every one of his obligations by inserting a meaningless exception from some of them. …
>
> In the present case there was nothing yet to be agreed. There was nothing left to further negotiation. All that happened was that the parties merely agreed that 'the usual conditions of acceptance apply'. That clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole, and it should be so rejected. The contract should be held good and the clause ignored. The parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them; and it would be most unfortunate if the law should say otherwise. You would find defaulters all scanning their contracts to find some meaningless clause on which to ride free.

The result was that the contract was to be found in the exchange of correspondence between the parties and the defendant's letter was to be read as an unqualified acceptance of the plaintiffs' order.

One of the cases relied upon by the defendant was *Scammell & Nephew* v. *Ouston* (see 4.2) but Denning LJ distinguished it (at p. 551) on the ground that, in that case, 'there were hire-purchase terms yet to be agreed' and he noted that Lord Wright stated that the 'agreement was inchoate, and never got beyond negotiations'. He also distinguished *Scammell* on the ground that the term in the present case was 'clearly severable from the rest of the contract' while the term in *Scammell* was not. The more important the term to the transaction as a whole, the less likely it is that the court will be able to sever it from the rest of the agreement.

4.3.4 Implication of Terms

Finally, the court may be able to imply a term the effect of which will be to fill the gap that was left by the parties. The courts do not have the power to imply a term into a contract simply on the basis that it would be reasonable to imply such a term into the contract (see 10.4.2). A term will only be implied where it is necessary to do so. It was once thought that the courts would not imply a term into a contract which was incomplete. In other words, the court had to first establish the existence of a binding contract before it could consider whether or not it was appropriate to imply a term into the contract. However, the Supreme Court in *Wells* v. *Devani* [2019] UKSC 4, [2020] AC 129 held that there was no such rule of English law. Thus Lord Kitchin stated (at [35]):

> [W]here, as here, the parties intended to create legal relations and have acted on that basis, I believe that it may be permissible to imply a term into the agreement between them where it is necessary to do so to give the agreement business efficacy if the term would be so obvious that 'it goes without saying', and where, without that term, the agreement would be regarded as incomplete or too uncertain to be enforceable.

p. 145 ↵ This being the case, there is no need first to identify the existence of a contract before consideration can be given to the question whether to imply a term into that contract. A term can be implied into what would otherwise be an incomplete agreement if it is necessary to do so in order to make the contract work as intended by the parties.

The courts are more likely to imply a term into the contract when the parties have acted on the basis of or (as it is often put) in reliance upon their agreement. Thus in *F & G Sykes (Wessex) Ltd* v. *Fine Fare Ltd* [1967] 1 Lloyd's Rep 53 Lord Denning stated (at pp. 57–58):

> In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed. But when an agreement has been acted upon and the parties, as here, have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties. In this case there is less difficulty than in others because there is an arbitration clause which, liberally construed, is sufficient to resolve any uncertainties which the parties have left.

To similar effect is the judgment of Steyn LJ in *G Percy Trentham Ltd* v. *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 when he stated (at p. 27) that, 'the fact that the transaction is executed *makes it easier* to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalized in negotiations as inessential' (emphasis added). Thus the point that is being made is not that action in reliance upon the agreement will inevitably result in the conclusion that the agreement is valid and binding (a case in point being *May and Butcher* where the fact that the suppliants had apparently deposited £1,000 as security was not sufficient to render the agreement between the parties sufficiently certain to be enforced). Rather, the point is that reliance makes it easier for the court to find that the agreement is valid and binding, by providing evidence from which the court can infer that the parties had reached agreement on all essential terms. However, the courts do not find the existence of an agreement in every case where the agreement has been partially or substantially executed. The court will not impose upon the parties a binding agreement which they have not reached (*RTS Flexible Systems Ltd* v. *Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753, [47]). Thus in *British Steel Corporation* v. *Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 (discussed at 3.3.1), Robert Goff J refused to find the existence of a contract between the parties, despite the fact that both parties had acted on the agreement, and he looked to the law of restitution to resolve the dispute between the parties.

4.4 Conclusion

English law is often criticized on the ground that it adopts an unduly restrictive approach to these issues and, in this respect, the decision of the House of Lords in *May and Butcher* is often held out as the prime illustration of this restrictive tendency. While cases can be found in which the courts have adopted a more relaxed approach, it can be argued that these are no more than piecemeal interventions which fail to provide a coherent set of principles to guide the courts when seeking to decide whether or not an agreement that is
p. 146 expressed in terms ↵ that are uncertain, incomplete, or vague is nevertheless valid and binding. Bearing in mind Professor Macneil's warning that the search for coherent principles in this area is a 'fool's errand' (see 4.1), would English law be put on a sounder footing if it adopted the following rules in place of its existing rules?

- Unidroit Principles of International Commercial Contracts: Conclusion of contract dependent on agreement on specific matters or in a particular form

  > Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.

- Contract with terms deliberately left open

  > If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.
  >
  > The existence of the contract is not affected by the fact that subsequently
  >
  > the parties reach no agreement on the term, or
  >
  > the third person does not determine the term,
  >
  > provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

These provisions are more liberal than the approach taken by the House of Lords in *May and Butcher*. They therefore add further weight to the argument that *May and Butcher* is out of line with the demands of modern commercial practice. That said, it should be noted that these provisions are all expressed in broad terms and so may not provide the clear guidance that English courts and practitioners generally seek.

Further Reading

FRIDMAN, GHL, 'Construing, Without Constructing a Contract' (1962) 76 *LQR* 521.

MCLAUCHLAN, D, 'Rethinking Agreements to Agree' (1998) 18 *NZULR* 77.

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Notes

[1] In this connection a suppliant is someone who petitions humbly of the King.

[2] Lord Dunedin was brought up in Scotland.

[3] If something is capable of being made certain, it should be treated as certain.

[4] With the necessary changes in points of detail.

[5] The case was in fact subsequently reported in 1934 and is set out earlier in this section.

[6] Words are to be understood that the object may be carried out and not fail.

[7] A mortgagee is the creditor in a mortgage, usually a bank or a building society.

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